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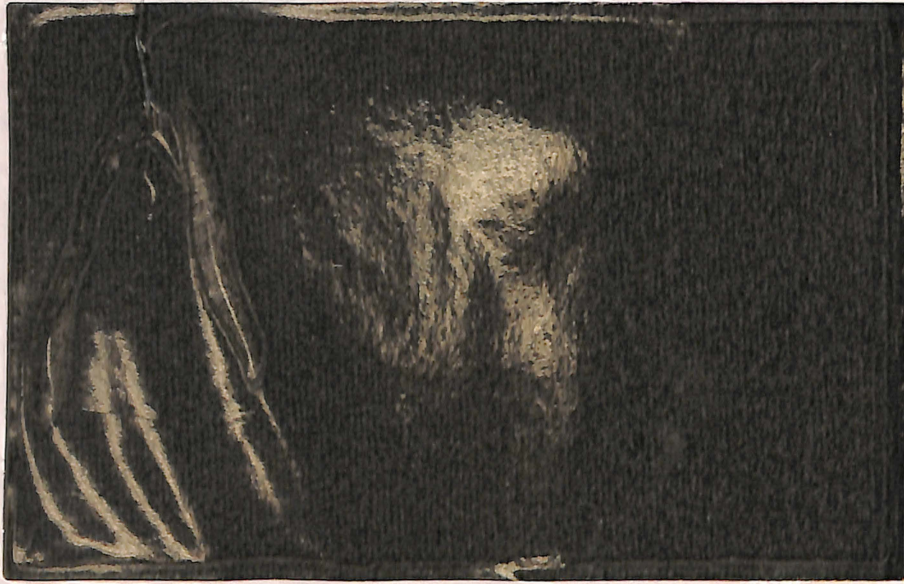
EVAN WILLIAMS VOYCE

THE PROVISION OF FREE AND
FRANK ADVICE TO GOVERNMENT

**A RESEARCH PAPER
FOR THE DEGREE OF
MASTER OF PUBLIC POLICY**

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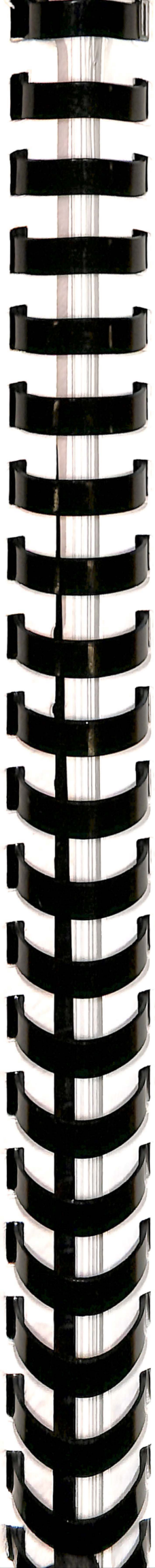


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EVAN WILLIAMS VOYCE

THE PROVISION OF FREE AND
FRANK ADVICE TO GOVERNMENT

THE PROVISION OF FREE AND FRANK ADVICE TO GOVERNMENT

A research paper

by

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INTRODUCTION

This paper examines the extent to which New Zealand public servants feel able to offer free and frank advice to the Government through Ministers of the Crown. It seeks to define the nature of constitutional conventions; the importance of the free and frank convention to the preservation of an apolitical, independent public service and how and where this convention is captured in the "rules" governing the behaviour of both public servants and the Ministers they serve.

Most importantly, this paper seeks answers to a number of significant questions; the answers to which are critical to the practice of the convention in New Zealand, both now and in the future. The questions are:

- How do the primary participants in the political environment - public servants and politicians - interpret the convention? Essentially, how free and frank is free and frank? What does it mean? What are its limits?
- Is the convention alive and well within the context of the current political environment?
- Is, in fact, free and frank advice proffered and received?
- What are the practical constraints in the way of practising the convention in New Zealand's current Parliamentary democracy? and
- What impact will the new system of electing our representatives to Parliament have on the convention?

Complete answers to these questions cannot be obtained from an analysis of the literature alone, it is also necessary to obtain responses from the participants themselves. This paper presents observations gained from a series of in-depth interviews with Cabinet Ministers, former Cabinet Ministers, Chief Executives of Government Departments and Ministries, past chief Executives of Government Departments and Ministries and senior public servants.¹ Rather than provide extensive commentary or interpretation, this paper reports the comments fully. They are relevant and, most importantly, they are from some of the current principal players on the public sector stage. These people do not require the author of this paper to interpret for them.

The conclusions, however, are those of the author. In the broadest sense I conclude that an apolitical, independent public service is a critical element in the preservation of our

parliamentary democracy; that the free and frank convention is a key part of that element; that the convention is practised in New Zealand today; there are no serious constraints to its practice and that it will survive in a post - MMP environment.

CHAPTER ONE

THE STATUS OF THE 'FREE AND FRANK' NOTION - A CONSTITUTIONAL CONVENTION OR NOT?

The notion of public servants providing free and frank advice to their political masters is something akin to motherhood and apple pie: icons representing the goals and aspirations of a comfortable, middle-class existence. Those who revile these icons do so at their peril.

Likewise, the notion of free and frank advice is also an icon representing the type of advice public servants should deliver to their political masters and the type of advice their political masters should encourage. A public servant who does not deliver free and frank advice, so the mythology goes, is spineless; a minister who does not want or encourage free and frank advice is seen as blinkered, insecure and certainly not meeting the obligations conferred by the Queen's warrant.

In fact, the "free and frank" notion is perceived as having the status of a constitutional convention. In all the 22 interviews with Cabinet Ministers, ex-Cabinet Ministers, chief Executives, former Chief Executives and other senior public servants, not one of those interviewed corrected the assertion made by the interviewer that the "free and frank" notion was a "constitutional convention". In fact, a number of those interviewed referred to it as a "convention" in their own responses.

But is the "free and frank" notion a constitutional convention, and if it is what does that status confer on the notion?

British constitutional writer Peter Hennessy writes that his view of what makes up a constitutional convention is a synthesis of two viewpoints.² The first is from the constitutional lawyer of the late nineteenth and early twentieth century, A.V.Dicey, who defined a convention as expressing "...the understandings which make up the constitutional morality of modern England."³ The second viewpoint comes from the constitutional historian, G.H.L.Le May who wrote that constitutional conventions were "...the general agreements of public men about the 'rules of the game' to be borne in mind in the conduct of public affairs."⁴

G. Marshall⁵ describes conventions as non-legal rules of constitutional behaviour. Other equally apt descriptions could include: maxims, practices, customs, usages and precepts.

Whereas Dicey tended to regard constitutional conventions as rules governing the power of the Crown (like the Monarch must assent to Bills passed by the two Houses of

Parliament, Ministers must resign from office when they no longer have the confidence of the House of Commons and Bills must be read a certain number of times before they are passed), Marshall argues that conventions apply to other constitutional relationships between Governmental persons and institutions, including relationships between the Cabinet and the Prime Minister, between the Government and Parliament, between Ministers and the judiciary and between Ministers and public servants. These relationships are governed by law and by convention.⁶

People and institutions, including Governments and Ministers, are compelled by the law to obey the law, but what, if anything, compels people and institutions to abide by constitutional conventions, particularly as they, by definition, are not legally binding and thus are so much easier to disregard? Marshall reports that there have been a number of theories expounded as to why people obey conventions. Dicey argued that breaking some conventions would bring the violators into conflict with the law and that other conventions, with only a small amount of custom in their favour, could be broken without legal consequences. That theory did not hold well with the thesis that people obeyed conventions because, if they did not, they would break the law. Other commentators have suggested people obey conventions (founded in law or custom) because of the political fallout if they break them. Others argue that they are obeyed because, if they were not, it might encourage a change in the law or the constitution.⁷

The more pragmatic Marshall notes: "It may be more illuminating first to remember that the widespread breach of political (as of linguistic) convention may itself lead to a change of convention and secondly that conventions are not always obeyed. So although we can sensibly ask what the uses or purposes of conventions are, it may be unnecessary to ask why they are obeyed when they are obeyed... Those who obey moral or other non-legal rules they believe to be obligatory, characteristically do so because of their belief that they are obligatory, or else from prudence or expected advantage."⁸

Marshall suggests that conventions can be viewed as **moral** rules, divided into two perspectives - critical morality and positive morality. Critical morality is a normative approach that says conventions are the rules that political actors ought to feel obliged by if they have considered the precedents and the reasons correctly. Positive morality "...suggests that the primary evidence as to the existence of a convention lies in the beliefs of the persons concerned."⁹

In summary, in respect of the British constitution, constitutional conventions appear to possess four critical characteristics. They are:

- designed to reflect general, rather than specific, expectations embodied in a constitutional code of behaviour;

- the code governs, in part, relationships between the forces engaged in the political process, including the relationship between Ministers and public servants;
- the code has a non-legal, or moral, focus; and
- the existence of a convention is confirmed by the perceptions of people who believe it to exist.

Using those benchmarks of what constitutes a constitutional convention, it is clear that the notion that public servants should provide free and frank advice meets the test of a constitutional convention. I return to the question posed earlier in this chapter, that is, is it important that the notion of "free and frank" advice enjoys the status of a constitutional convention? My view is that it is important, because constitutional conventions provide an ethical and moral framework within which all players in the parliamentary process are expected to operate. They can be ignored, but like those who shun motherhood and apple pies, those players who ignore constitutional conventions do so at their peril.

In the introduction to the chapter on constitutional conventions in *Public law in New Zealand: Cases, Materials, Commentary and Questions* Chen and Palmer note that, while constitutional conventions are an important feature of the United Kingdom constitution, and while they exist in New Zealand "...they are neither as extensive nor deep."¹⁰

Perhaps that is hardly surprising, bearing in mind that the United Kingdom's system of governance has developed over many hundreds of years to meet the needs of a nation of 53 million people. It is made more complex than its New Zealand counterpart with the existence of two Houses, whereas in New Zealand we have only one House, less than one tenth of the population of the United Kingdom and a less complex system of governance designed to reflect those disparities. Overall, the New Zealand view of constitutional conventions, as described by the State Services Commission (SSC), mirrors the United Kingdom view. The SSC advises that constitutional conventions are "...understandings, either explicit or implicit, that guide conduct and relationships."¹¹

And while, in Chen and Palmer's words, our conventions may not be as extensive or deep as those of the United Kingdom, there are some conventions in New Zealand seen as critical to the way the nation conducts the business of good Government.

One of these conventions revolves around the principle of the neutrality and the political impartiality of the public service. The ability of public servants to provide free and frank advice is seen as an important aspect of that principle.

The present Minister of State Services, the Hon. Paul East, put the two concepts - the free and frank convention and the neutrality of the public service - very neatly. Mr East said: "It is important to remember, I think, that the existence of a neutral, professional public service is by now an important aspect of our traditions of government and that it has proved to work effectively with our constitutional system. In addition, there are significant practical advantages to having a neutral, professional, non-partisan public service such as we have in New Zealand. These include the benefits of continuity, detailed professional knowledge, stability, and the requirement to give free and frank advice (rather than advice Ministers necessarily want to hear)".¹²

This view is mirrored by many of those interviewed for this paper.

"The free and frank convention is about the neutrality of public servants and the need to avoid capture of the decision-making process by sectoral lobbying pressures. This, in turn, reduces the risk of corruption and [political] bias, preserves institutional memory and a system where politicians have access to neutral expertise. Advice from a permanent, neutral public service is likely to be long term, putting up and defending more strategic policy options than you would get from a bunch of people who were only concerned with the short term policy options of the people in power."

Senior Public Servant

A Chief Executive puts it far more graphically.

"I bet Mussolini never had free and frank advice."

Chief Executive

In an article in *State Sector*,¹³ long serving public servant and current Secretary for Defence, Gerald Hensley, writes that the concept of free and frank advice is underpinned in the Westminster system by three main doctrines: independence of promotion and tenure for the public servant; the anonymity of public servants; and their impartiality.

While Hensley draws a distinction between neutrality and impartiality in that he postulates that neutrality implies a "cool detachment" that is contrary to the view that public servants should work sympathetically (and loyally) to achieve the aims and policies of all governments, he reinforces the view that the ability of public servants to provide free and frank advice is an important tenet of New Zealand's particular brand of constitutionalism.

Furthermore, he makes the very practical observation that, "Political impartiality is an obvious requirement if Ministers are to trust the advice they receive from their public

servants. Ministers understandably want to be assured that the advice they receive is not coloured by support for another party's policies."¹⁴

Hensley's emphasis on impartiality is echoed by one of the interview subjects.

"A public servant's advice is given freely, frankly and impartially. Freeness and frankness both have "impartiality" built in. The elected Government governs for all New Zealanders - not for its own supporters. Advice has to help the Government govern on behalf of all New Zealanders. In a corrupt system, advice is not given freely. In a "political" system, advice is not given frankly or impartially. It is given [in the latter case] to keep the Government in power and may not be in the best interests of the country as a whole."

Chief Executive

There was an overwhelming view from those interviewed for this paper that, while the advice from advisors operating in a system where senior public officials were political appointees might not be less free and frank, the conscious alignment of politics and advice would mean that the advice would be more likely to be focused on meeting the demands of short term political issues rather than longer term national issues. Regardless of the neutrality or lack of neutrality of the source of the advice, naturally politicians often opt for the short term focus. However, the concept of neutral free and frank advice gives them other options, hopefully a longer term perspective and encourages them to at least consider why they will not take the advice, particularly as that advice is likely to become public through disclosure under the Official Information Act 1982.

The guardian and promoter of the public service ethic, the SSC, has published an ethical framework within which public servants are expected to operate.¹⁵ There are two principles that embody both freeness and frankness and impartiality. One principle reads: "Give free and frank advice to the Government of the day, and inform and implement its decisions with intelligence, enthusiasm, energy, innovation and common sense." The other reads: "Ensure that every public servant demonstrates understanding of the collective interest of Government and the special nature of the relationship between Parliament, the Crown and the Public Service in the need for apolitical, objective policy advice and the custodianship of the nation's resources for future generations of New Zealanders."¹⁶

Or, as one Chief Executive puts it:

"Because public servants are involved in the distribution of the assets of the state, you can't have a state where those doing the distribution could be bought or sold ~~like in~~ the third world. This goes right to the sort of society and Government you're going to have."

Chief Executive

In its advice to senior public servants, the SSC writes: "Senior public servants...have a duty to tender informed, impartial and politically-disinterested advice on policy initiatives..."¹⁷

The SSC goes on to advise: "The doctrine of ministerial responsibility is complemented by the principle of political neutrality. This holds that if public servants are to maintain the confidence and trust of, and be fit to serve, successive governments, those officials must conduct themselves and tender advice impartially, without fear or favour to any party political interest or particular administration."¹⁸

The "free and frank" notion is embodied in the Cabinet Office Manual, the official "rulebook" for Ministers and officials. The manual states that public servants "...are (as appropriate) to give free and frank advice to Ministers and others in authority and, when decisions have been taken, to give effect to those decisions in accordance with their responsibility to the Ministers or others;"¹⁹ The manual advises that "...public servants should act in such a way that their department maintains the confidence of its present Minister and also of future Ministers. Advice given to Ministers must be honest, impartial and comprehensive. Although regard must be had to the policies and priorities of the Government of the day, the advice given by officials should be "free and frank," so that Ministers can take decisions based on all the facts and an appreciation of all the options."²⁰

The Public Service Code of Conduct advises: "It is the responsibility of public servants to provide honest, impartial and comprehensive advice to Ministers, and to alert Ministers to the possible consequences of following particular policies, whether or not such advice accords with Ministers' views."²¹

The issue is also referred to in a "teach yourself" manual on policy advice published by the SSC. It advises: "Policy analysts should offer free and frank advice, and if that advice is rejected as unacceptable because it does not support the Minister's position on a particular policy issue, then they should supply advice which includes an analysis of their Minister's position."²²

The notion that state servants should provide free and frank advice is also embodied in the performance agreements between state sector Chief Executives and the State Services Commissioner and in the Official Information Act 1982. The performance agreement and the Act are dealt with in greater detail in chapter four of this paper.

One of the clearest descriptions of the convention is given by an authority on the New Zealand constitution, Professor K.J. Scott, who writes: "Public servants owe a duty of loyalty to their Minister and to the public generally...our constitution is not subverted by

the errors of judgements that Ministers, being human, are bound to make, but is subverted by the obstruction of Ministerial wishes by politically irresponsible public servants.

"Public servants should do all they can to help the Minister to elaborate and execute any policy he adopts, even if they suspect that he has adopted the policy only for electoral reasons...

"Where a permanent head thinks the Minister is wrong about the merits of a policy, or wrong in allowing himself to be influenced by considerations of political principle or of political interest, he owes it to his Minister to say so. He owes the duty of offering disinterested and fearless advice, and should argue as strongly as he feels is justified. But he should not argue the matter repeatedly...It goes without saying that the way to express differences of opinion with the Minister is by making appropriate recommendations, not by sabotaging approved policy."²³

In summary, this chapter has sought to establish three key points. They are:

- both in terms of the Westminster constitution, and its New Zealand variation, the "free and frank" concept is an important constitutional convention;
- it is a critical factor underpinning one of the fundamental tenets of our constitution, that is, the importance of an impartial, apolitical, objective and professional public service charged with serving present and future Governments; and
- the "free and frank" convention (as it will be described henceforth in this paper) is given further weight by the Government, and state servants, in its inclusion in the principles and values underpinning the New Zealand Public Service, the advice given to public servants by the State Services Commission, the performance agreements between state sector Chief Executives and the Ministers and the provisions of the Official Information Act 1982.

In short, both Government and public servants believe that the nature of the advice proffered by the one and received by the other should be based upon the assumption that it will be free and frank.

There is an apocryphal tale that goes something like this:

Two Scots are sitting in their club in Edinburgh. One asks the other who, in his view, was the world's greatest inventor? The response is Sir Thomas Dewar, the man who invented the thermos flask. The first asks, "What's so special about the thermos flask?"

"It keeps hot things hot and cold things cold," comes the reply.

"Of course it keeps hot things hot and cold things cold," says the first, exasperated.
"What's so special about that?"

"But how does it know?" is the response.

One could imagine two Cabinet Ministers in Bellamys. One asks of the other, what, in his view, is the best kind of policy advice a Minister could receive?

"Why, free and frank advice, of course," comes the answer.

And the first Minister responds, "But how do you know?"

That is the question to be addressed in the next chapter - what is "free and frank" advice?

CHAPTER TWO

WHAT IS "FREE AND FRANK" ADVICE?

At this point, it is important to remind ourselves of Marshall's view, discussed in Chapter One, that constitutional conventions can be viewed as moral rules divided into two perspectives - critical and positive morality. The latter perspective suggests that that is what people believe or perceive.²⁴

The present Minister of Finance, Bill Birch, makes the following observation.

"It's actually a question [what is "free and frank advice?"] that defies precise interpretation, because there are as many opinions about it as there are people giving opinions."

Rt Hon. Bill Birch. Cabinet Minister

A synthesis of these two views might suggest there was little to be gained from pursuing the point: that asking "what is free and frank advice?" is akin to posing the question "how long is a piece of string?" The answer depends on whose piece of string it is and how long the owner believes or perceives that particular piece to be.

Fortunately, the difficulties inherent in providing an answer have not prevented the SSC from, at least, trying to describe the "free and frank" convention in broad terms.

"...the onus is to provide advice free of personal interest or the interests of the agency. The advice should reflect an appreciation of the policies of the government of the day and be transparent. That is, the advice should not contain unclear or hidden agendas.

"Free and frank advice is not always the same as advice the Minister may wish to hear. Advice to a Minister that has been watered down may not meet the test of being free and frank. It is inappropriate, for instance, for departmental advice to be altered, or influenced unduly, by a third party (say, by Ministerial staff) before it reaches a Minister...officials should be sensitive to Ministers' aspirations and objectives. At the same time, officials tendering advice should aim to take the broadest possible view, to balance (often explicitly) short-term considerations against the longer term and have regard to a concept of the broader public interest which they can (if necessary) define and articulate. Such an approach requires a wide appreciation of relevant subject areas and may also require a sound institutional memory and well-developed links with the wider policy communities and sector groups affected. It requires effective and professional relationships between advisers in different agencies and a good grasp of ethical principles."²⁵

Public servants are advised by the SSC to tender their free and frank advice with "...courage, tenacity and independence."²⁶ They are to "...provide the Minister with competent, balanced, free and frank advice regarding policy options, whether or not such advice accords with the Minister's views."²⁷

Out of all that flows some key concepts. According to the SSC, free and frank advice contains the following characteristics. It is advice which is:

- **honest**, in that it truly reflects the views of the advisor;
- **independent**, in that it truly reflects the advice of the advisor and/or the Ministry or Department the advisor represents and is not unduly influenced by the views/opinions of a third party;
- **objective**, in that it does not unduly reflect the individual's partisan views. It is **impartial**;
- **forthright**, in that it is advice the Minister needs to hear as opposed to advice the Minister wants to hear and sometimes that requires the public servant to be courageous;
- **comprehensive**, in that it contains options and focuses on the long term;
- **sympathetic**, in that it takes into account the policy needs and objectives of Ministers and/or the Government, but is mindful of a wider public interest; and
- **not conditioned** by fear of possible consequences.

In broad terms, the SSC's view reflects the views of the subjects of the 22 interviews carried out for this paper.

"Free and frank advice is advice that's given without fear or favour. Ministers ought to be told the truth, even if they don't want to hear it. The advice you give is based on professional opinion and not on what they [Ministers] want to hear. You are under an obligation to tell Ministers what they need to know, using your best professional judgement. Transparency and integrity are the words for it."

Senior Public Servant

"You should be able to give advice which is politically and/or personally unattractive to the Minister, personally unattractive in that it [the advice] may go against their own personal ideologies."

Chief Executive

"Free and frank advice is honest, open and forthright. You can't mute your advice. You tell it to the Minister as it is, straight from the shoulder, it's open and explicit on matters the Minister should be informed of."

Chief Executive

"The advice is "free" in that it is free from personal, political or financial bias on my part. I'm not coming from a view of the world rooted in my personal philosophy, or from political gain. In terms of "frank" my starting point is with the Minister's needs and the best service for the Minister. A Minister is entitled to advice which is sufficiently open, clear and comprehensive to enable him or her to make decisions. Therefore, I don't think that advice should be constrained by my judgements about what is polite, appropriate, or what I think the Minister may, or may not, want to hear."

Senior Public Servant

"I give the Minister politically neutral, independent advice which consists of analysis, options and recommendations."

Senior Public Servant

"It [free and frank advice] means that public servants feel free to tender advice without fear of the consequences for individuals."

Senior Public Servant

"It [free and frank advice] means I can tell it like I see it. I have to be prepared to offer advice I know the Government won't like...If they look like they are going to make a mistake, then it is my job to tell them that they are going to make a mistake."

Senior Public Servant

"In practical terms, free and frank means being able to tell the Minister things he or she does not want to hear...when you're in a situation where you are, in fact, explicitly criticising the Minister's actions, or the actions he or she wants to take."

Former Chief Executive

All those observations mirror, in broad terms, the characteristics identified by the SSC: honesty; independence; objectivity and impartiality; forthrightness; comprehensiveness and a sympathetic reflection of the Minister's policy needs or objectives, while remaining mindful of a wider public interest. However, there is a qualification best expressed by the following comments.

"Free and frank advice must be well supported by reliable evidence that will give the authority a Minister needs if he or she is going to act on that advice...It is not opening the door to personal opinion...it is not an untrammelled opportunity to say what you like.

Chief Executive

"I don't think it means I'm free to offer any advice to the Minister. My advice is offered within constraints to do with the Government's policy or political philosophy of the day."

Senior Public Servant

"The convention doesn't give public servants the right to think out loud...The advice has to be tendered within the context of the policy objectives of the Government of the day."

Senior Public Servant

The advice should be subjected to analysis, thought and the facts...It must be professional."

Chief Executive

Simply, free and frank advice must also be professional, prepared "...using analytically sound, well-rounded, informed and inclusive approaches."²⁸

The previous four quotations suggest that free and frank advice must be supported by rigorous thought and analysis, but also that it has boundaries - the policy objectives of the Government of the day.

In my view, if free and frank advice is truly that and is "owned" by the deliverer of the advice, then it should not exclude the advisor's personal viewpoint. Such an exclusion would act as a constraint on the provision of free and frank advice and would be contrary to the notion of free and frank which, by its very nature, is unconstrained.

There will be times when an individual's personal views demand that their advice is not within the policy objectives of the Government of the day. The convention, if it is to be important to Parliamentary democracy, should allow public servants to express views

contrary to the Government's broader policy objectives. It should not have "... to be tendered within the context of the policy objectives of the Government of the day".

Having given that advice which is not accepted by the Government, the public servant has a simple choice. Either he or she believes they have met their own moral and ethical standards by imparting that advice and they can then implement the Government's policy with a clear conscience or their own standards demand their resignation.

However, that scenario represents the extreme position. Generally, and in a practical sense, public servants do present their advice within the parameters of the policies of the Government of the day, but they are not obliged by the convention to do so. If anything, the convention demands a high level of responsibility from public servants to tell it as it is.

But what do politicians think about the convention? After all conventions govern relationships and relationships usually involve more than one party. As the State Services Commissioner Don Hunn observes, it takes two to tango.

"If the free and frank convention's going to work, it's not just sufficient for the public servant to give free and frank advice, the Minister has to accept that a public servant has an obligation to provide such advice...it's a two-way street...it will only work if it's a two-way street."

Don Hunn, State Services Commissioner

The question was put to Cabinet Ministers and former Cabinet Ministers: "What do you understand the free and frank convention means and how important is the convention to the business of good government?"

"In a very simple sense, it just means providing a view based on the experience and the professional expertise of those involved, but that's rather trite. It becomes significant, I think, where there is an important matter where the professional view is quite clearly at odds with the Government's instincts or intentions and the public service feels it is important that advice, which the Government may not want to hear, is still tendered. This puts the Government into a position where it has had to apply its mind to the full range of information or views and reject it knowingly. That's when it [the free and frank convention] becomes important and significant...I think the convention is very important to the business of good Government and, in my experience, it's pretty professionally handled. I think that the ethic [of neutrality through the provision of free and frank advice] is alive and

well and, in my experience, most Ministers actually respect that...I mean it's very comforting to the Minister as well. It's much better to be able to point to advice which is tendered neutrally than it is to point to advice from any other quarter."

Hon. Simon. Upton Cabinet Minister

"The free and frank convention is crucial to protect the ministerial responsibilities that Ministers undertake and to contribute to the quality of governance."

Hon. Jenny Shipley, Cabinet Minister

"It's [the free and frank convention] critical to the business of good government. Without it, ultimately you would end up with irresponsible conduct on the part of the political sector."

Hon. Murray McCully, Cabinet Minister

"I think it is absolutely crucial that advisors don't trim their advice, that they don't get into the business of trying to reflect what Ministers want to hear. I think that is absolutely fundamental to maintaining a distinction between advice and decision-making...The advice shouldn't be tailored by the thought that the view may be palatable or unpalatable to a particular Government... If what's crucial to a democracy is that you can hold the decision-makers to account, then the

truth is you can't hold public servants to account in the same way. They can be sacked if their work is truly lacking in quality, but you can't sack them because you don't like their advice. You sack the people that made the decisions."

Hon. David Caygill, former Cabinet Minister

"I suppose the convention simply means that public servants, primarily chief executives, have the responsibility of advising Ministers on policy matters without any hint or suggestion that advice that is unpalatable will lead to some form of retribution or breakdown in the relationship between the Minister and the department...Ministers have responsibility for policy, departments have responsibility for policy advice. That advice has to be given according to how the department sees the situation and not necessarily hedged with what is perceived to be the desire of the Minister for certain advice to be given. I rank the value of the convention to the business of good government relatively highly, but not as highly as some people would tend to think. It's really almost more a mechanism for warning Ministers when they are thinking of doing something particularly silly that won't work, so it's a protective device as much as anything else against unwise actions by the Minister and/or a Government but, beyond that, I think it is possible to exaggerate both its importance and the extent to which it has to be rigidly adhered to."

Hon. Michael Cullen, former Cabinet Minister

In summary, the politicians reflect the views of the public servants. The free and frank convention is all about receiving advice you may not wish to hear. Public servants should not attempt to "second guess" Ministers by providing advice they think Ministers are wanting to hear; and that the convention is a useful safeguard in the way of Ministers and/or governments, in the words of Michael Cullen, "doing silly things."

So in that respect, the tango is underway. There is broad agreement between public servants and Ministers about the convention and its value to the business of good government, but it itself, that is not surprising. It is useful to have the confirmation, but posing a question to Ministers about the value of free and frank advice does beg the anticipated response.

However, Michael Cullen's comments address a fundamental issue already touched on in this chapter. There is a dichotomy in that public servants are, on the one hand, expected to give free and frank advice which may be in conflict with the Minister's views while, on the other hand, those same public servants are, in the words of the Cabinet Office Manual, obliged "to serve the aims and objectives of the Minister."²⁹ In short, public servants are expected to be loyal and faithful to the Government they serve. At what stage, then, does the public servant cease providing free and frank advice which the Government is clearly not going to accept, and get on with the job of either offering

alternative policy advice, or implementing a Government policy that the public servant may have freely and frankly advised against?

This paper now turns to that issue.

"If you do the free and frank thing too long, it may be perceived by Ministers that you don't want to implement the policy. Equally, there are problems if you pass over to the (loyally and faithfull)y too quickly."

Senior Public Servant

Central to this issue is the one already alluded to in David Caygill's earlier comments. That is, while public servants give policy advice, Ministers make the policy decisions. The *Public Service Code of Conduct* is explicit on this point. "...the final decision on policy is the prerogative of Ministers, and public servants may not withhold relevant information from Ministers, nor seek to obstruct or delay a decision, nor attempt to undermine or improperly influence Government policy (for example, by the unauthorised release of official information)."³⁰

"You have to separate advice and decision-making. You win some and lose some. Most of the senior public servants I work with understand this. There are variations on how hard they press the advice on the system before they yield...They can use their persuasive powers. They can't make policy advice and then, through deliberate action or neglect, frustrate the decision of the Government."

Chief Executive

"Potentially there is a tension between the free and frank convention and the obligation of public servants to serve the Government of the day, but in practice, no, because Governments are more likely not to do the things they have been advised to do, than to do things they have not been advised to do."

Senior Public Servant

"I don't have to be tediously free and frank. I need to know I've given the advice, but I don't need to strain the relationship."

Senior Public Servant

"One of the interesting things about the free and frank convention is that if you give it [free and frank advice] too frequently, if you don't strike the balance between free and frank and faithfully and loyally, you can become an impediment to government policy, irrelevant to government policy and encourage the Government to view that behaviour as obstructive."

Former Chief Executive

"There are times when your Minister wishes to take a course of action you strongly disagree with...you have to tell your Minister that he or she is doing something for political ends which will not be in the wider public good...this does not arise that often and it's often very difficult to distinguish between that and when your department simply disagrees with the course of action being proposed..."

Former Chief Executive

This last comment raises a fundamental issue. That is, what remedies are available to the public servant if he or she believes the course to be taken by the Government is not in the wider public good, or public interest? A response to this question involves the nature of the ethics surrounding the business of being a public servant and lies outside the parameters of this paper. However, the issue cannot be passed over without comment and John Martin's series of essays in *Public Service and the Public Servant*³¹ provides a useful analysis of the issue. Martin writes: "For the public servant the working rule is that the 'public interest' is what the Government of the day says it is...An individual choosing to dissent does so as a matter of conscience, and the consequences for that individual cannot be foreseen."³²

While that may be a pragmatic response, in itself it does not help public servants resolve what is essentially a moral conflict. To do that, they have to turn to the source of ethics for those who are employed in the public service which are derived from the law, constitutional and political conventions, public trust, professional standards and the employment relationship and obligations.³³

The *Public Service Code of Conduct* also provides some guidance on this issue. "The dilemma for public servants who hold strong personal beliefs on certain issues is recognised, but it is one which must be managed so as to avoid conflict with their official duties. It is Ministers who bear political responsibility for Government policies, and it is the role of public servants to faithfully implement those policies to the best of their abilities. Once the Minister has made a decision, it is the duty of public servants to implement that decision within the law, whether or not they personally agree with it.

"If public servants find themselves in a situation where their conscience demands that they should decline to carry out a lawful instruction, they should discuss their circumstances and options with their chief executives."³⁴ [One assumes Chief Executives would discuss their "circumstances and options" with the State Services Commissioner - author].

Essentially, public servants who find themselves in a position of conflict between their personal values and their obligation to implement Government policy have two options:

they either put up and shut up, or they resign. The latter is less common than the former, but there are some notable exceptions, including the case of Treasury official John Zohrab, head of the Treasury's debt management office, who resigned when the then Finance Minister, David Caygill, rejected Treasury advice to repay foreign debt and, accepted Reserve Bank advice to repay domestic debt instead. David Caygill recalls the incident when he lost, in his own words, a "very good" Treasury official.

"Here's a relatively rare example of an official saying: I cannot in conscience, or whatever, loyally implement this decision. Nobody [the Treasury or the Reserve Bank] did trim their advice for the sake of winning half the battle. We [the Government] had a clear difference of view from the two agencies [The Treasury and the Reserve Bank] that argued their positions forthrightly. I expected no less and I got no less."

Hon. David Caygill, former Minister of Finance

There are suggestions that Zohrab's stance was fuelled by undertakings he had made on behalf of the Treasury to overseas bankers which he could no longer meet. Likewise, the tension between free and frank and faithfully and loyally caused some problems for the then Ministry of Foreign Affairs.

"This is hearsay, but there was tension between officials and Ministers over New Zealand's nuclear free policy and the subsequent ANZUS rift. Some senior staff attempted to moderate the impact of the policy in their own dealings with their counterparts in the Northern Hemisphere, because they were very unhappy with that policy."

Senior Public Servant

A former Chief Executive says there is a lot of tension between the dual obligations of providing free and frank advice and faithfully and loyally serving the Minister.

"It's almost the art of being a public service chief executive. The real test is to know how far to push the point and when to stop arguing and get on and do it."

Former Chief Executive

"The free and frank convention does require a certain amount of maturity on the part of the Minister that officials are servants of the Government, not servants of the Minister. We are loyal in implementing policy, but we are not clones in giving advice."

Senior Public Servant

Clearly, public servants acknowledge the tension between the two obligations of providing free and frank and implementing Government policy faithfully and loyally, and that the line between where you stop doing the former and get on with the latter is fine and a matter of judgement in each case. Ultimately, the only practical outcome, if the tension moves into conflict and the conflict is unresolved, is acceptance or resignation.

That represents the public servant's position, but what is the view of Ministers? Has public servants' insistence on providing free and frank advice which is contrary to the Government's policy ever undermined Ministers' confidence in the ability of the public servant or ministry or department to implement the Government's policy? Is there a point when public servants should stop giving free and frank advice and get on with it?

"I've always thought public servants would implement Government policy faithfully and loyally. I don't think it's a matter of giving free and frank advice on every single issue. The practicality is that the Government has a policy and I wouldn't expect public servants faithfully, every day, to suggest there is another policy view and that they must register it...I think it is vital they do provide free and frank advice when, notwithstanding that the Government has a policy...that is going to put the Government and/or the public service in a position of some public debate and contention...something of moment at stake... then free and frank advice becomes important... otherwise, it seems to me to become terribly complicated if public servants were always giving all views...always starting from the premise that there were "n" number of policies that could be chosen. I don't think that's right. [A full range of options] would clog the system up. For instance, the Government has taken a decision to make science funding contestable, then officials express free and frank advice on the pros and cons of doing that, but having done that...I think the public service has to work on the basis of: 'well, that's cast the die, so we go from there.' But when the policy looks fundamentally at risk in terms of the ability to carry it out, or there are going to be consequences which may have been warned of and perhaps put to one side but really have come back with knobs on, then public servants have to continue the debate. That's just a matter of being sensible."

Hon. Simon Upton Cabinet Minister

"There are regular occasions when I don't accept the advice of the Department. I don't have any difficulty asking them to follow a quite tangential course of action and a highly professional ministry, like the Treasury, don't see it as a difficulty at all. I don't find them obstructive or unhelpful in that regard."

Rt Hon. Bill Birch, Cabinet Minister

While Bill Birch has no problems with the Treasury, he is less unequivocal about other departments or ministries.

"I guess it's a human reaction if someone rejects your advice to say 'well, he or she is going down the wrong track', so maybe as a consequence the commitment and the energy that would have been applied to the implementation of that advice may be a little bit less than it may have been."

Rt Hon. Bill Birch, Cabinet Minister

Cabinet Minister Jenny Shipley records some concerns that the public service would implement government policy faithfully and loyally following a decision by the government to proceed contrary to advice from officials.

"Ministers are not stupid in that they can sense when, having had their advice rejected, the public service tends to go into a 'minimalist' type of assistance. I mean they tell you what you've asked for, rather than tender active, dynamic, and free and frank advice [on the implementation of the policy]. It's only a small problem generally, but I've observed it."

Hon. Jenny Shipley, Cabinet Minister

Jenny Shipley identifies another issue: a famine of free and frank advice, rather than a feast.

"The withholding of free and frank advice is a problem one sometimes observes. I sometimes wonder if it's paralysis, purposeful obstruction or just fatigue, but there are times when I think departments should have been responsible for things and should have taken a more active interest...I mean a lot of people in Government are paid a lot of money to have good ideas and yet when we talk about free and frank often I observe that policy advice is more about the state sector's view than innovative solutions that Governments might be interested in... the "also rans" are tending to churn out papers which will almost reflect all the views of the analysts around a table and leave the Minister to choose...a paper containing options with good analysis as to why they are legitimate choices is not the same as a paper where analysts couldn't actually come to grips with the issue and provide viable solutions with credible explanation and argumentation...and in some of the big structural reforms, I have observed there have been papers which have got much more to do with territorial roles of departments than they have got to do with quality, free and frank advice..."

Hon. Jenny Shipley, Cabinet Minister

Both current Cabinet Minister Murray McCully and former Cabinet Minister Michael Cullen share one view in common: that is, the Treasury oversteps the mark between giving free and frank advice and getting on with the job.

"A lot of the advice that I've had in the housing area by way of Treasury comment on Housing papers could be summarised as Treasury holding the view that there are plenty of bridges for poor people to sleep under. To rehearse that sort of attitude in Cabinet papers that the Treasury knows are discoverable is nothing short of disgraceful and unprofessional and I've told them so numerous times...I do not accept that it is either professional or competent for them [the Treasury] to gratuitously pen those sorts of comment in Cabinet Committee papers and then, having lost the argument in the Cabinet Committee and the Cabinet, at every subsequent opportunity, to relitigate a decision already made after due deliberation by the Government."

Hon. Murray McCully, Cabinet Minister

Michael Cullen says he was very critical of the briefing paper from the Treasury for the incoming Government following the 1987 general election.

"180 pages of the history of free-market thought seemed to me to be rather irrelevant to a briefing on the position of the country. I basically said, 'I don't need this. I've taught economic history. I do not need to be told about this. I can write this for you if you want me to. It's a waste of my time and of yours'. It was more the appropriateness of the advice, the way it was cast..[that Dr Cullen objected to]..If I become Minister of Finance, I would not be interested in long, ideological statements from the Treasury disguised as policy. They would be wasting public resources if they did that."

Hon. Michael Cullen, former Cabinet Minister

David Caygill holds a different view from those expressed by Murray McCully or Michael Cullen.

"As the Minister of Finance and an Associate Minister of Finance before that, I was accustomed to getting a lot of complaints about the Treasury from colleagues, and I was equally accustomed to saying to people, 'Look, you've just got to get this into perspective. It's no use having a group of financial advisors who trim their sails to our breeze. Treasury will persist in believing certain things. We are free to accept or reject that. Don't be surprised if in three months time, in six months time, you get exactly the same arguments coming up that you have turned down before. That's not their obduracy, that is their view of their duty. Come to that, it's my view too...'If we said here's what we've decided to do

and they went and did something else, then that would be intolerable. However, when we ask for their advice, then we shouldn't be in the least surprised when they offer the same advice as they offered last time."

Hon. David Caygill, former Cabinet Minister

There appears to be a wider range of views among politicians about the line between "free and frank" and "faithfully and loyally" than there is among public servants.

By and large, public servants believe they are able to implement faithfully and loyally policies decided on by Government but that are contrary to free and frank advice. Jenny Shipley presents a view that public servants sometimes obstruct through inactivity. Bill Birch concedes that it is possible that departments and ministries would put less commitment and energy into implementing policies which ran counter to their own advice.

By and large, public servants believe they know when to stop giving free and frank advice and get on with the job when it is clear the Government is not going to accept that advice. Jenny Shipley suggests that public servants should be more "bold"³⁵ and that Ministers do not always get free and frank advice (up to an alarming 30 percent of the time in her estimation) when they need it. Murray McCully and Michael Cullen believe Treasury provides free and frank advice to the point of being decidedly unhelpful. That is, in these instances anyway, the Treasury has not achieved the right balance. Bill Birch suggests the Treasury is very professional in that, if its advice is rejected, it gets on with the job.

It is likely that politicians, because they represent particular policy agendas (more so than public servants) are likely to view these issues from a far more personal perspective. Perhaps Bill Birch is comfortable with the behaviour of the Treasury because he believes the Treasury is sympathetic to the Government's broad economic thrust. The differences in approach probably surface more at the edge of that policy rather than at its centre. Perhaps Murray McCully is uncomfortable with a ministry that is charged with taking a "whole of Government" view "interfering" in the affairs of a ministry run by a minister who takes a "hands on" approach. Perhaps Michael Cullen mistrusts a ministry that he believes lost Labour the last election because of its costings of Labour policies. Perhaps Jenny Shipley for some reason, real or imagined, lacks confidence in her Ministry and its officials.

The more moderate views expressed by Simon Upton and David Caygill seem to best mirror the views of public servants. They are:

- public servants should provide free and frank advice to the point where the Government has decided upon the policy option and is in full possession of all the facts enabling it to estimate the risk;
- once the Government has made a lawful policy decision, public servants should faithfully and loyally implement that policy, regardless of whether or not they agree with it;
- there are policy issues with a big "P" and ones with a small "p." A constant parade of free and frank options on every policy, particularly those with a small "p" and upon which the Government has already made its decision, would be exhausting, counter-productive and inefficient; and
- on fundamental policy issues, such as overall economic policy or the provision and/or delivery of a social service, Ministers should be comforted, rather than threatened by the consistency of free and frank advice, even if it runs counter to their own views.

The SSC acknowledges the difficulties facing chief executives in resolving this issue. It advises "...it will not always be easy to determine when to stop giving advice on a matter about which the Minister and the Government have already made up their minds. In such cases, being quite explicit about the issue may be helpful - even to the point of the Chief Executive suggesting that the Minister says when, in his or her views, the critical point has been reached. Until then, senior officials have an important role to play in making available to Ministers all relevant information and experience at their disposal and the most honest, comprehensive and rigorously developed evaluation possible of proposals and alternatives."³⁶

There is one final issue to be traversed in this chapter on what the players perceive "free and frank" advice to be. That is, the breadth of free and frank advice. Should free and frank advice be constrained by what the Minister asks for or the outputs prescribed in the purchase agreement between the ministry/department and the Minister? Or do public servants have an obligation to take the initiative in raising issues outside the parameters of current government policy?

A graphic example of public servants tendering advice with "...courage, tenacity and independence" ³⁷ is contained in the following observations from a senior public servant. They are recorded in full, firstly because they represent an interesting slice of political history and, secondly, because they provide examples of dangers at either end of the spectrum: no recognition of policy advice from public servants to significant recognition of advice from public servants.

"As the Minister of Finance, Sir Robert Muldoon, in effect, foreclosed on many options for the use of economic instruments that officials were able to offer. This led to a very narrow range of policy options to the extent that the Treasury considered their advice was of no value or causing economic harm. In that case, I can remember advice that went like this: 'This is the Government's objective, Prime Minister. This is the situation. This is a very difficult objective to achieve or is achievable only with certain policy initiatives. If you don't want to take the initiatives which we recommend you do take, then the least damaging option is....'

"In this case, the Minister of Finance was seeking confirmation of a view of a policy he had already decided upon. This was to help him shore up his position with his Ministers and give his policy some legitimacy. Officials, on the other hand, were seeking to provide advice on ways to address what they saw as a deep-seated problem with our economic structure and performance.

"In contrast, the way Sir Roger Douglas accepted the Treasury's advice in the 1980s carried with it, I think, some other risks. In that case, there was such an alignment of Treasury officials' views and the Minister's views that the acceptance and speed of economic and structural reform carried with it its own dangers of a failure to identify and manage the implications of those policies. There was little attempt to canvas the alternatives and to get the sequencing and timing of the implementation right."

Senior Public Servant

Both Bill Birch and Jenny Shipley confirm they would expect free and frank advice on matters over and above the areas covered in the key results areas detailed in the purchase agreement between Ministers and their departments.

"I don't think any Chief Executive should feel bound to limit free and frank advice to the matters covered in the purchase agreement. Ministers have day-to-day issues and longer term policy developments and you get free and frank advice on both."

Rt. Hon. Bill Birch, Cabinet Minister

Jenny Shipley also focuses on immediate issues, using blood transfusion services as an example.

"No Government has a policy on blood other than they expect the Ministry of Health to be competent enough to monitor these things, report effectively and to advise on what to do about it."

Hon. Jenny Shipley, Cabinet Minister

Generally, Ministers believe it is appropriate for public servants to offer advice that is not requested and is not covered in the purchase agreement. However, the overall tenor of the interviews suggested that the "extra" advice should be of an operational as opposed to a fundamental nature.

Conversely, the interviews suggest the public servants are not likely to provide advice challenging the basic premises of government. That is not surprising, because it is difficult to challenge a senior Cabinet Minister, particularly one who is unaccustomed to having his or her views challenged. The State Services Commission acknowledges it as such. "The obligation and functions of public servants to give free and frank advice to Ministers and to the Government of the day is vital and it can give rise to some difficulties."³⁸

It is possible those Treasury officials who courageously faced Sir Robert Muldoon at his most acerbic and intimidating best would find the SSC's observation magnificently understated.

However, if a convention is what people perceive it to be, then it is likely the convention, for whatever reason, is that public servants will not use the free and frank convention to challenge the underlying premises upon which a particular Government policy is based, unless they hold a deep-seated conviction that not to do so would be avoiding their wider obligations to serve the needs of present New Zealanders and future governments.

The final words in this chapter go to a former Chief Executive

"Democracy is fragile and we need to stop and consider are we doing the right thing? Can it be done legitimately? Will it contribute to the overall well-being of the nation? If you do not question things, good government becomes convenient government."

Former Chief Executive

We have a convention, and we have a broad understanding of what the players understand the convention means. The next question to be addressed is: is the convention working in a practical sense. That is, is free and frank proffered on the one hand and encouraged on the other? That is the subject of the next chapter of this paper.

CHAPTER THREE

THE CONVENTION IN PRACTICE

Is free and frank advice proffered on the one hand and encouraged on the other? It is impossible to answer this question through a retrospective examination of the policy advice itself. Such an approach would lead to some idea about the **quality** of advice proffered, but few clues as to whether or not it was **free and frank** advice as there is a limited association between the two. One way to address the question is to pose it to the players.

"Some Ministers just don't want to hear bad news. Some are happy to hear bad news, but not in public...There are some instances where officials have lost heart and stopped trying on particular issues."

Senior Public Servant

"Often free and frank advice is proffered, but not always. There are examples where the free and frank stage never seemed to happen and, if it did, it happened in a verbal, non-transparent way. In other words, there is no record of it happening."

Senior Public Servant

This respondent continued to recount an instance where the Government decided to provide more funding in the anticipation that it would generate additional services for the public. The agency advising the Government knew that the extra funding would not provide extra services, but simply pay for current services that were already being funded through a different source of revenue. The agency's Chief Executive said that he thought the Prime Minister would not want to hear this, but that the Prime Minister would want to hear that he was getting more services for the additional funding. And that is what the Prime Minister was told.³⁹ The same respondent continues:

"There are also other examples where free and frank advice has been given, but covered up, with Ministers having Cabinet papers, and even Cabinet minutes, withdrawn, shredded and rewritten. I've had personal experience of an explicit message from a Minister that there are some things that can't be written down. This raises a significant point about accountability. That is, Ministers may receive free and frank advice, but if it's not written down, it leaves the public service exposed and open to acting negligently if a Minister or Government imposed policy fails, or the public service is seen to be acting politically and, as such, compromising the credibility resulting from its neutrality. Not all chief executives appear to appreciate this point.⁴⁰ Generally, the closer you are to the politicians, the more you behave like one. The lower down the chain the advice is

generated, the more likely it is to be free and frank. However, by the time that advice is passed on to the Minister by the chief executive, it has gone through the chief executive's political or 'fudge-factor' filter."

Senior Public Servant

"By and large, governments have been quite willing to receive free and frank advice, but there have been some Ministers who haven't been so keen, but I would have to say that, generally, they have been poorer Ministers for two reasons: they're either bigoted and biased, or they feel threatened. Sure, it may be lousy advice and they just disagree, but usually you can work out which camp a Minister is in. On the other hand, intelligent Ministers are not threatened by free and frank advice. They recognise the value of pitting their own views against it. I've always had Ministers with whom I could discuss matters freely and frankly. Other Chief Executives have not been quite so lucky.

Chief Executive

Generally, the public service respondents agreed that by and large free and frank advice was preferred and encouraged. Some Ministers are more encouraging and some public servants are more bold. However, a former Chief Executive says the real issue is not so much whether free and frank advice is proffered, but the level of commitment with which it is proffered. He continues:

"I know of judgements made to back off an issue on the basis that the issue was unwinnable, that it was going to be too high a cost to continue to pursue it. But I can't think of instances where that wasn't flagged and flagged on paper. The real issue was 'how hard was it pushed?... the politicians won, because the officials didn't really push the issue. Because to push really difficult issues when there's a conflict requires someone to do a lot of hard work."

Former Chief Executive

Bill Birch says that in his experience as a Cabinet Minister over a number of years, he has received free and frank advice. Simon Upton mirrors Bill Birch's sentiments.

"I think free and frank advice certainly is proffered and received, and the Public Finance Act has made that much more transparent too. It seems to me that, in the past, Chief Executives could well have been somewhat concerned about the consequences of advice, given that the roles were not clearly specified. Because of this, the Minister's enthusiasm [for a particular policy] could be directly imputed to the public service. I have almost unlimited admiration for the Public Finance Act and the State Sector Act in getting these roles right."

Hon. Simon Upton Cabinet Minister

David Caygill and Michael Cullen believe that they received free and frank advice during their terms of office. David Caygill was asked if, in his experience as a Cabinet Minister, did he ever think he was receiving advice officials wanted him to hear rather than advice he needed to hear?

"Overwhelmingly, I think the contrary. In fact, if you look at the kind of advice that the Treasury served up to the incoming Government in 1984 (or the incoming government in 1990) the notion that the advice reflected what Treasury thought the incoming Government would like to hear is, in my view, fanciful. Given Treasury's knowledge of Roger Douglas's views in 1984, or Jim Bolger, Bill Birch, or Ruth Richardson's views in 1990, Treasury might have had some reason to think that their might be some sympathy for their view, but that's not the same thing as saying their views were tailored. On the contrary, given the thoroughgoing nature of the proposals, given the amount of criticism and controversy they generated, I think it's much more plausible to believe the opposite. That is, to say that Treasury would have had very good reason to think that they were making a very big 'ask' of a government. Nevertheless, they volunteered their views, believing it was their duty to do so."

Hon. David Caygill, former Cabinet Minister

Jenny Shipley believes that, sometimes, free and frank advice is not proffered.

"I think that free and frank advice sometimes means what public servants think Ministers want to hear, but of 100 per cent of the time, that only ranges from 0 to 30 percent. I think that public servants in New Zealand, given that they are a professional service, should be more bold in giving Ministers advice. When I say more bold, they have to be careful not to slip into personal, political rhetoric as opposed to well analysed and promoted policy options, but often I see more territorial patch war than I see innovative policy solutions. And so, free and frank advice sometimes gets caught up in matters to do with the state sector, rather than free and frank advice to Ministers. That's only 20 percent of the time, but it's certainly visible."

Hon. Jenny Shipley, Cabinet Minister

Jenny Shipley's observations are, in fact, a close reflection of the observations of a former senior public servant, R.J. Polaschek, who wrote nearly 40 years ago: "Today, one suspects that the fact that certain permanent heads have a positive policy is sometimes more important than the name of the particular party or particular Minister in office. It is not customary for public servants to be quite as forceful as this. One or two go to inordinate lengths to produce selected facts to justify ministerial policy. They endeavour to read the minister's mind, and provide him with a recommendation that will please rather than with one that will solve a problem satisfactorily." ⁴¹

Then there is the story, which unfortunately cannot be sourced, about a Minister who does not want any advice at all. When the Minister's chief executive resigned the comment was made: "Well, Minister, you'll be looking for a Chief Executive to give you good advice."

"I don't want a Chief Executive to advise me," came the response. "I want someone to run my Department!" Supreme confidence or stupidity? Only the Minister can supply the answer and the response is unlikely to be free and frank.

There is the issue flagged at the beginning of this chapter by the senior public servant who observed that, in their experience, Ministers had even Cabinet papers and Cabinet minutes shredded or withdrawn, because of the freeness and frankness of the advice. Is this a common practice?

"Some Ministers get very nervous about seeing advice in writing. Their concern is that a later paper trail may show they have taken decisions contrary to advice. I have been put in the situation where my Department has put up advice in the form of a written memo and I have been asked to withdraw the memo."

Chief Executive

"I have seen Ministers ask to have reports withdrawn. They didn't want it to be known that they had received advice that ran contrary to Government policy."

Senior Public Servant

"I have known of occasions when advice has been shredded, not by the Minister, but by a public servant."

"Senior Public Servant"

It is the view of the author of this paper that it is not unknown for draft policy papers to be withdrawn and shredded to escape discovery under the Official Information Act.⁴² There are a number of understandable pressures leading to this. They include the one already alluded to here. That is, Ministers not wanting it to be known that they have acted contrary to the advice they have received; Ministers not wanting it to be known that a particular government policy is not achieving the anticipated and publicly announced outcomes; and Chief Executives who enjoy less public anonymity and greater public accountability not wanting public scrutiny of their advice to Ministers.

While it is not an offence under the Official Information Act to destroy information (unless it is destroyed after a request has been made under the Act), the practice does have important ramifications. First, it muddies accountabilities between Ministers and officials in that it is easier to shift accountability and/or blame when there is no record, Second, it intensifies a problem already experienced as a result of significant state sector

restructuring since 1988 and that is a lack of institutional memory in the state sector. Third, it stretches the ethics of both Ministers and public servants to breaking point. The final point is best expressed by a senior public servant.

"It [the practice] encourages senior advisors and Ministers to become co-conspirators in getting around the Act. Once they have eaten of this apple together, it changes their relationship forever.

Senior Public Servant

There is the question of who "owns" the advice. Can a Minister ask his or her officials to change the colour of their "free and frank" advice to suit the Minister's requirements?

In theory, anyway, the convention is clear.

"A Minister can't dictate the nature of the free and frank advice from an official to him or her. However, if an official is writing a Cabinet paper on behalf of the Minister and which the Minister will sign, then the Minister has every right to dictate what is written."

Senior Public Servant

"If I am giving the Minister politically neutral, independent advice in a report which consists of analysis, options and recommendations, the Minister cannot tell me what to write in my own report. However, if I am drafting a Cabinet paper, a note from one Minister to another, or a letter from the Minister to a member of the public, then the Minister has every right to tell me what to draft. Provided I have an opportunity to tell the Minister what I think he or she should write, then my role is preserved."

Senior Public Servant

"A chief executive will say to their Minister: ' I am happy to write a paper that you can put your name to, but you can't make me put my name to advice I don't agree with.' It happens, and it's good."

Chief Executive

Thus far this paper has largely dealt with relationships between a Minister and officials, but there remains an issue around the proffering of free and frank advice to other Ministers to ensure that, when the Cabinet doors are closed cutting that metaphorical umbilical cord between officials and Ministers, Cabinet Ministers are fully aware of the range of free and frank advice, including that from departments and ministries other than their own, before they embark upon that collective Cabinet decision.

David Caygill takes pride in the fact that the Labour Government excluded officials (other than those from the central agencies - the Treasury, Department of the Prime Minister and Cabinet and the State Services Commission) from the deliberations of the Cabinet Committees. This was done on the grounds that it would speed up business (and the reforming Labour Government had a lot of business to get through) and to stop departments and/or ministries "gaming" and attempting to influence the decision-making process by introducing new material which had not been previously introduced during the standard round of consultation between Government agencies. ⁴³

It was a decision the National Government revoked immediately on obtaining office in 1990. Finance Minister Bill Birch says:

"I think excluding officials from Cabinet Committee meetings was a great mistake. It was very obvious when we came into office the damage it had caused. You've got the opportunity at Cabinet to have the political debates on your own, no officials are there at all. But it's very important in the process leading up to making decisions for a Minister to be able to access advice from officials outside of his or her own agency. Otherwise you get the Ministers who have had the free and frank advice forming their own views, coming into a Cabinet committee meeting and not allowing other Ministers to test the advice that's been given...and it's a great weakness. We haven't done that. Generally, if we have an issue of substance before us, we like to expose the Ministers to the full range of advice that's available. And then, once having heard that advice, we generally don't debate in front of officials. If it's very contentious, we'll toss it upstairs and let the full Cabinet have a go at it. If it's something we want to chew over ourselves, we often make our decisions and recommendations after the officials have left. I don't think the officials need to be there to hear the debates among Ministers, but I think it's valuable for other Ministers to be able to test the quality of the advice given to the portfolio Minister."

Rt Hon. Bill Birch. Cabinet Minister

Perhaps understandably, Bill Birch's view is endorsed by officials.

Despite David Caygill's protestations about the rigour of the rationale underpinning the Labour Government's decision to exclude officials from Cabinet Committee meetings, one cannot help but speculate that a more visceral reason may have centred around the old myth that Labour Governments - or perhaps Governments that have been out of office for six years - mistrust a public service which, after all, has made some contribution to policies that have kept the Opposition out of office.

Whatever the reason, there is a view that Government is best served through the exposure of a wide number of Ministers to free and frank advice through the Cabinet Committee system. If nothing else, it is one way of keeping the officials honest.

In summary, this chapter has endeavoured to demonstrate that:

- by and large, free and frank advice is proffered by public servants and encouraged, received and valued by Ministers;
- there have been, however, some notable exceptions where, for a number of reasons, free and frank advice has not been proffered by public servants;
- some Ministers are reluctant to receive free and frank advice if it could be used to show at a later date that the Minister or the Government made a policy decision contrary to the advice of officials;
- there is evidence to suggest that, in an effort to hide embarrassing or conflicting advice, in some cases papers have been withdrawn and, sometimes, destroyed;
- there is an understanding that Ministers cannot ask public servants to alter their advice to the Minister, but Ministers have every right to ask public servants to present the Minister's advice in material that the Minister "owns" by signing. This covers material from memoranda to Cabinet and Cabinet Committees to letters to members of the public; and
- all Ministers should be able to access free and frank advice from ministries and departments other than their own portfolios in order to be able to test that advice and to be in possession of the widest possible range of advice when debating policy at the Cabinet level.

The next chapter in this paper looks at some of the major constraints in the way of exercising the free and frank convention.

CHAPTER FOUR: CONSTRAINTS IN THE WAY OF EXERCISING THE FREE AND FRANK CONVENTION

It is all very well having a noble constitutional convention, a broad understanding of what that convention means and general agreement about its application, but to maximise its intended constitutional impact, the convention must have few constraints, perceived or real, placed on its ability to operate.

Are there any constraints in the way of the practice of the free and frank convention in New Zealand? Three possible constraints are:

- the influence of the State Sector Act 1988 and the Public Finance Act 1989 which, together, established the contractual relationship between Ministers and their Chief Executives;
- the impact of the Official Information Act 1982; and
- the individual personalities of Ministers.

This chapter examines each of these "constraints" in turn.

The impact of a contracting regime on the convention

There is a view that the contractual relationship between Ministers and their Chief Executives forged by the State Sector Act 1988 and, to a lesser degree, the Public Finance Act 1989, has impacted adversely on the ability of public servants to provide free and frank advice with comfort.

This perspective is expressed by commentator, John Martin, who writes: "But now under the pressure of extraordinary external factors coupled with radical governments the tensions are showing. In post-reform language ministers are unequivocally the 'clients' of departments; they 'purchase' the departments' services and they judge the performance. The customer is always right. Two adverse consequences for the behaviour of public servants are, in my observation, following from the reforms. First, the nature of widespread short-term contract employment is having an effect on the capacity of the public service to offer "free and frank" quality advice. This is not a reflection on the contribution of Chief Executives. I simply do not have that kind of knowledge; and, indeed, their performance contracts with their ministers require such

advice to be provided. However, too often for it to be regarded as a random phenomenon, I have been told by people in the middle ranks of departments - often those writing policy papers - that their professional integrity is compromised by the requirement to provide 'what the Minister wants.'⁴⁴

Martin's focus is the total contracting regime, not just the performance agreement between the Chief Executive and the Minister. However, the State Services Commissioner, Don Hunn, observes that at the time of state sector restructuring by the Labour Government there were fears that, as a result of the restructuring, the public service would become more politicised and the advice would no longer be free and frank. "There was a concern that the advice would be tailored, that it would no longer be free and frank, because people would want to preserve their positions, they would want to preserve their jobs."⁴⁵

State Services Commissioner Don Hunn says the restructuring was in part motivated by a view of Labour Governments, both the Kirk and Lange administrations, that senior public servants were much more biased towards what they regarded as the natural party of Government - the National Party - than they should be. There was a feeling in the Kirk Government and, initially, the Lange Government, that the Chief Executives were biased against them.

One former Chief Executive says he felt there were some questionmarks over the loyalty of the public service.

"I felt that the old shibboleth that Labour Governments mistrusted the public service was, in fact, miscast. Governments who have been out of office for six years mistrust the public service."

Former Chief Executive

A recent survey by political scientists Boston, Levine, McLeay and Roberts ⁴⁶ found that 49.4 per cent of senior public servants intend to vote National in the 1996 general election while 11.4 per cent intend to vote Labour. Perhaps the Kirk and Lange Governments got it right.

"One of the compelling reasons for the Labour Government introducing state sector reform was that Lange wanted to break the oligarchy, the old idea of the public service choosing its own. He wanted to change the ground rules and the nature of the relationship between the Chief Executive and the politician by making the service open for competition from the outside and, by that, introducing a wider range of people to give that free and frank advice, and to make Chief Executives respond more to Ministers."

"The fears that the service would become more politicised and that people would tailor their advice in order to preserve their jobs was counteracted by making sure the appointment process was apolitical".

Don Hunn, State Services Commissioner

The State Sector Act 1988 makes it very clear that the State Services Commissioner is to appoint Chief Executives and is to act independently in respect of that task.⁴⁷ But was the Act in itself regarded as sufficient to preserve the free and frank convention? Clearly not. The State Sector Act came into force in March 1988. By May of that year in a paper to the Cabinet Committee on Chief Executives based on the advice from the State Services Commission, the then Minister of State Services, Stan Rodger, reaffirmed the convention that public servants should provide free and frank advice, but that there was "one new element" in the equation. Rodger advised the Committee: "The Commission has the responsibility of reviewing, in consultation with the Minister, the performance of the chief executive. It would be understandable if Chief Executives had some concern that their expression of "free and frank" advice might in certain circumstances be considered as a deficiency in their performance."⁴⁸

The paper rejects the idea that the issue could be dealt with in the contract of service arguing that, as constitutional conventions are "notoriously hard to define"⁴⁹ the performance agreement would be a more appropriate vehicle in which to confirm the Government's expectation that the convention would still operate within the parameters of the new contractual relationship regime.

The paper recommended that a letter be sent from the Prime Minister to Chief Executives recording the Government's expectation that it would continue to receive free and frank advice from Chief Executives and indeed all public servants, and that the expectation would be articulated in the Chief Executives' performance agreements. Both parts of the recommendation were accepted.

"People did perceive a danger that Ministers would get advice geared to what they wanted to hear and because that thought was abroad very early in the piece, that's why we got the Prime Minister to write the letter...to make it very clear that, whatever the implications might be in the new system, it certainly wasn't the intention..."

Don Hunn, State Services Commissioner

The letter from the Prime Minister, Rt. Hon. David Lange, to Chief Executives was despatched on 26 May 1988. It read in part: "I wish to reaffirm the Government's expectation that it will continue to receive free and frank advice from Chief Executives and indeed all public servants. It is to be expected that this advice from time to time will differ from the views of the Government or your Minister. However as long as final

decisions on policy affecting your department are properly implemented by the department, there can of course be no criticism of your performance on the grounds of the provision of independent advice.

"I have been advised by the Chief Commissioner of the State Services Commission that the provision of independent advice should be included as an element in your performance agreement against which your performance will be assessed." 50

The requirement for Chief Executives to "...provide the Minister with free and frank advice that is relevant, accurate and timely" was included as a key expectation in the Chief Executives' performance agreement with the relevant Minister.⁵¹

There is the potential for confusion in viewing the performance agreement as representing a direct contractual link between the Minister and the Chief Executive. That is, crudely put, if Chief Executive do not perform to expectations, Ministers can dismiss them. This is not the case. The performance agreement is a measurement which the State Services Commissioner will use when reviewing the Chief Executive's performance in terms of the employment contract between the Chief Executive and the Commissioner. Only the Commissioner can hire and fire state sector Chief Executives. In principle, however, if the relationship between a Minister and a Chief Executive breaks down to the point where it is unworkable, as apparently was the situation between the Chief Executive of the Department of Internal Affairs, Perry Cameron, and the then Minister Warren Cooper, then the intervention of the Commissioner is really a formality. The practical fact of the matter is in that case the Minister was relieved of a "difficult" Chief Executive.

However, was the letter from the Prime Minister and the expectation in the performance agreement sufficient to preserve the free and frank convention? What is the view of chief executives some six years later?

"There are three main constraints to the provision of free and frank advice to a Minister. One is the personality of the Minister; another is the Official Information Act, and the third is the fact that a Chief Executive's performance assessment is done by the Minister. You're less likely to continue to push free and frank advice if the Minister thinks you're a pain in the neck. The Minister's views weigh very heavily with Don Hunn [the State Services Commissioner] when he does his performance review and contract renewal... chief executives' service contracts should no longer be term contracts, but still subject to performance. Term contracts are a convenient way of getting rid of someone - their contract just doesn't get renewed.

"I think the free and frank convention could be entrenched by doing away with term contracts for Chief Executives, because the onus will be on Don Hunn to prove you're not performing, rather than giving the Government the opportunity to get rid of a Chief Executive whose advice they don't like simply by not renewing the contract."

Chief Executive

The same Chief Executive notes that, in his view, there were a number of Chief Executives who based their advice, or coloured their advice, to fit in with what the Minister wanted to hear. It is claimed that this group was a minority, but well known among Chief Executive circles.

No doubt these comments will be music to John Martin's ears, but the views expressed were not typical of the Chief Executives and senior public servants interviewed in the course of this research. They either did not identify, without prompting, the performance agreement and/or the contractual arrangements as a constraint or, if asked to comment on whether or not they thought the performance agreement or the contractual arrangements might be a constraint, most responded in the negative. Even when pressed, no other Chief Executive confirmed the existence of a cabal of sycophantic Chief Executives.

Simon Upton says that the performance agreement works both ways.

"Remember this, that a Chief Executive's performance agreement isn't solely governed by the Minister, and I don't think it should be because of the particular incentives and vagaries of the political system. It's absolutely open to a Chief Executive, who is also being reviewed by the State Services Commission to say: 'if you want my candid, professional opinion, this Minister is a fool. People who don't read their papers and people who, frankly, don't take the job seriously are not in a position to make those judgements that person is making about me."

"Now the State Services Commissioner really has to have the wisdom of Solomon and be locked on the top of a mountain far away and try and be objective about that. I'm pretty confident they can be. Clearly, in any Government there are people who, frankly, aren't up to scratch and you can't hold - the SSC can't hold - that against a person. So there's all sorts of checks and balances in this. I certainly wouldn't support a system where the Chief Executive was judged and paid solely on the Minister's view."

Hon. Simon Upton, Cabinet Minister

However, while one can only applaud Simon Upton's view that Chief Executives have the opportunity to comment on the performance of Ministers, it should be noted that, other than the displeasure of the Prime Minister and/or the electorate at a three-yearly general election, Ministers do not face the same **formal** incentives to perform. Also, it is not a function of the State Services Commission to evaluate and report on the performance of Ministers.

While it is impossible to quantify the impact of the contractual environment on the free and frank convention, the interviews with past and present chief executives, senior public servants and past and present Ministers showed little support for any contention that there has been any impact on the convention, whether negative or positive.

The impact of the Official Information Act 1982

The principle purposes of the Official Information Act 1982 are, through the availability of information, to enable the more effective participation of citizens in the making and administration of laws and policies, and to promote the accountability of Ministers and officials.

Although laudable, the first principle is of limited practical effect. Simply, in itself the availability of information is not going to enable more effective public participation in the framing of policy. To be effective, the public must be able to influence the policy process. In many respects, it is hoped by many that the change in the electoral system will better achieve what the Official Information Act has failed to do.

However, the second principle - to promote the accountability of Ministers and officials - has more bite to it. A point already noted in this paper is the lengths to which some Ministers (and some officials) will go to fudging the policy decision-making paper trail and to prevent discoverability under the Act for a number of reasons, including a desire to hide the fact that a Government policy decision has been taken against the advice of a professional and neutral public service.

Advice to Ministers from Government agencies, and vice-versa, can be withheld for a raft of reasons under the withholding provisions of s.9 of the Act. Of particular relevance to the free and frank convention are s. 9(2)(f)(iv) of the Act which maintains the constitutional convention protecting the confidentiality of advice tendered by Ministers and officials, and s.9(2)(g)(i) which maintains the effective conduct of public affairs through the free and frank expression of opinions by or between or to Ministers or members of an organisation or officers and employees of any department or organisation in the course of their duty.

There is a view that the policy decision-making process should enter a cone of silence so that Ministers can consider advice in an environment where they are not subjected to outside influences and pressure. That requirement has to be weighed against the public's need to know in order to participate more fully in the process itself.

One would think those two clauses in the withholding provisions would catch all free and frank advice and prevent it from being released under the Act. However, requests for withholding under s.9 have to be measured by the Ombudsman against the countervailing public interest. Further, there is no provision preventing the release of information because it may give rise to criticism of the Government or some degree of political embarrassment for Ministers and/or officials.

The issues around this area of interpretation of the Act are complex and it is not proposed to deal with them in detail in this paper. It is sufficient to say that it is the weighting between reasons for withholding and the countervailing public interest that cause the angst. Politicians and some officials might say that the Ombudsman gives too much weighting to public interest considerations (thereby forcing the release of sensitive advice of a free and frank nature), and the requesters of information (often public groups with a specific public issue agenda, or members of other political parties) might say the Ombudsman does not give sufficient weighting to public interest considerations.

The issue for this paper is not around the debate centred on those decisions, but how those decisions, or the perceived likelihood of those decisions, impacts on behaviour. That is, what constraint, if any, does the possibility of discovery through the Official Information Act 1982 have on the provision of free and frank advice?

Overwhelmingly, the public servants interviewed for this research paper said that the Official Information Act was encouraging the generation of more informal advice and discouraging the generation of more formal or written advice. The simple reason for this was that Ministers do not want to be haunted by a paper trail which could demonstrate that they have made decisions contrary to the advice preferred by officials. Most public servants viewed the trend as disturbing and a constraint on historical record, institutional knowledge, and most importantly, accountability for decisions. However public servants agreed that the Act has forced an improvement in the quality of written advice, simply because that advice will become public.

An issue around the discoverability of free and frank advice under the Official Information Act goes back to the anonymity of public servants - one of the three main doctrines Gerald Hensley⁵² identified as underpinning the free and frank convention and already discussed in this paper.

Simply, a public servant is more likely to give free and frank advice, if he or she (and the nature and/or quality of that advice) is protected from the glare of publicity. The impact of the Official Information Act on the disclosure of advice given to the Government, the focus in the State Sector Act on improved accountability and the growing role of Parliamentary select committees in enforcing accountability of the Executive (and its advisors) to Parliament have all fuelled a growing trend which sees senior public servants, particularly Chief Executives, having a public profile in their own right.

Sometimes this is seen as quite appropriate.

"I think that sometimes people want to hear from ~~Dr Karen Poutasi~~ [the Director-General of Health] that such and such was so, because there are many statutory responsibilities that rest with the Director General. I don't think there's a problem. Indeed, if anything, I suspect New Zealand could be a little more bold in that area. It would give the public confidence if they saw some key public servants that are consistently there while politicians come and go...I don't mean that chief executives should go around being pseudo politicians, but there are roles where the Director-General can give public confidence on statutory issues from time to time, like water quality for example."

Hon. Jenny Shipley, Cabinet Minister

But there are some concerns that too much exposure of public servants lets Ministers off the hook.

"I don't think the lack of anonymity of public servants has as great an impact on the free and frank convention as some would think. I don't think it would impact on the quality of the advice, because it is the quality of the advice that's important more so than the reputation of the person giving it. The more worrying thing is Ministers not being prepared to protect the anonymity of the public servant. There has been an attempt by some Ministers to shift ministerial responsibility on to public servants. I think that is an important constitutional issue."

Senior Public Servant

Finally, there are some suggestions that public servants use the Act to "stick it" to their Ministers.

"Ministers sometimes get suspicious that people [public servants] write things on files in order to have them discovered so that Ministers are put at a disadvantage: there's the public servant presenting him or herself as whiter than the driven snow and there's the Minister taking another line for political reasons and it all looks rather grubby."

Chief Executive

As this revelation came towards the end of the series of interviews, it was not possible to investigate the substance of this allegation. And it is unlikely the responses would be "free and frank." However, it was not raised as an issue during any of the other interviews, including those with Ministers.

Some Ministers do, however, have significant concerns about the Act and its impact on the free and frank convention. It is worth noting that these are Ministers representing a party that introduced the legislation .

"I would say the Act has impacted on the free and frank convention. I think in fact it has got to a stronger stage where there is a likelihood of it inhibiting the free and frank exchange of views between Ministers. The Ombudsman in one case has claimed official information includes material written by one Cabinet Minister in the way of advice to his or her colleagues. Now, although, there still may be an escape clause on the basis of the need for free and frank exchanges in terms of making that information public, it is worrying enough that advice between Ministers is considered official information. That in itself as an inhibitor on the free and frank exchange of views between Ministers."

Hon. Paul East. Cabinet Minister

"I was involved as a Minister when the Official Information Act was drafted by Jim McLay [a former Attorney-General in the Muldoon Government] and we had numerous discussions about its implications at that point. I'm bound to say I think the definition of it today is much more restrictive than was ever considered likely in the earlier days...I think in the earlier stages, one was expecting that advice given by officials would be regarded as free and frank advice [for the purposes of withholding under the Act], but it has gone well beyond that...It's a regular practice now for Cabinet Committee papers, all official advice to Ministers, to be regarded as available under the Act."

Rt Hon. Bill Birch. Cabinet Minister

"One recognises that it is a constraint when you see that officials start making efforts to work around it in order to give you what they consider to be free and frank advice, but when they then view it as discoverable, they know that either they, or someone else, will have to explain why that advice exists."

Hon. Jenny Shipley. Cabinet Minister

Jenny Shipley says she has been tested by the Ombudsman on a number of occasions on her decision not to release information on the basis that it contained free and frank advice. On one occasion she says it took nearly two years to resolve the issue, but finally the Ombudsman agreed with her view that in this instance release of the

information would expose differences of opinion between Cabinet Ministers and, in doing so, compromise the convention of the collective responsibility of the Cabinet.

Murray McCully believes the "incremental reach" of the Act will actually force an improvement in the relationships between officials and Ministers which will be beneficial to the quality of their advice.

"I think you're going to see a substantial culture of informality develop between senior advisors and Ministers of the Crown... I think you'll see increasing use of devices that are outside the scope of the Act. Just to give you a simple illustration, a memorandum from a department to a Minister canvassing some policy options, which is addressed only to the Minister, is generally discoverable under the Act, but if it is addressed to the Caucus Committee, it ceases to be discoverable because Caucus Committees are not creatures of Government. There are many ways to achieve an interaction between policy advisors and politicians that take them outside the Act...In many ways this can be beneficial. I have found, as the Act has provided increasingly strong incentives to have discussions personally with officials and not to rely on written advice in the first instance, that I have had an improved relationship with officials. This in turn has led to an improved performance by them so it's been beneficial. I think it is a good thing that the Act encourages officials to think hard about their position before they commit it to paper."

Hon. Murray McCully, Cabinet Minister

"Ministers do not wholeheartedly believe in the legislation...they have a much more casual attitude towards the Act than their officials do...public servants comply more with the Act than their political masters."

Senior Public Servant

In the experience of the author of this paper, attitudes to the Act often depend on to whom the request for information is made. It is much easier to demonstrate a more casual regard for the legislation when you are not the agency or individual required to meet its provisions.

As a number of public servants acknowledged, the Act has been beneficial in encouraging officials to think hard about policy options and analyse them well before committing them to paper, but what about planning with Ministers to circumvent the legislation? That, in my view, is a dangerous game to enter with long term implications for the neutrality of the public service, the freeness and frankness of their advice to

Ministers and the nature of the relationship between public servants and Ministers. It is a prime example of the observation already reported in this paper: that once public servants and Ministers have eaten of this apple together, it changes their relationship forever!

The interviews did not identify deliberate circumvention of the legislation as a significant issue. However, there seems little doubt that it will become a significant issue if public servants and Ministers believe that their free and frank exchanges are becoming public property to the point where such exchanges are inhibited. In its report, *Towards Open Government*, those charged with putting forward the draft legislation, the Government Committee on Official Information, (the Danks Committee) said: "that there should be continuing protection as needs be for the free and frank exchange of views between Ministers and their colleagues, between Ministers and officials, or between other officers of the Government in the course of their duty." 53

The Committee also said, as noted in the Office of the Ombudsman's practice guidelines, 54 that such a protection may not always be necessary, or may only be needed for a short period.

It appears both public servants and Ministers believe the Ombudsman's current approach to "continuing protection" does little to provide it. That in itself is hardly surprising. The natural instinct of the bureaucracy (both Ministers and public servants) is to conceal. The Ombudsman has a mandate to reveal.

However, if the situation is such that the free and frank convention is being driven underground with verbal advice and not written advice being provided (and all the problems that practice raises) and if there are legitimate avenues to avoid the legislation, thereby rendering the legislation impotent and encouraging the parties - public servants and politicians - into an undesirable and unholy alliance, the situation ought to be resolved in the interests of good government in New Zealand. Fortunately, the advent of MMP may have a beneficial influence in this regard. This issue is addressed in more detail in the next chapter in this paper.

In summary, the following points can be made:

- the Official Information Act has acted as a constraint on the willingness of officials to provide free and frank advice in writing, thus impacting on issues around the rigour and transparency of verbal advice. In short, many believe the convention is being forced to operate "underground;"
- conversely, others believe the Act has improved the quality of advice, forcing advisors to think before they put their pen in gear;

- there is some concern, particularly among Ministers, that current interpretation of the Act is too liberal and is leading to the release of information that should have been withheld under the "free and frank" or "confidentiality of advice" provisions in the Act; and
- in turn, this is leading to a situation where, at best, advice is given informally and, at worst, Ministers and public servants join to circumvent the legislation.

The final word on this subject goes to Simon Upton.

"I have no problems with the application of the Act when it comes to definitive advice... When the chips are down, when there are issues of moment, you must record why people took the decisions they did and so on...to actually uncover the paper trail so that responsibility for decisions is laid bare. That I support. I think it is vitally important the public do know that.

"Where the Act is a constraint is in the more speculative area...where you actually may want someone to be completely lateral, completely off the wall and to toss ideas around... if I was a Chief Executive, I'd be worried about what my fellow Chief Executives might think or, in fact, what other people might think. Frankly, it's much better to sit and have a discussion for an hour. And that's a pity, but there it is.

"The Act hasn't forced the advice on the former issues - the issues of note, the grave issues, issues of high civic virtue, the big issues of public importance - they haven't been forced underground, but I do think a lot more of this speculative stuff has. And the irony is that's material which really is ultimately vital in the public interest. The only people inconvenienced by that are the parties themselves."

Hon. Simon Upton, Cabinet Minister

Simon Upton's comments may, in fact, provide a rationale for an interpretation of the Act which would ensure that quality advice on significant issues involving Government actions, accountabilities and policies is available to the public, while preserving that "cone of silence" to create an environment where public servants and Ministers believe all ideas - no matter how "off the wall"- can be put up and shot down without the risk of exposure in a public sense. The "one in ten" rule might apply. That is, for every nine non-starters, there may be a great idea of significant benefit to all New Zealanders.

Perhaps that is where the balance between disclosure and non-disclosure should be.

The impact of a Minister's personality on the provision of free and frank advice

Relationship management - the relationship between Chief Executives and their Ministers - is critical to the free and frank convention.

"The convention is very difficult to put into a rule book or to write down. The convention is like a marriage. It requires constant communication, trust and constant application of good judgement in the way public servants and Ministers manage the relationships between them."

Senior Public Servant

So the question is not 'do personalities act as a constraint on the provision of free and frank advice' as **how much** do personalities act as a constraint on the provision of free and frank advice?'

"It is probably true to say the style of a Minister can encourage or discourage free and frank advice...this is part of a Chief Executive's competencies - a high level of people skills allowing him or her to manage the relationship with the Minister in such a way that unpalatable free and frank advice can be given, even though the Minister may not be able to support that advice...even though their style may not encourage free and frank advice, Ministers I've worked with have understood the importance of being told the truth."

Chief Executive

Former Prime Minister, Sir Robert Muldoon, featured in a number of comments from those interviewed.

"Muldoon had very strong views about the role of the public servant. In his book, the public servant was there to serve him. He could not abide officials saying: 'Minister, I don't think....' His response would be: 'I don't care what you think, who are you?' I heard him ripping up a senior Trade and Industry official with those words."

Senior Public Servant

"Muldoon more than anyone else understood the role of the public service and respected the role of the public servant. He sometimes attacked the man and not the argument but, in my experience, Muldoon would listen to the people he respected, even if he disagreed with them."

Senior Public Servant

However, putting Sir Robert to one side, the following conclusions can be drawn:

- both public servants and politicians agree: the free and frank convention is about relationships and the management of those relationships;
- it is clear that the personalities of "strong" Ministers could and sometimes can act as a constraint in the way of the delivery of free and frank advice; and
- it is considered to be one of the key competencies of a Chief Executive to manage and maintain a relationship conducive to the exchange of free and frank advice; and, in my view, there is little to suggest that, currently, personalities are significantly constraining the flow of free and frank advice.

Finally, two diametrically opposed views of former Prime Minister, Sir Robert Muldoon, emerge from these observations. One is of Muldoon The Reasonable; the other is of Muldoon The Tyrant. One can only assume it depended on who you were and what time of the day it was as to which persona you were exposed. Whatever, it is clear Sir Robert Muldoon was a difficult person with whom to deal. One can only marvel at the courage of the Treasury officials from around 1980 to 1984 who, regardless of the consequences, kept persistently presenting the most powerful personality in politics at that time with advice he did not want to hear.

New Zealand owes a debt to those Treasury officials who tendered their advice with "courage, tenacity and independence" and, in so, doing preserved the ideals embodied in the free and frank convention. For once lost, such ideals are difficult to recover.

CHAPTER FIVE

THE FATE OF THE FREE AND FRANK CONVENTION UNDER MMP

This paper has sought to establish that the preservation of the free and frank convention is critical to the continuance of an apolitical, neutral, objective and professional public service. However, thus far the convention has been examined within the context of the current electoral environment. But that environment will change significantly after the general election on October 12 of this year when New Zealand will have a Parliament elected under proportional representation. Will a change in the way we elect our representatives to Parliament have an impact on the free and frank convention?

The Minister of State Services Paul East believes that, under MMP, there should be few changes to the basic tenets underpinning New Zealand's professional public service.

"In my view, the essential role of the public service should remain what it has been in the past, despite the introduction of MMP. That role will be to serve the government of the day within the framework of the law, in a professional and non-partisan manner. The public service will continue to be a key deliverer of services on behalf of the Government, and a key source of policy advice." ⁵⁵

The SSC advises: "The Government's need for high-quality free and frank advice, however, will be as important in the new environment as it has been up to this point." ⁵⁶

Political scientists Boston, Levine, McLeay and Roberts observed that in all the debate around electoral reform over the past five or six years it appears that it has been simply assumed "...that the existing laws and conventions governing the conduct of public servants would continue to apply, and that it would be mostly business as usual... Thus, public servants would still be expected to serve the duly elected government, regardless of its composition or ideological complexion with equal dedication and vigour. They would similarly be expected to provide 'free and frank' advice, execute ministerial decisions and deliver public services in a professional, non-partisan and lawful manner. Their role, in short, would remain that of obedient servant." ⁵⁷

In a more recent study, the same political scientists published the results of a survey of the expectations of senior public servants, together with the views of other decision makers and opinion leaders, on the impact of MMP. ⁵⁸

In the context of this paper, three important findings emerge from that survey. They are that senior public servants expect a high degree of policy stability; they do not see a proportional system impacting significantly on the delivery of public policy and they

anticipate that non-departmental policy advisors will have a greater role in the future policy-making process, because of "...the development of more varied and fuller sources of policy advice for coalition partners, the leaders of supporting parties, and opposition party leaders." 59

By and large, the views expressed in the interviews conducted for this paper confirm the "business as usual" conclusions of the Minister of State Services, the State Services Commission and senior public servants as articulated in the findings of the political scientists.

"I don't see why the free and frank convention will have to change. It will still be relevant in the new environment."

Senior Public Servant

"I think the convention will stay under MMP. In some ways it might be easier to give free and frank advice because, under a coalition government, the views may not be so monolithically ideological. A neutral public service giving free and frank advice may be very helpful in keeping a coalition together, a kind of objective referee between conflicting political perspectives. Ministers' offices will become highly politicised, so the public service will be a counter to purely political decision-making. Maintaining the free and frank convention will be very important in this respect."

Chief Executive

"I think the free and frank convention will survive. There will possibly be more incentives for it to survive, because public servants will have to get used to contact with, and to provide advice to, a range of politicians with different views, both at the same time and over time...in a coalition other audiences will come with a different perspective. If your advice is tempered by telling each audience what they want to hear, then the inconsistencies in your advice will be easier to detect. It will be very important to be free and frank, because a greater range of decision-makers will be receiving it, along with advice from other, contestable sources."

Senior Public Servant

Cabinet Ministers hold much the same views as public servants.

However, some concerns were voiced, suggesting that the grafting of an old convention on to a new electoral framework will not altogether be an easy task.

"Free and frank advice will be much more difficult in a multi-party environment where each party has different objectives and perspectives. Officials will get caught in the crossfire. This already happens in a single party government. My guess is that a number of parties will ask for funding for their own advisors paid for from the public purse. That creates a difficult ethical position for the public service. Some of these difficulties will be inevitable, but out of the ruins of a few peoples' careers, a new convention will emerge."

Senior Public Servant

"I think their [public servants] advisory and policy skills, their judgement and detachment - real neutrality - are going to be integral to an effective process. Public servants will be slipping into different roles. Some will be Minister focused and some will transcend the single Ministerial responsibility."

Senior Public Servant

The final word on this issue goes to Murray McCully who chairs the Government's strategy committee.

"Under MMP, deals that are committed to in the Cabinet room are going to be less relevant. By and large, the deals are going to have to be made elsewhere - sanctioned by that process, but not driven by it so much. I guess the greater the latitude, the greater the degree of capricious decision-making by Ministers based on some sort of communication with another political party, the less influential the officials' policy advice will be and the more guarded officials will become."

Hon. Murray McCully, Cabinet Minister

Undoubtedly, Murray McCully's comments will be a disappointment for those who supported the introduction of MMP on the assumption that it would lead to more accountable and open Government.

However, his perspective is not shared by the other Ministers interviewed for this paper. And while Chief Executives and senior public servants expressed some caution about the introduction of the new electoral system and its impact on the free and frank convention, none were as pessimistic as the senior public servant who sees a new convention arising out of the ruins of a few peoples' careers.

In fact, MMP is viewed as having a beneficial impact on the free and frank convention, primarily because the need to provide advice in an increasingly contestable environment to a wider range of groups and individuals with differing agendas will force public

service advisors to be consistent with their advice in order not to be caught out in providing different advice to different group who might then compare notes within the Cabinet or, in the world painted by MurrayMcCully, up and down the corridors of power.

In this environment, a useful strategy to preserve consistency is to be free, frank and truthful every time.

CHAPTER SIX

IN CONCLUSION

In some ways, this paper is not just about narrow conventions per se. It is about the importance of an apolitical, independent and professional public service to New Zealand's unique brand of democracy. The free and frank convention is a benchmark; a measurement of just how independent, just how apolitical our public service is.

The measurement is imprecise. "How free and frank?" is a bit like asking "How long is a piece of string?" At the end of the day, the length of the string is less important than its use in tying things up. In the same way, the degree of freeness and frankness is less important than its use in helping to define the relationship between politicians and public servants, the nature of which preserves the larger and more important convention of neutrality.

The information gathering and analysis leads the author of this paper to one conclusion. That is, as imperfect as it is and with a wide variation in its practice, there is a real understanding and appreciation by both politicians and public servants as to the importance of the convention to the preservation of a neutral, professional public service and the value of both to our democratic system. Furthermore, the concept of neutrality, underpinned by the free and frank convention, will be even more important in the new electoral environment created by MMP. Fortunately, both politicians and public servants are confident neutrality and the free and frank convention will survive, perhaps even prosper, in the new political environment created by MMP. That should give all New Zealand, regardless of whether or not they supported the change, some confidence that the harbingers of doom will be proven wrong and that, in fact, there will be life after 12 October 1996.

Specifically, this paper concludes:

- free and frank advice has a number of essential ingredients. They are: honesty; independence; objectivity; impartiality; forthrightness; and comprehensives;
- that there is a tension between providing free and frank advice and serving the Government faithfully and loyally, but public servants manage this tension well and Ministers do not have any concerns about the ability of the public service to serve current and future governments faithfully and loyally;

- providing free and frank advice does not mean public servants have an obligation to tiresomely present their advice after the Government has decided upon the course of action it wishes to pursue, or to present free and frank advice with all the options for every policy issue big and small;
- within the context of the convention, public servants should be able to challenge the underlying philosophical premises upon which Government policy is founded;
- by and large, free and frank advice is proffered by public servants, encouraged and received by Ministers;
- the contractual environment forged by the State Sector Act 1988 and the Public Finance Act 1989 is not considered to constrain the delivery of free and frank advice;
- the Official Information Act 1982, while encouraging an unhelpful practice in public servants not writing advice down, has improved the quality of written advice because it has forced public servants to consider all the implications before they write;
- the personality of individual Ministers can act as a constraint on the delivery of free and frank advice, but it is the responsibility of the Chief Executive to manage and maintain a relationship conducive to the exchange of free and frank advice; and
- the free and frank convention will survive, if not prosper, in the new political environment created by MMP.

Those are positive conclusions gained by talking to people, both public servants and politicians who, generally, have sought to take a longer term and considered approach to an important issue.

There were, however, some concerns expressed, both by public servants and Ministers, about the quality of policy advice.

But then that must be the subject of someone else's paper.

END NOTES

¹ The interviews were conducted by the author during April and May of 1996. There were 22 interviews in all. The breakdown was as follows: five present Cabinet Ministers; two past Cabinet Ministers; four current Chief Executives of Government Ministries, Departments and other agencies; the State Services Commissioner; two past Chief Executives of Government Departments and/or Ministries and eight senior public servants. Seven of the eight were first reports to their Chief Executives, the eighth was a senior advisor with considerable experience in directly advising Ministers on a wide range of economic and social issues. Present Chief Executives and senior public servants were interviewed on an "off the record" basis. For ease of reference in this paper, all direct comment gained from that process is presented in italic script and either specifically or generically attributed. It is not separately footnoted.

² Peter Hennessy, *The Hidden Wiring: Unearthing the British Constitution*, (Victor Gollancz, 1995), p.36.

³ A.V.Dicey, *Introduction to the Study of the Law of the Constitution*, quoted in Peter Hennessy, *The Hidden Wiring: Unearthing the British Constitution*, (Victor Gollancz, 1995), p.36.

⁴ G.H.L.May, *The Victorian Constitution*, quoted in Peter Hennessy, *The Hidden Wiring: Unearthing the British Constitution*, (Victor Gollancz, 1995), p.37.

⁵ G.Marshall, *Constitutional Conventions - the Rules and Form of Political Accountability*,(1986), quoted in Mai Chen & Sir Geoffrey Palmer, *Public Law in New Zealand: Cases, Materials, Commentary and Questions*, (Oxford University Press, 1994 edn), p.200.

⁶ Ibid, p. 200.

⁷ Ibid, p. 201.

⁸ Ibid, p. 201.

⁹ Ibid, p.203.

¹⁰ Mai Chen & Sir Geoffrey Palmer, *Public Law in New Zealand: Cases, Materials, Commentary and Questions*, (Oxford University Press, 1994 edn), p. 200.

¹¹ The State Services Commission, *Public Service Principles, Conventions and Practice: The Constitutional Setting*, (SSC, 1995), p. 4.

¹² Hon.. Paul East, Minister of State Services, *How Does the New Electoral Environment Affect the Role and Structure of the Public Sector?*, a keynote address to a conference on managing the political/public sector interface under MMP, Wellington, 24 March 1994.

¹³ Gerald Hensley, "Free and Frank Advice to Ministers - Reappraising Ethical Fundamentals," *State Sector*, (Vol. 18, No.3, September 1995) pp.21 - 23.

¹⁴ Ibid, p. 21.

¹⁵ State Services Commission, *The New Zealand Public Service: Striving for Excellence in Serving New Zealand*, SSC, 1995.

¹⁶ Ibid.

¹⁷ The State Services Commission, *Public Service Principles, Conventions and Practice: the Senior Public Servant*, (SSC, 2nd edn, 1995), p. 10.

¹⁸ Ibid, p. 11.

¹⁹ New Zealand Government, *Cabinet Office Manual*, (December, 1991), p. 5.

²⁰ Ibid, p. 2/8.

²¹ State Services Commission, *Public Service Code of Conduct*, (SSC, 1995), p. 11.

²² State Services Commission, *The Policy Advice Initiative: Opportunities for Management*, (SSC, 1995), p. 18.

²³ K.J.Scott, *The New Zealand Constitution*, (Oxford University Press, 1962), pp. 140-142

²⁴ G. Marshall, *Constitutional Conventions - the Rules and Form of Political Accountability*, (1986), quoted in Mai Chen Sir Geoffrey Palmer, *Public Law in New Zealand: Cases, Materials, Commentary and Questions*, (Oxford University Press, 1994 edn), p. 200.

²⁵ State Services Commission, *Public Service Principles, Conventions and Practice: The Senior Public Servant*, (SSC, 1995 edn), p. 24.

²⁶ Ibid, p. 5.

²⁷ State Services Commission, *Public Service Principles, Conventions and Practice: the Public Service and Government*, (SSC, 1995 edn), p. 4.

²⁸ State Services Commission, *Public Service Principles, Conventions and Practice: the Senior Public Servant*, (SSC, 1995 edn), p. 5.

²⁹ New Zealand Government, *The Cabinet Office Manual*, (1994), p. 2/8.

³⁰ State Services Commission, *Public Service Code of Conduct*, (SSC, 1995), p. 12.

³¹ John Martin, *Public Service and the Public Servant*, (SSC, 1991).

³² Ibid, p. 12.

³³ State Services Commission, *Public Service Principles, Conventions and Practice: An Introduction*, (SSC, 1995 edn), p. 6.

³⁴ State Services Commission, *Public Service Code of Conduct*, (SSC, 1995), p. 12.

³⁵ The author's understanding of Mrs Shipley's use of the word bold is that she believes that public servants should be more bold in recommending initiatives involving a higher degree of risk not "bold" in the sense of public servants providing advice that Ministers do not want to hear.

³⁶ State Services Commission, *Public Service Principles, Conventions and Practice: the Senior Public Servant*, (SSC, 1994 edn), p. 25.

³⁷ State Services Commission, *Public Service Principle, Conventions and Practice: the Senior Public Servant*, (SSC, 1995 edn), p. 5.

³⁸ State Services Commission, *Public Service Principles, Conventions and Practice: the Senior Public Servant*, (SSC, 1994 edn), p. 25.

³⁹ While it is impossible to reveal more detail of the incident without compromising the confidentiality of the interview, the author of this paper has heard accounts of this incident from other sources confirming its veracity.

⁴⁰ The issues around verbal as opposed to written advice will be examined in greater detail in Chapter Four of this paper which looks at constraints on the convention, including the impact of the Official Information Act 1982.

⁴¹ R.J. Polaschek, *Government Administration in New Zealand*, (Oxford University Press, London, 1958), p. 213.

⁴² The impact of the Official Information Act 1982 as a constraint on the free and frank convention is discussed in greater detail in Chapter Four of this paper.

⁴³ Hon. David Caygill in an interview with the author, May, 1995.

⁴⁴ John Martin, "The role of the State in Administration" in *Leap into the Dark: The Changing Role of the State in New Zealand since 1984*, (ed. Andrew Sharp, Auckland University Press, 1994), p. 58.

⁴⁵ The State Service Commissioner, Don Hunn, in an interview with the author May 1996.

⁴⁶ Jonathan Boston, Stephen Levine, Elizabeth McLeay and Nigel Roberts, "The Political Culture of Public Servants: Expectations and Beliefs about MMP" *State Sector*, (vol 19, no 2, June 1996)

⁴⁷ S. 5 of the State Sector Act 1988 states that in matters relating to decisions on individual employees, the Commissioner shall not be responsible to the Minister but shall act independently. S.6(c) relating to the functions of the Commissioner states that the Commissioner is to appoint Chief Executives of Departments and to negotiate their terms of employment.

⁴⁸ The Minister of State Services, Hon. Stan Rodger, in a paper to the Cabinet Committee of Chief Executives, *State Sector Act: Tendering of Advice by Chief Executives*, (May, 1988).

⁴⁹ Ibid.

⁵⁰ Rt Hon. David Lange, Prime Minister, in a letter to all state sector Chief Executives, (26 May 1988).

⁵¹ State Services Commission, *Chief Executive Performance Agreement: Proforma and Guidelines 1996/97*, (SSC, January 1996), p. 9.

⁵² Gerald Hensley, "Free and Frank Advice to Ministers - Reappraising Ethical Fundamentals" in *Public Sector* (Vol. 18, No.3, September 1995), p. 22.

⁵³ New Zealand Government, *Towards Open Government: the General Report of the Committee on Official Information*, (1980), p. 20.

⁵⁴ Office of the Ombudsman, *Practice Guidelines - No 2*. (May, 1995), p. 5.

⁵⁵ The Minister of State Services, Hon. Paul East, *How Does the New Electoral Environment Affect the Role and Structure of the Public Sector*, an address on MMP - Managing the Political/Public Sector Interface, Wellington, (24 March 1994).

⁵⁶ State Services Commission, *Working Under Proportional Representation: A Reference for the Public Service*, (SSC, September, 1995), p. 30.

⁵⁷ J. Boston, S. Levine, E. McLeay, N. Roberts, *New Zealand Under MMP: A New Politics?* (Auckland University Press with Bridget Williams Books, Auckland, 1996), p. 136.

⁵⁸ J. Boston, S. Levine, E. McLeay, N. Roberts, "The Political Culture of Public Servants: Expectations and Beliefs about MMP," in *State Sector*, (Vol. 19, No. 2. June 1996)..

⁵⁹ *Ibid.*

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