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NEW ZEALAND JOURNAL OF PUBLIC AND INTERNATIONAL LAW

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TE WĀNANGA O NGĀ KAUPAPA TURE Ā IWI O AOTEAROA

The New Zealand Centre for Public Law was established in 1996 by the Victoria University of Wellington Council with the funding assistance of the VUW Foundation. Its aims are to stimulate awareness of and interest in public law issues, to provide a forum for discussion of these issues and to foster and promote research in public law. To these ends, the Centre organises a year-round programme of conferences, public seminars and lectures, workshops, distinguished visitors and research projects. It also publishes a series of occasional papers.

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SITUATING STEWARDSHIP IN THE STATE SECTOR: CONSIDERING "LEGISLATIVE STEWARDSHIP" IN CONTEXT

Mark Hickford*

This article contends that to understand legislative stewardship under the State Sector Act 1988 requires placing it within both a broader conception of "stewardship" and a state sector system as contemplated in that particular statutory regime. Certainly, what is characterised in the secondary literature as regulatory practice plays a part in comprehending the stewardship of legislation administered by departments and departmental agencies. But it is not all that is envisaged. Indeed, more than departmentally-sited domains of activity and responsibility are envisaged. Five interacting characteristics are identified here. Amongst these, holistically orientated and integrated behaviours are to be focused on, including legal and non-legal phenomena (including overall organisational capability and cross-disciplinary expertise at policy, technical and operational levels), all of which ought to be factored in if one is to nourish a dynamic, sufficiently vigilant culture undergirding legislative stewardship. Tools such as behavioural insights and integrated data sets are undoubtedly useful but remain non-exhaustive resources requiring ongoing interrogation and critical evaluation. Feedback loops are also conveyed via sources external to the state sector: courts, inquiries and changeable jurisprudence are presented here as illustrations. Further, the ambience of constitutional values, although implicitly relevant, cannot be neglected. Ultimately, the pursuit of stewardship ought to be regarded as persistently incomplete and iterative; actively mindful of historicity and its contestable inheritances as much as future-oriented.

* Pro Vice-Chancellor and Dean of Law, Victoria University of Wellington. I am grateful for conversations with Jonathan Ayto, Ellen MacGregor-Reid, Simon MacPherson, Peter Mumford, Frank Peek and Jonathan Robinson. This article is based on my closing address of 28 October 2016 at the *Advancing Better Government through Legislative Stewardship Conference*. The views expressed in this article are personal to the author albeit informed by reflections on my roles in the state sector until 2015.

I INTRODUCTION – FIVE CORE, INTERACTING CHARACTERISTICS

In s 2 of the State Sector Act 1988, the notion of "stewardship" is defined in a delightfully elusive way as meaning, unless the context otherwise requires, "active planning and management of medium- and long-term interests, along with associated advice". Section 1A(h) of the State Sector Act, inserted in July 2013, provides that a "purpose" of the legislation is to "promote and uphold a State sector system" that "fosters a culture of stewardship". Alongside this statement, with its systemic-cultural focus, we see a list of other values or attributes falling within the State Sector Act's purpose, including that of maintaining "political neutrality",[1] as well as operating in the "collective interests of the government".[2]

In situating "stewardship", as deployed in the State Sector Act, I argue that it must be seen, first, holistically, as embracing legal and non-legal phenomena, including policy and operational advice, organisational capability (which is mentioned specifically in s 32(1)(c)); secondly, that these phenomena ought to be viewed as having individual value requiring pro-active attentiveness, but also interweaving contributory value as part of an ecosystem of activities in government; thirdly, to see "stewardship" thus requires a dynamic, alert awareness of how those interests falling within its definition might be seen systemically at a macro-level as well as individually. This dynamism ought to inform an *adaptive* quality, alive to how adjustments might be required in institutional, behavioural or legislative settings, with the benefit of feedback received from different publics, communities of interest and critics who might evaluate performance in, or of regimes, including inquiries, the courts or specialist jurisdictions, such as the Environment Court, the Māori Land Court or the Waitangi Tribunal. These feedback sources can be innovative in themselves or tilt a discourse relative to a particular issue of public normativity in different ways.[3] Interpretative expectations on the part of the executive branch can be confounded or disrupted through these forms of feedback. The shifting sands of jurisprudence might undermine or challenge hitherto casually held assumptions or views insufficiently stress-tested in the courts. Previously cherished or understood positions might have become otiose over time as jurisprudence and scholarship have developed.

Fourth, and relatedly, there is indeed a *temporal* or time-based quality to "stewardship". It is a *Janus*-like concept. It speaks not merely to present or contemporary, let alone future-orientated, understandings or motivations. It must also attend to subjects or attributes inherited from various

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1 Section 1A(d).

2 Section 1A(b).

3 "Public normativity" is used here as an amorphous, broad-ranging concept, inclusive of contested philosophical principles or propositions (such as those arising in discussions concerning democratic governance or processes), positive legal principles and enacted or promulgated instruments (such as statutes). It entails an understanding of those norms that influence or shape the distribution of authority and legitimacy as to the exercise of power in a given polity.

pasts, discerned to be a value, or of value, such as the specific mention in s 32(1)(c) of the "capacity to offer free and frank advice to successive governments".[4]

Stewardship, then, requires a sensibility mindful of what it is that is inherited from the past which ought to be subject to continuing custodianship. This implicit historical quality does not imply stasis, however, or resolute commitment to maintaining the specifics of what is inherited. To be sure, adaptations and departures are potentially contemplated in terms of legislation. Such adjustability is certainly inherent in our constitutional settings. And, relative to our customised British parliamentary inheritance from imperial sources in the wake of the New Zealand Constitution Act 1852, that quality of adjustability is not only one with an accent that has developed its own idiosyncratic characteristics in these islands, but also possesses constitutional value. Furthermore (and not unrelatedly), a functional stewardship under the State Sector Act must be mindful of changing political dimensions and denizens of the executive branch. A fluid, changeable public interest is still largely ascertained or determined across time at the behest of these dimensions – known colloquially as the "government of the day" – and their changing personnel, comprising those who may rely upon the confidence of the House of Representatives, for the time being, and resort to their resources within that chamber. If one is talking of constitutional value and its legitimising effect, that political element remains a vital feature, giving rise to tension, creative and yet discomforting or even occasionally disconcerting for certain officials. This underlying context informs aspects of s 32 with varying degrees of precision, but is predominantly implicit, exemplifying the environment in which stewardship must play its part.

Finally, these foregoing attributes imply certain operational settings or behaviours within the state sector – a self-aware consciousness, for a start; possibly a state of professionalised anxiety or ambient alertness. If something is to be adapted or departed from, that implies an awareness at least as to the nature of what might be altered, dependent on specific individuals, but also institutional knowledge and intelligence sources. Earlier last year, the Attorney-General, the Hon Christopher Finlayson, observed before the Māori Affairs Committee that the Crown had "very little institutional memory".[5] Stewardship supplies a basis – a statutory marker – with which to discuss and to contest proposed change or adjustments, but also suggests a focus on what it is that might be inherited and present (even if neglected or forgotten), some of which might be less than visible or assumed.

To this end, "legislative stewardship" should also ignite reflection on a broader contextualised understanding of "stewardship" in the state sector. Section 32(1)(d)(ii) of the State Sector Act provides that a chief executive is responsible to the appropriate minister for the "stewardship of – the legislation administered by the department or departmental agency". If one is to steward legislation, then one must be aware of how it is sustained, refined or let go as part of a complex, contested and contestable,

4 Section 32(1)(f) of the State Sector Act 1988 expressly refers to the act of "tendering of free and frank advice to Ministers" as a principal responsibility too.

5 Rosanna Price "No 'happy ever after' for Treaty settlements – Minister Chris Finlayson" (16 June 2016) <www.stuff.co.nz>.

dynamic system of policy, operational and legal settings or behaviours. These are not isolated domains of activity. Instead, an integrative, inter-disciplinary cluster of approaches to these elements must be borne in mind. A multi-directional outlook is contemplated if a notion of a "system" is to be effectively employed, envisaging integrated domains of activity horizontally across departmental portfolios and within organisationally-specific operational, policy and legal teams. There is also a sense in which legislation so administered in a particular department might not be required or is no longer well adapted to meet stated purposes or objectives. Overall, the sorts of thought and action envisaged under s 32(1)(c) around organisational capabilities and capacity underpins performance relative to legislative stewardship. Remember that the provision speaks to the "stewardship of the department or departmental agency, including of its medium- and long-term sustainability, organisational health, capability, and capacity to offer free and frank advice to successive governments". That, too, is a context for placing or situating the stewardship of legislation administered by a department or departmental agency.

II FOSTERING A "CULTURE OF STEWARDSHIP" … "LEGISLATIVE STEWARDSHIP" AS SITED WITHIN ITERATIVE REGULATORY, POLICY AND OPERATIONAL PRACTICE

A The Sensibilities of a "Culture of Stewardship": Anticipatory Governance in an Open System Comprising Legal and Non-Legal Phenomena

Like the youth on John Keats' Grecian urn, forever in pursuit, stewardship, whether legislative or otherwise, is an on-going venture – a process that is forever incomplete. Jonathan Ayto's definition is appealing but needs further elaboration and addition to address what the concept of stewardship in the State Sector Act connotes. In 2014, he observed, "[a]t its core, however, being a steward simply means having a proactive duty of care for a resource that belongs to, or exists for the benefit of, others".[6] That statement is merely a beginning. What we might call "other-regarding mindfulness" is to be looked for. What sorts of sensibilities are to be invoked? A humility, or conscious incompetence – being alive to what one might not be able to know or cannot know and the limits of one’s own disciplinary points of view – is a helpful, constructive sensibility. The moments of contact with a proposal through its policy and implementation phases, whether expressed partly in legislation or otherwise, should be multiplied and diversified. This is because of endemic uncertainty in human affairs and the simple observation that error is ever-present. On this account, "best in world" options are not attainable. Rather, a constant striving and openness to recalibration is in the offing, particularly as circumstances, including demographics and social settings, change. There can be a tendency for certain assumptions to be made as to how regulatory regimes ought to work depending on whether

6 Jonathan Ayto "Why Departments Need to be Regulatory Stewards" (2014) 10(4) Policy Quarterly 23 at 27.

one's discipline is derived from legal scholarship or, say, economics or public administration – and the assessments of what counts for "quality" or even normative legitimacy in the relevant, respective literature. Scholars in regulatory practice, such as Martin Lodge, have cautioned that it is preferable to "pluralize the deliberation regarding regulatory options", something that would be appropriate to legislative stewardship within a state sector system.[7] Such a stance places considerable responsibilities on participants:[8]

> [I]t requires the ability to be aware, to understand, to communicate and to apply contrasting regulatory recipes that are often linked to very different constituencies. Such demands also have implications for the kind of competencies that are in demand for a[n] analyst [whether in policy or operations]. They go beyond the demands for technocratic and judge-type subject expertise (in whatever relevant discipline or disciplinary field), and extend to so-called boundary-spanning skills, namely the skills of being able to pick expertise on a trans-disciplinary basis, to access these different sources of expertise and to translate that expertise to different contexts. It also requires considerable sage-type skills, as it requires an understanding of the political and administrative feasibility of particular strategies in a given context.

Section 1A of the State Sector Act represents a useful beginning point:

> The purpose of this Act is to promote and uphold a State sector system that—
>
> (a) is imbued with the spirit of service to the community; and
> (b) operates in the collective interests of government; and
> (c) maintains appropriate standards of integrity and conduct; and
> (d) maintains political neutrality; and
> (e) is supported by effective workforce and personnel arrangements; and
> (f) meets good-employer obligations; and
> (g) is driven by a culture of excellence and efficiency; and
> (h) fosters a culture of stewardship.

As Jonathan Robinson of the Parliamentary Counsel Office has commented specifically in relation to legislative stewardship, there are multiple players acting independently and to different cycles within departments and across portfolios or departments, whether clustering as sectors or not.[9] It remains undeniably important to retain this underlying awareness in mind. These varied, occasionally layered or overlapping elements operate within a "system" as contemplated under s 1A of the State Sector Act, which speaks of a "State sector system". The phrase is undefined but a statutory function

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7 Martin Lodge and Kai Wegrich *Managing Regulation: Regulatory Analysis, Politics and Policy* (Palgrave Macmillan, Basingstoke (UK), 2012) at 253.

8 At 253.

9 Jonathan Robinson "A Culture of Stewardship: Planning, Management, Advice" (*Advancing Better Government through Legislative Stewardship Conference*, Victoria University of Wellington, 27 October 2016).

of the State Services Commissioner under s 6(a) of that legislation is to "review the State sector *system* in order to advise on possible improvements to agency, sector, and system-wide performance".[10] Indeed, I would suggest that there are many so-called touch-points or, in other words, points of interaction in any given issue or area of practice, signifying that it is insufficient to assume or rely upon another party to bear the responsibilities for raising concerns of systemic stewardship in an inextricably changeable set of circumstances or events, whether in, say, a natural resources regulatory system or one pertaining to education, social development or reducing harm in families. Stewardship is a collective, behaviourally integrative responsibility, engaging all participants, irrespective of department or portfolio commitment or outlook.[11] In view of the inevitable risks of failure or error in any complex inter-relationships, it is important that we do not lose sight of this overarching obligation. Of course, this state sector should not be understood as isolated or hermetically sealed. Its relations are porous, as with any "open" system comprising complex interactions and human as well as collective, organisational factors, inheritances and practices in and through time.[12] The interactions are not static and do not conform to linear planning cycles, notwithstanding the tendencies of certain individuals to write as if "stewardship" was something within one's mastery interior to a system, depending upon various legislative intimations or leadership directions.

Legal and non-legal phenomena have to be considered holistically as part of what "stewardship" under the statute entails. It is mistaken, indeed counter-productive, to treat "legislative stewardship" as somehow divorced or detached from the broader operational, institutional and behavioural elements and attributes of a state sector and its denizens. The term "active" in the definition of "stewardship" within s 2 of the State Sector Act ought to drive a continuously watchful orientation or tendency that is first, mindful of, and open to, the requirement for adaptation; but secondly, one that remains capable of pivoting with agility to meet novel developments in the present or future; and thirdly, that is cognisant of what ongoing stewardship might potentially require organisationally or institutionally and, most assuredly, behaviourally within and across departments or departmental agencies. Contemplating potential organisational implications entails the possibility of being vigorously open-

10 Robinson, above n 9 (emphasis added).

11 As recognised in the State Services Commission's understanding of "priority interventions to lift system stewardship", such as, among other things:

> *Aligning executive management to system performance* – Renew the approach to executive management for Public Service chief executives, including the introduction of a single set of expectations which explicitly focus on collective leadership for shared results alongside serving Ministers, managing people and *departmental core business, and ensuring financial sustainability*.

State Services Commission "State Services Commission Statement of Intent 2014–2018" (press release, 30 July 2014) (emphasis in original).

12 On "systems" and policy dynamics in conditions of complexity, see Robert Jervis *System Effects: Complexity in Political and Social Life* (Princeton University Press, Princeton, 1997) [*System Effects*]; and Robert Jervis "System Effects Revisited" (2012) 24 Critical Review 393.

minded about reconfiguring or shifting teams and units within a department, considering joint-departmental groups or sectoral clusters of portfolio. These attributes or implications, which would include creating cross-cutting teams combining different policy, technical (whether, say, legal, sociological or scientific) and operational expertise (and departmental perspectives), are rarely thought through or even subsequently assessed for performance in line with the initial expectations underlying an intervention, organisational change or operational practice. Certainly, the performance improvement framework does offer some ability to test the performance of an organisation to meet its stewardship expectations in a broad, high-level sense. But it is still too early to critically evaluate the ways in which these processes get at the heart of what is being done, within or *across* agencies in the state sector. "Culture", a notoriously elusive concept, is not explicated either. Habit-forming, at the least, is implied so that a general, percipient, intuitive disposition to orientate one's thinking and conduct towards a conception of "stewardship" is suggested.

Against this statutory background, bringing together different forms and logics of domain expertise is desirable, nourishing engagement, testing assumptions and evaluating evidence and encouraging or at least remaining attuned or alive to feedback loops, endogenous or exogenous (such as assorted publics, judicial decisions, international instruments or agreements). Appropriately sophisticated legislative and regulatory approaches ought to be situated within these broader settings or circumstances. "Research in regulation would [or rather should] converse across the disciplines".[13] In doing so, the cautions of self-regard for one's own disciplinary preferences – whether the vanities of legal reasoning, veterinary or statistical sciences or economics – must be identified and understood. This is aligned with the phenomenon of "epistemic communities", where cohorts of like-minded individuals cleave to well-developed professional, domain-specific areas of expertise, preferring their own intellectual frameworks and perspectives. Of course, no disciplinary or "epistemic" community is uniform or singular in its approaches. Complexities lurk and contestations occur as in any human interaction. Yet, narrowing, parochial perceptions and framings of issues or problems must be avoided.[14] For such a reason, one might embrace the advantages of deliberative processes both within the executive branch of government and beyond (policy co-production exercises, for example), as they can reveal and provide spaces to counteract unconscious incompetence through permitting an array of voices or perspectives to be brought to bear.

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13 Robert Baldwin, Martin Cave and Martin Lodge "The Future of Regulation" in *Oxford Handbook of Regulation* (Oxford University Press, Oxford, 2010) 613 at 625.

14 See generally Graham Allison and Philip Zelikow *Essence of Decision: Explaining the Cuban Missile Crisis* (2nd ed, Longman, New York, 1999).

B Awareness of Dynamic Endogenous and Exogenous Factors Affecting the Performance of a System Across Time – Understanding the Layered Complexities of Legislative Stewardship and Using Feedback Loops

Factors or influences endogenous and exogenous to any system must be appreciated, therefore, including their dynamic, fluid qualities. Amongst external elements, we should be conscious of diverse publics, media pressure on issues and the understandable contestability of views as to appropriate regulatory responses in the face of such pressures.[15] International legal and policy dimensions are also increasingly significant relative to legislative stewardship, as witnessed with import health standards in connection with s 24A of the Biosecurity Act 1993, an area that has led to litigation.[16] These standards are agreed elsewhere, outside of New Zealand, but become part of the overall legislative system. Furthermore, sometimes the logics or fashions in regulatory practice or statutory language can lead to complexities, multiplying a potentially confusing morass of instruments that undermine the values of stewardship itself, producing impenetrability, confusion or superficial desktop varieties of compliance. One example is risk-based regulation and audit, which, although arguably attractive in theory or abstract terms, can nevertheless give rise to innumerable difficulties if applied generically with scant appreciation for the particular micro-level economic or social characteristics of those to be subject to such regulatory logics. In this specific regulatory term of art, "risk" is understood, broadly, as an analysis of risks that should be ranked and prioritised for supervisory and remedial intervention or tolerated at certain levels predicated on data or other evidence.[17] The premise is to focus interventions in those areas deserving higher prioritisation, whether in terms of the likelihood of a risk occurring or the magnitude or seriousness of consequences should a risk materialise. With a considerable variety of risks in a number of regulated sectors, such as financial services or food safety, the approach to regulatory practice and design can lead to voluminous and complicated material on how to identify and manage areas of operational risk.

One contemporary instance, arising in the context of a sophisticated, large-scale New Zealand entity, Fonterra Co-operative Group Limited, was the relevant risk management programme under the Animal Products Act 1999 and related materials (numbering in excess of 1,000 pages) for the Hautapu plant (located some four kilometres from the township of Cambridge in the Waikato). That site lay at

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15 See for instance Martin Lodge "Risk, Regulation and Crisis: Comparing National Responses in Food Safety Regulation" (2011) 31 Journal of Public Policy 25.

16 *New Zealand Pork Industry Board v Director-General of the Ministry for Primary Industries* [2013] NZSC 154.

17 See Julia Black "The Role of Risk in Regulatory Processes" in Robert Baldwin, Martin Cave and Martin Lodge (eds) *The Oxford Handbook of Regulation* (Oxford University Press, Oxford, 2010) 302. See also Peter Mumford *Enhancing Performance-Based Regulation: Lessons from New Zealand's Building Control System* (Institute of Policy Studies, Wellington, 2011) at 112–115.

the centre of the whey protein concentrate incident in 2013. The whey protein incident concerned what turned out to be a false alarm as to the contamination of batches of whey protein concentrate by *clostridium botulinum* across some 871.1 tonnes of nutritional powder product, notified as "confirmed" to the Ministry for Primary Industries on Friday, 2 August 2013 following an AgResearch Limited-conducted test.[18] Distribution into market had effectively occurred, thereby reducing the ability for the allegedly affected whey protein to be expeditiously traced, identified and contained. By 28 August 2013, additional testing at the behest of the Ministry had revealed that the initial testing was incorrect. As set out in the internally commissioned, independent inquiry report, dated 23 October 2013, for the Fonterra board, there were diagrams illustrating the presence of yet further lengthy and densely written documents used to navigate material within the risk management programme itself.[19] The report also identified a fragmented information technology network, with different as well as incompatible systems operating at Fonterra – a key situational characteristic in operationalising and supporting regulatory practice behaviours (as in food safety events where tracing product distribution is vital).[20] Moreover, there were layers to the risk management programme along with production process-specific Hazard Analysis and Critical Control Points plans, which applied generally to New Zealand Milk Products (a Fonterra business unit).[21] The internally commissioned inquiry for the Fonterra board on the whey protein concentrate incident involving potential contamination by *clostridium botulinum* cautioned that the "objective will always be *considered* and *intelligent decision-making*, and *discussion* (*including escalation*) where there is doubt", an undeniably challenging demand of many workforces, irrespective of the economic sector at issue.[22] With any decision-making in circumstances of contestability or even technical disagreement as to what should be done, adroit judgment is ordinarily required (if truly adroit, such decision-making must accept that errors can and will occur, thereby placing an emphasis upon anticipating risks and mitigations or adaptive tactics upfront, while recognising that not all risks to preferred performance or to attaining objectives can be identified, even under an active, on-going watching brief).[23] Ambiguity and

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18 AgResearch (a Crown Research Institute) was not accredited to undertake testing for the presence of *clostridium botulinum*. Fonterra was aware of this fact. Much of the 871.1 tonnes had not yet been manufactured into finished product, but had been shipped to various customers for production into infant formula.

19 See for instance Jacob Heida and others "Report of WPC80 Independent Inquiry for Fonterra Board" (23 October 2013) <www.wpc80-inde-report.fonterra.com> at 68 and 70.

20 At 83–85.

21 Also refer to "Animal Products (Dairy Processing Specifications) Notice 2011" (30 June 2011) Ministry for Primary Industries <www.mpi.govt.nz>. DPC1, DPC3 Pathogen Management Plan Guidance Material is applicable to Fonterra as a dairy processor.

22 Heida and others, above n 19, at 8 (emphasis added).

23 This constant watchfulness and updating is a critical part of maintaining sensible risk management plans and reports both within executive leadership teams and in teams subordinate to the executive managers. All too

uncertainty tend to be omnipresent too. It is frequently the case that particular issues will emerge replete with uncertainty as to appropriate courses of particular action and those with jurisdiction must demonstrate a willingness to make decisions and plans in the face of incomplete information.

Readers may now see that we have moved from the sense of the term "risk", as used in the conception of "performance" and "risk-based" regulation or audit. We are now using a notion of "risk" relative to the state sector system and its constituent parts, including departments and their denizens, particularly the idea that "risk" is ever-present in ascertaining whether a certain intervention – whether it is characterised as "risk-based regulation" or is another form of regulatory design – is indeed able to yield the consequences desired or intimated in a given policy. Risk of under-performance is ubiquitous in that regard. Such possibilities can emerge due to many reasons, including expressions or terminology used in legislative drafting failing to capture intended policy understandings. They can also materialise through the legal directions to micro-level regulatees (such as small or medium-sized enterprises) being viewed or experienced as overly onerous, requiring additional discretionary decisions on their part and, therefore, yet further human capability building in circumstances where their available time and cash flow might be meagre or under strain.[24] If agencies are to be well-placed to respond to their statutory obligations in the State Sector Act, then these are the sorts of situational sensitivities that stewardship should imply – seriously contemplating empirically understood operational or behavioural factors on the ground that can influence just how fit for purpose a piece of regulation might be. Of course, there are also risks that can crystallise in the ordinary conduct of official affairs, whereby (for instance) legal and operational risks arise out of decisions or the processes pursued in reaching decisions (including choices not to proceed with a certain course of action or to omit undertaking an act). These are always present but ought to prompt *ex post facto* evaluation if upfront departmental (or cross-departmental, systems-based) risk-management has not been effective in identifying, mitigating or avoiding the risk.

In these vexed contexts of possible regulatory failure or under-performance, as with the false alarm around whey protein contamination in August 2013, a space for stewardship can be garnered. Feedback may be enlisted, for instance, through independent inquiries, becoming a way for particular elements within public service departments or political portfolios to enlist external support for critical scrutiny of existing regulatory settings and their performance.[25] Through these techniques, they can

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often, however, these documents can become static or fail to illuminate how transactional risks or events (much easier for personnel to identify) might reveal or illuminate more systemic issues.

24 Which may be a cost those enterprises choose to ignore or to avoid. On small enterprises, defined as those with up to 20 employees and making up an estimated 97 per cent of New Zealand enterprises, see "Small Enterprise" (14 October 2016) Ministry of Business, Innovation and Employment <www.mbie.govt.nz>.

25 Of course, these reports can also be ignored or side-lined where their recommendations are not accepted by the recipient office-holder or agency. They are contributions to a process, but it should not be assumed that the advice they muster is consistently persuasive. Much will turn on the repertoire of skills of those sitting on the inquiry panel, their understanding of central government policy processes and what might count as

obtain recommendations giving additional support for those elements to develop constituencies for change within a specific department or parts of a portfolio sector (occasionally in opposition to those aspects of an agency that might wish to preserve or defend the *status quo ante*). Feedback should be regarded as a critical friend, as discomforting or unwelcome as it might sometimes seem. With the whey protein concentrate contamination incident, a space was deliberately crafted for a subsequent review of the food safety regime settings at the primary, secondary and tertiary levels of legislation, but whether the opportunities have been used as fully as they might have been remains to be seen and tested. A government inquiry was swiftly established under the newly enacted Inquiries Act 2013 (assented to on 23 August 2013) and its terms of reference were carefully structured in two discrete phases given the reasonably apprehended risks of civil litigation (eventually engaging Fonterra and affected users of its whey protein products, Danone Nutricia), possible prosecutorial activity subsequent to an ongoing Ministry investigation and the announced inquiries on the part of Fonterra and the Financial Markets Authority, respectively.[26] A new Food Act was enacted in 2014 in the wake of the Inquiry's first phase report of December 2013, but planning for a further, systemically-mindful bill was already underway with the possibility of responding much more fully (what is called the Food Safety Law Reform Bill).[27] The Inquiry's first phase report noted how a "tertiary layer" included "numerous instruments of different types and runs to about 12,000 pages, taking up more than three metres of shelf space".[28] Its report recorded that "[s]ubmitters noted this layer as "difficult to navigate", "inaccessible" and "a bit of a nightmare", adding that "[t]he burden of navigating the tertiary layer is particularly felt by small to medium-sized businesses".[29] Subsequently, the Inquiry repeated its concerns as to the complexity of legislative instruments in its second stage report on the causes of, and responses to, the whey protein concentrate incident.[30] These preceding observations simply demonstrate that it is rarely the case that a policy is a linear, end-to-end movement towards an outcome or objective. Various relationships need to be factored in, including a variety of domain-specific expertise (such as legal, economic, scientific), differing portfolios or departments, the possibilities of

plausible and persuasive. Moreover, official sources of advice might still be evaluated as preferable for a complex suite of reasons.

26 The terms of reference may be found in "Establishment of the Government Inquiry into the Whey Protein Concentrate Contamination Incident" (12 September 2013) 126 *New Zealand Gazette* 3512.

27 Some provisions were conceived in the aftermath of the whey protein concentrate contamination incident. One illustration includes alignment in the food recall directions provision at s 284 of the Food Act 2014 with s 85(1) of the Animal Products Act 1999, such that the relevant chief executive need only have "doubt" as to whether a food or food-related accessory was safe or suitable, for example (s 284(3)(a) of the Food Act 2014).

28 Government Inquiry into the Whey Protein Concentrate Contamination Incident *Report on New Zealand's Dairy Food Safety Regulatory System* (Department of Internal Affairs, 3 December 2013) at 31.

29 At 31.

30 Government Inquiry into the Whey Protein Concentrate Contamination Incident *The WPC80 Incident: Causes and Responses* (Department of Internal Affairs, 24 November 2014) at 85.

other fora being engaged through litigation (like the courts) or inquiry processes. Whilst some officials may have been acutely mindful of the pertinence of systems-orientated "stewardship" when it was brought to the attention of the inquiry process, the panel itself only referred to it briefly in a footnote in its initial report concerning New Zealand's dairy food regulatory system.[31] That highlights the point that the tangible behavioural and operational implications of "stewardship" require reiteration, as with many policy or legislative approaches that enunciate or reflect a slightly different or energised focus. It takes repetition and time before the substantive connotations of a concept can be appreciated.

Critically examining past behaviours compared to legislative or broader regulatory requirements or expectations remains vital too. Where there is misalignment between what one was, or is aspiring, to achieve and the empirical evidence in the field, then that can represent and prompt an appropriate response to adjust legislative settings or, if the authorising environment, via law, is still seen as sufficient, to reconsider the operational and enforcement conduct that officials are pursuing. Monitoring performance of regulatory settings on a regular basis has to occur. Indeed, the expectations of Cabinet set out in 2013 make this clear. The submission stated, very clearly and aptly:[32]

> … recent experience in New Zealand of significant regulatory failures reminds us that how well government policy is translated into workable legislation, and how well regulatory regimes are monitored, implemented, enforced and maintained is just as important for regulatory performance as the policy design.

Organisational culture was understood to be a part of any functionally effective regulatory regime. In outlining initial Cabinet expectations as to "regulatory stewardship", the submission said further that departments were expected to "monitor, and thoroughly assess at appropriate intervals, the performance and condition of their regulatory regimes to ensure they are, and will remain, fit for purpose".[33] Likewise, in July 2015, the government's response to the New Zealand Productivity Commission's report on regulatory institutions and practices stated that "[b]etter monitoring and

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31 See Government Inquiry into the Whey Protein Concentrate Contamination Incident, above n 28, at 56, n 128:

> A recently enacted requirement makes the chief executive responsible for the stewardship of his or her department, which includes planning, in the State Sector Act 1988, s 32. However, the Food Act 1981 and Food Bill do not impose any responsibility on the ministry for food safety incident planning.

32 Memorandum to the Cabinet Committee on State Sector Reform and Expenditure Control SEC (13) 8: Regulatory Systems paper two: Improving New Zealand's Regulatory Performance (Treasury, March 2013), at [3].

33 At Annex One.

review practices will require greater departmental engagement with stakeholders, between regulators and regulatory policy agencies, and between central and local government".[34]

III "LEGISLATIVE STEWARDSHIP" AS IMPLYING THE CUSTODIANSHIP OF CONSTITUTIONAL VALUE – UNDERSTANDING THE LEGITIMATING FACTORS OF NON-LEGAL ASPECTS OF THE CONSTITUTIONAL SETTINGS

There are philosophical and practical tensions that persist and, in my view, ought to endure. We see (or should see, rather than ignore or marginalise) tensions, for instance, around the legitimating place of politics, a key role of which is to navigate and socialise the complexities of co-existence in circumstances of uncertainty, conflict and change. Although this context is implicit in the operations of the state sector, it is perhaps at risk of neglect or forgetfulness. It has also become attractive to assume technocratic logics as superior to politics or better able to insulate certain values from the compromises obtained through political interactions.[35] "Commitment devices" of the sort that Jonathan Boston envisages in his recent important contributions on anticipatory governance can assist the functionality of "stewardship". As he conceives them, they oblige a decision-maker or agency to consider particularised factors or to follow processes as outlined prescriptively or directively.[36] Yet, I would suggest that these devices must be entwined or become entangled with a commitment to the work of political legitimacy, of constructing coalitions of support and sustenance amongst diverse publics. Policy and political flexibility also has its advantages, as "stewardship" cannot assume a static, inalterable state of affairs. Adaptable, customary constitutional values can emerge beyond the ken of positive outcrops of law, an observation that it is salutary to recall and one that is embedded within our inheritance perhaps all too reflexively. In one instance, in 1855, Thomas Babington

34 *Government Response to the New Zealand Productivity Commission Report on Regulatory Institutions and Practices* (Treasury, 28 July 2015) at 4. See also Economic Growth and Infrastructure Cabinet Committee EGI *Response to the Productivity Commission's Report on Regulatory Institutions and* Practices (Treasury, 28 July 2015).

35 Recent illustrations include Jonathan Boston *Safeguarding the Future: Governing in an Uncertain World* (Bridget Williams Books, Wellington, 2017) [*Safeguarding the Future*]; Jonathan Boston *Governing for the Future: Designing Democratic Institutions for a Better Tomorrow* (Emerald Publishing, Bingley (UK), 2017) [*Governing for the Future*]. While I sympathise with the various perspectives and substantive aspirations Boston is adumbrating, his recommendations as to means and methods are not always ones I would agree with, although there are a number of proposed "commitment devices" in his work that seem plausible starting points, for instance, the role of the long-term fiscal statements which the Treasury issues pursuant to s 26N of the Public Finance Act 1989 being strengthened by requiring a legislative response: see Boston *Safeguarding the Future* at 135. His other suggestions concerning environmental reporting are also worthy of consideration (at 136).

36 Boston *Governing for the Future*, above n 35, at 239–283.

Macaulay notoriously wrote that a customary "institution" such as the "ministry" was one of which constitutional writers such as William Blackstone "took no notice".[37] He went on:[38]

> Among the members of this committee [this institution] are distributed the great departments of administration. Each Minister conducts the ordinary business of his own office without reference to his colleagues. But the most important business of any office, and especially such business as is likely to be subject of discussion in Parliament, is brought under the consideration of the whole Ministry.

These complications lurk. In 1902, the jurist John Salmond noted these in commenting on how "[a] statement of the strict legal theory of the British constitution would differ curiously from a statement of the actual facts".[39] That author cautioned that:[40]

> Although the constitution *de jure* and the constitution *de facto* are not necessarily the same, they nevertheless tend towards coincidence. Constitutional law and practice react upon each other, each striving to assimilate the other to itself.

A thoroughgoing appreciation of the customary norms of constitutional significance or materiality needs to underpin any understanding of "stewardship". These less than visible, occasionally elusive or obscure normative aspects and principles, are, in effect, part of the ambient cosmos in which "stewardship", under the State Sector Act, operates. This very point is implied through those references in s 1A of the Act to maintaining "political neutrality" (the constitutional value of a disinterested permanent public service), for instance, or to the concept of a "culture of stewardship" itself, which entails an awareness of those customary and practice-orientated inheritances drawn from diverse pasts that suffuse the context of one's conduct (or ought to). In this sense, then, a notion of constitutional guardianship can be seen as tacitly material to the notion of "stewardship" legislated for in the State Sector Act. The concern is that it might be neglected in favour of the more technocratic, tactical approaches to future-oriented policy proposals, in particular regulatory practice areas. Yet, a stewardship function relative to departmental organisational capability under s 32(1)(c) of the State Sector Act, as well as the capacity to supply free and frank advice to successive governments, may be seen as instantiating those larger, intimated constitutional values animating an independent, professionalised civil service.

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37 TB Macaulay *The History of England from the Accession of James II: Volume IV* (Longman, Brown, Green and Longmans, London, 1855) at 435.

38 At 435.

39 JW Salmond *Jurisprudence, or, The Theory of Law* (Stevens and Haynes, London, 1902) at 205.

40 At 205.

IV THE ADAPTIVE BEHAVIOURAL, CAPABILITY AND LEGISLATIVE DESIGN REQUIREMENTS OF STEWARDSHIP IN A DYNAMIC, OPEN SYSTEM

Incremental changes in political or policy orientations, including executive interpretations of legislative settings, can be disrupted and distracted onto different trajectories or courses. So, one technocratic conceit ought to be removed and that is the vanity of pure abstractions and musings on white-boards insulated from politics. For a start, ministers are legislators, reflecting a fusion of governmental and legislative competencies or authorities in their complex political dimensions, an aspect noted historically. In saying "politics", I am invoking the contestation of publics and a multitude of interpretative communities. "Politics, like nature, rarely settles down as each dispute, policy or action affects others and reshapes the political landscape, inhibiting some behaviors and enabling others."[41] So it is also with policy options. Such complexities will always be part of the landscape and it would be problematic for unelected officials to neglect that factor of politics or to quarrel with it.[42] It is ineffably a part of the continuing puzzle.

A Reflecting on Preferred Behaviours … and Evaluating How these Forms of Conduct Might be Incentivised Through Legislative Design or Non-Legal Phenomena such as Organisational Capabilities

Contemplating preferred behaviours ought to be a key part in thinking about "stewardship" both *internally* to the state sector and externally; that is, scenario-testing and stress-testing what state sector servants would expect to see differently of themselves or a set of actors in the community or interest groups who are subject to regulation or are to be regulated. In addition, attentive reflection is required as to what might assist in incentivising, encouraging or enabling such behaviours, bearing in mind that a degree of agility and flexibility will need to be exercised as understandings or circumstances change across time. What sort of instrument choice or institutional configurations might be relevant in order to support delivering on such expectations? Would primary legislation supply a useful signal, or are non-legislative instruments to be preferred? Is a suite of options interacting, legal and non-legal, likely to attain the desired objects? What feedback loops, both at the *ex ante* stage and in evaluating performance relative to assumed objectives, ought to be factored in? If stewardship was to be operationally effective in this way, what sort of behaviours would one expect to see within and across state sector agencies in order to nourish and sustain it culturally? It would be mistaken to start with structures or a structural focus without critically analysing the sought-after behavioural outcomes and incentives sustaining those results or perhaps militating against preferred ends. These foregoing queries remind me of Julia Black's useful, albeit admittedly imperfect, definition of regulation, of

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41 Jervis *System Effects*, above n 12, at 50.

42 Although I am aware of a number who do, suggesting the importance of an appreciation of the political-constitutional processes and values to overall stewardship capability in the state sector system.

which legislation is a part, as "a process involving the sustained and focused attempt to alter the behaviour of others according to identified purposes with the intention of producing a broadly identified outcome or outcomes which may involve mechanisms of standard-setting, information-gathering and behaviour-modification".[43] The Ministry for the Environment's *Our Regulatory Stewardship Strategy* document potentially exemplifies this awareness in stating, for example, that resort to "non-regulatory mechanisms", such as "science, information, funding and sharing best practice" might be necessary where these sources or techniques "can add value".[44] In presenting this understanding, it suggests a "partnership model" to regulatory design and continuing upkeep might be judicious, adding:[45]

> We expect non-regulatory options [referred to in the relevant passage as consisting of "product stewardship, education and marketing campaigns, and funding schemes"], especially in partnership with different levels of government, iwi and stakeholders, to become more common in achieving lasting change in environmental outcomes.

It also signals a present and future need to actively consider "how to address iwi rights and interests in a post-settlement era".[46]

Yet, as I have intimated elsewhere in referring to constitutional values regarding the political dimension of the executive, this should not be seen as a technocratic exercise.[47] As Jürgen Habermas also recognises, technocratic governance, whether that of courts or of international organisations, is problematic if the broader contextual role of various, less than tidy, "out-of-doors" communities, pressing interests or publics do not leaven it in terms of appreciating questions of legitimacy and constitutionalism. He has pointed out the advantages of politics and the legitimacy acquired through

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43 Julia Black "Regulatory Conversations" (2002) 29 Journal of Law and Society 163 at 170. See also generally Julia Black "Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory' World" (2001) 54 Current Legal Problems 103. A note of caution can be sounded as to just how pervasive the information-gathering and behaviour modification instruments are, let alone their quality from a suitably rigorous evaluation of outcomes perspective.

44 Ministry for the Environment *Our Regulatory Stewardship Strategy* (September 2016) at 6. In full, the excerpt reads (emphasis added):

> Within that framework, we will emphasize continuous improvement, information, working with iwi and Māori, building our own and the system's capability to support better decision making, and partnerships. This will include a focus on innovative, collaborative models; using *non-regulatory mechanisms wherever these can add value*; and holding both new and existing regulations to a high standard, reflecting the burdens they impose.

45 At 15.

46 At 13.

47 Mark Hickford "The Historical, Political Constitution – Some Reflections on Political Constitutionalism in New Zealand's History and its Possible Normative Qualities" [2013] NZ L Rev 585.

political activity, mustering or eliciting support from the *dēmos* (will-formation) or deliberating on the risks of squandering such support or seeking to adjust it around different narratives.[48] "In contrast to the decisions of national cabinets that cover all policy fields", he says, "the agenda of functionally specialised organisations is confined to particular areas of responsibility, so that this narrow focus does not allow [or incentivise] the undesirable external effects of decisions to be taken into account".[49] This interaction must be multi-directional rather than unilinear. The educative and evaluative role is mutually aligned. One of the curiosities can be the contradictory messages, received with certain publics requesting bespoke or particular regulatory interventions or settings but expressing complaint or unease nonetheless at the resulting multiplicity of instruments. This places much more pressure on the exercise of communication at various levels of engagement. It also requires an educative function. The demand for particular regulatory instruments, especially responsive to certain sectors or parts of a market or even a cluster of enterprises, can be evident in the Ministry for Primary Industries portfolio. In food safety, biosecurity or in fisheries management, small or medium-sized enterprises might demand particular forms of regulatory design catering to their angles of vision without necessarily appreciating the range of interlocking activities in a system of trans-jurisdictional distribution, requiring sophisticated forms of regulatory oversight that may need to communicate with other regulatory systems in trading partner jurisdictions.

Nonetheless, officials (and political representatives in the executive) can perform an invaluable educative or instructive role, challenging or contesting the need for such instruments instead of interpreting customer-centric or customer sensitive conduct as necessitating the crafting of additional regulatory tools. That is, an untutored, unqualified or less than sophisticated emphasis on customer approaches, such as we see in the State Services Commission's high-level expectations for 2018 of demonstrating success in "system stewardship" through "state services leaders [being] focused on building strong, innovative, customer-focused public agencies".[50] At the level of communicating a general aspiration, this high-level quality is understandable and perhaps tolerable given that a variety of techniques may deliver on a customer focus, but the available guidance on how to think about what such a focus would entail in view of years of accrued experience leaves much to be desired. Moreover, as I have contended already, "stewardship" ought to be seen as an iterative work-in-progress. It is important to have goals, but these objectives must be demonstrated through alertness and constant vigour to ensure that complacency as to something being "demonstrated" or attained does not

48 Jürgen Habermas *Im Sog Der Technokratie* (Suhrkamp Verlag, Berlin, 2013) (translated ed: Ciaran Cronin (translator) *The Lure of Technocracy* (Polity, Cambridge, 2015)) at 34, 56–57. He has also argued how, in the contemporary European Union setting, political parties may be unready to "engage in processes of opinion- and will-formation that shape mentalities and deviate from established routines" (at 20). See also the difficulties noted in Peter Mair *Ruling the Void: The Hollowing of Western Democracy* (Verso, London, 2013).

49 Habermas, above n 48, at 56.

50 "System Stewardship" State Services Commission (30 July 2014) <www.ssc.govt.nz>.

eventuate. This is not to suggest that a "customer" focus needs to be marginalised. Rather, as with anything, it needs to be approached with operational sophistication and nuance, realising that the pecuniary and non-pecuniary costs to the consumer or user of regulatory systems have to be assessed holistically, as they experience or are subject to several regimes. How end-users of regulatory orders might game their application or seek to minimise their effects have to be anticipated and evaluated operationally to ascertain how practice accorded with what was expected or not and how it might have changed in diverse conditions. Profoundly different scales or forms of organisational or market expertise (including human resource capabilities) might be available to certain participants as opposed to others. A central query is whether those constituencies affected by new regulation or policy interventions experience an appreciable improvement in services delivered or alignment of behaviours with the preferred norms. This is the sort of expectation that political principals in the executive would tend to expect at the least, as well as those publics whose interests they are mindful of engaging with and representing.

In this manner, legislative stewardship, properly construed, ought to be seen as a constant work-in-progress, incomplete and never a subject of either satisfied complacency or comfort. Building capabilities in state sector human resources (policy and legal analysts; executive leaders) available to agencies and sectors of portfolios or areas, such as natural resources, is also an aspect of stewardship as seen in s 32(1)(c) of the State Sector Act and implicitly in the notion of legislative stewardship. To act as a steward invokes several attributes within individuals and amongst teams of officials, including the ability and awareness to impart and receive insights and to capture them reflectively and adaptively, let alone preparing successors for legal positions or relevant operational and policy roles in order to sustain on-going, vigilant stewardship of legislation and organisational capability. Talent management must be a core part of stewardship. At one level, this is enabled through a focus on "key positions" identified under s 50 of the State Sector Act. That provision gives the State Services Commissioner the ability to designate roles within a department or departmental agency, after consulting with the relevant chief executive, as "key positions".[51] The State Services Commissioner may delegate the power to designate or remove key positions and to agree to any appointments to an office-holder with domain-based professional acumen, like the Solicitor-General, or a functional leader such as the Government Chief Information Officer (GCIO).[52]

More particularly, however, capability development requires extensive consideration below executive leadership roles (whether at the first, second or third tier) at the level of technical or analytical advisory generalists and specialists operating on specific policy issues, as they tend to predominantly perform the tasks of formulating the content of policy options and ought to evaluate operational implications. These levels of officialdom can represent an important incubator of talent

51 See "Public Service Key Positions" State Services Commission (October 2016) <www.ssc.govt.nz>.

52 See "Public Service Key Positions", above n 51.

and succession for leadership roles.[53] An array of domains of expertise ought to be considered. Preconceptions as to structure should not predominate in shaping how these processes perform or behave, a significant challenge given the very real danger that structures do tend to fragment the considerations actively addressed and also a number of decision-makers can leap to structural solutions without examining the range of behaviours to be incentivised, thereby undermining the possibilities of sound stewardship. The very notion of a state sector "system" presupposes departmental or agency specific capabilities as well as actively nourished cross-portfolio or agency approaches – integrated, cross-portfolio obligations for shared outcomes or results. This sort of multi-directional stance is to be preferred. Touch-points in these processes of development may be seen in a variety of places, including (non-exhaustively) the Crown Law Office, intra-agency legal teams, parliamentary counsel, cross-sector engagements of legal advisors, including those that the Government Legal Network or "GLN" encourages, and policy or operational advisors. The Government Regulatory Practice Initiative is an important creation in this regard.[54] Comprising a network of central and local government regulatory agencies, it seeks to impart educational and capability building programmes for improving "leadership, culture, regulatory practice and workforce capability in regulatory organisations and systems".[55] Certain departments, such as the Crown Law Office, can perform a meta-stewardship form of role relative to certain constitutional norms, as can the Cabinet Office or elements of the Prime Minister's advisory group within the Department of the Prime Minister and Cabinet and the other two central agencies in addition to that Department (the Treasury and State Services Commission).

An ongoing educative commitment within the interior of the executive is important. Otherwise, these influences can be sporadic, person- or relationship-specific, but effective nevertheless at a transactional or sectoral level. An example of a GLN subgroup is the Treaty-Māori practice group, as well as that of the Natural Resources practice group comprising persons from diverse public service departments or with differing portfolio experiences. As personnel change, however, through leaving the state sector for a time or moving into different roles or domains of activity, including from one

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53 As one instance, the Office of Treaty Settlements is an example of a domain where particular relational or "interactive" expertise is developed in the context of Crown-iwi-hapū-Māori policy and practice. Certain personnel with stress-tested experience in that area have developed executive leadership and situationally aware understandings of the interface between political and public policy judgments.

54 Conventionally referred to as the "G-Reg". See Ministry of Business, Innovation and Employment *Regulatory Management Strategy 2016/2017* (August 2016) at 16:

> In response to the growing recognition of the importance of regulatory practice, a group of central and local government regulators established the Government regulatory practice initiative. The initiative is a multi-agency network that collaborates on regulatory practice and capability activities where collective action is likely to be beneficial.

55 "Regulatory Capability (G-Reg Initiative)" Ministry of Business, Innovation and Employment <mbie.govt.nz>.

legal practice area into a broader policy role or a more senior managerial position in an agency, there is invariably a risk that insights and expertise are lost. This inevitable trend signifies a need for considering how capabilities across a sector or system might be harnessed or brought to bear as such individuals move (including having access to trusted alumni of the system, seeing them as potential sources for recruiting in the future, or, of use as confidential advisors). It is far too simplistic, as is well known, to anticipate that tacit knowledge or even historical domain expertise based on prior, intensive policy and operational experiences can be transferred with ease to those who remain or enter the agency afresh.[56] Blending policy, legal and operational disciplines in cross-sectoral or portfolio areas should be a more frequent activity. This certainly occurs on an ad hoc basis around looming or emergent issues. There is always the possible disadvantage that establishing regular cross-disciplinary teams can lead to ossification of those fora such that they become relatively passive, phlegmatically bureaucratic spaces for conversation. They may tend to principally placate diverse interests in the state sector through departmental representation instead of generating vigorous, mindful discourse leading to advice to political principals or executive leadership teams.

Incentivising desired behaviours through the specific design of instruments is a difficult but important challenge. Here, behavioural insights evidence presents one form of tool. It should not be regarded as an exhaustive or exclusive tool, but remains a factor to be drawn on when considering how to evaluate the performance of regulatory systems, including legislative regimes and the possibilities of reform or amendment. Behavioural insights logic has been used, as the advocates of this literature remind us, in New Zealand legislative design already – through outlining a *preferred* default setting in statute as opposed to a minimum requirement. In essence, it works by identifying what behaviour one would wish to see encouraged by prescribing that certain classes of person will be enrolled automatically into one option and by requiring an express opting out exercise. On balance, this preferred default setting gives rise to more onerous acts because one has to do something if one wishes to opt out of the preferred default event, situation or conduct. The KiwiSaver Act 2006 is conventionally cited as an illustration of this style of choice architecture expressed through a statute (s 10 for example).[57] Nevertheless, as with any other technique, care ought to be taken so as not to invest a behavioural insights stance with some sort of canonical status unable to be evaluated critically as a form of technical intervention. It remains a tactic to be deployed with judgment (including any *ex post facto* audit or evaluation of performance in judgment case-by-case inter-temporally) and not an inexorably applicable rule or norm of idealised practice.

Using mixed strategies and techniques in regulatory design and practice must be a part of any thought concerning how legislative stewardship may be given expression across assorted

56 See generally Harry Collins *Tacit and Explicit Knowledge* (University of Chicago Press, Chicago, 2010); and Michael Polanyi *The Tacit Dimension* (University of Chicago Press, Chicago, 2009).

57 For instance in Richard Thaler and Cass Sunstein *Nudge: Improving Decisions About Health, Wealth and Happiness* (Penguin, London, 2008) at 126.

circumstances.[58] A one-size-fits-all approach is seldom, if ever, apt in view of the complexities of real markets and human lives in all their messiness. All that has been said in this article about situating this stance in a larger, ongoing conversation concerning interacting teams of different disciplines – social, interactive expertise is to be encouraged and developed – thinking about behaviours internal to departments and across them and what external behaviours one is actually seeking and seeing on the ground (open systems thinking) remains important. Reflecting seriously on a generally preferred default or upfront behavioural expectation in regulatory design may be useful to those enterprises that do not have the resources to apply in making demanding discretionary judgments as to what is to be done to satisfy a regulatory provision. Accordingly, a mix of prescribed default or baseline expectations in legislation in some areas and judgment-focused requirements around assessing performance outcomes or risks in others has to be thought through.

Importantly, a challenge for stewardship of legislation or policy development underpinning regulatory design is to remain alive to how one creates incentives – let alone what those incentives might be – in order to encourage preferred individual and organisational responses or behaviours, whether through legislative design or regulatory practice. Our understanding as to how to incentivise the behaviour within the varied organisations subject to regulatory approaches must develop much further, including our thinking about what goes beyond mere desktop compliance such that the preferred, default behaviours become as much as possible an intuitive or instinctive part of the regulatee's business operating model.[59] Yet, it would be fair to say that encouraging officials and parliamentary counsel to interact in these ways and to develop the appropriate drafting language, not to mention the policy and operational precursors, remains a challenge. Parliamentary counsel drafting techniques also have an impact. The contemporary stylistic preference is less for setting out language that incentivises or encourages specified behaviours, with the concomitant demands on the qualities of policy-operational thought. More could be done in interactions between policy advisors, those authorising drafting instructions, and parliamentary counsel, asking very explicitly what behaviours might certain drafting encourage or discourage and endeavouring to test these queries against a variety of "scenarios" or fact patterns. Indeed, the inherited and still developing orientation is generally towards a terse or spare legislative drafting style (that does not have the denser, narrative style associated with some drafting in other jurisdictions), with the logics of statutory interpretation found in the legal professional discipline informing these tendencies too.[60] As such, it is not always the case that those preparing drafting instructions for parliamentary counsel or the drafters themselves engage

58 As put so aptly by Lodge and Wegrich, above n 7, at 244–245.

59 That is, the judgment to ask the relevant question or questions, to evaluate and to make appropriate, adaptive decisions becomes institutionalised or normalised to such an extent that it is not merely a shallow or superficial compliance exercise. Again, given the complexities of the behaviours that might be engaged, this is easier said than executed.

60 Compare, for instance, the drafting in the Submerged Land Act 43 USC §1301 (and following) in the United States.

in the critical discussions needed for stewardship thinking around whether the legislative instrument is actually fit for purpose in the sense of incentivising certain outcomes. The methodologies for drafting legislative instruments tend to be framed around, and informed by, particular registers as to legal interpretation with their own genealogies of thought, style and approach.[61]

In this vein, behavioural insights could also be used to inform an investment approach to deliverable justice or social policy outcomes, some of which might require particular legal and non-legal instruments to be brought to bear. This is more than engaging with data sets or data analytics. That is merely a part of the puzzle and complexity. It asks what might be yielded behaviourally in response to the commitment of resources – financial and otherwise – and, if efficacy cannot be demonstrated, then where such resources should be re-directed to enable improved consequences. A much more granular, nuanced set of interrogations is required, therefore, examining and evaluating behavioural responses in the field and across time, specific to certain populations or sub-groups and to particular localities or practices. That is, the evaluation must proceed beyond large-scale data. Again, these approaches have implications for state sector workforce capabilities: a demanding sort of developmental specification for prospective and existing personnel, looking also for complementarities within or across teams. Care has to be taken, of course, but there is no doubt that this heightens the capability expectations of those subject to regulatory or legislative regimes and those charged with stewarding them effectively. As Gallagher and McCauley have hinted at,[62] these forms of behavioural insight need to be mindful of compliance regimes, requiring escalation pathways from informing or educating through to prosecutorial action while noting, nevertheless, where gaming by those subject to such regulatory expectations might occur.[63] Taking behavioural insights seriously based on evidence requires more than musing on intervention by "nudges" too. Other norms or values are also engaged and need to be considered, as there may be transgressions of these in circumstances where behaviourally attuned evidence entails using the personal information of those who are subject

61 For instances of logics in interpreting legislation: J Evans, *Statutory Interpretation: Problems of Communication* (Oxford University Press, Auckland, 1988); Ross Carter, *Burrows and Carter on Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015).

62 R Gallagher and L McCauley "Using behavioural insights in effective regulation and legislation" (*Advancing Better Government through Legislative Stewardship Conference*, Victoria University of Wellington, 27 October 2016). See also David Halpern *Inside the Nudge Unit: How Small Changes Can Make a Big Difference* (WH Allen, London, 2015); and The Behavioural Insights Team *Update Report 2015-16* (Behavioural Insights Ltd, London, 2016).

63 Again, the Ministry for Primary Industries' experience is pertinent. It has deployed a VADE principle in terms of regulatory compliance consisting of the following elements and contemplating the possibilities of escalating forms of intervention: *Voluntary* – voluntarily comply and informed; *Assisted* – attempting to comply and uninformed; *Directed* – propensity to offend (opportunistic); *Enforced* – criminal intent and illegal activity.

to calibrated and re-calibrated forms of policy intervention.[64] That is, as interventions affecting specific cohorts or classes of regulated citizen are made and then adapted based on increasingly real-time qualitative (or quantitative) evidence, then the possibilities that personal information is being used to improve the efficacy of intervention logic raises awkward challenges around privacy or human rights values. Clarity in the legal settings authorising these forms of regulatory practice is essential. In addition, if the evaluative assessments suggest that governmental investment in the form of financial or other resources support needs to adjust or to be transferred to other delivery partners in the market, then these shifts (unless well addressed in the legal authorising environment) can give rise to judicial review or breach of contract litigation challenging such decisions.[65] These possibilities reinforce the need to engage a cross-section of capabilities and domain expertise in stewarding the legislative regimes or the respective organisational and personnel capabilities of state sector departments or departmental agencies. Legislative design may incentivise unanticipated consequences if stress-testing of options does not occur rigorously, asking the discomforting questions of policy and legal advisors alike.

Part of assessing incentives requires thinking about how have persons, collectives of persons or organisations behaved in the past, such as those agencies and denizens of the state, as well as those subject to legislation or regulation broadly understood. This is where so-named institutional memory is relevant, as the current Attorney-General noted in the context of Treaty of Waitangi settlements in 2016.[66] In this sense, the work of Christopher Pollitt is useful in his endeavours to recommend that policy developers and legal-policy formulators be mindful of time horizons, not merely future or present orientations, but also those attuned to various pasts – the craft of trained, scholarly historians.[67] Earlier instances of policy experience can alert us to fragilities in crafting legislative instruments as parts of regulatory systems in circumstances where perverse incentives emerged and desired consequences were foiled. There is also the salient point that we often draw incorrect prudential insights from past endeavours without a sufficiently acute historical understanding, predicated on rigorous methodologies, as to what might have led to failure or under-performance. Furthermore, in seeking to evade historical errors, we may unwittingly engender novel sources of

64 Thereby raising questions as to information-sharing between agencies, including those which are not within the state sector. Approaches to enable information-sharing were developed under 2013 amendments to the Privacy Act 1993, as set out under pt 9A of that statute (approved information sharing agreements).

65 Illustrations have emerged of late, such as *Te Whānau o Waipareira Trust v Attorney-General* [2012] NZHC 3107, where Te Whānau o Waipareira Trust unsuccessfully challenged a decision on the part of the Ministry of Social Development to terminate an agreement with the Trust whereby the latter was a provider under the government's "Family Start" programme of services.

66 See Price, above n 5.

67 See generally Christopher Pollitt *Time, Policy, Management: Governing with the Past* (Oxford University Press, Oxford, 2008).

difficulty. None of this should discourage an understanding of diverse pasts, but reinforces, again, the need for tutored sophistication and critical self-awareness.

B Historicity and Constitutional Values – the Possibilities of Continuity and Discontinuity with which "Stewardship" Must Contend

Importantly, then, none of this thought on stewardship and what it supposes should occur in a vacuum. In pursuing stewardship seriously, one cannot merely express or engineer an institutional and behavioural commitment to *future*-oriented outlooks, as if that is somehow sufficient. *Historicity* is relevant not only in the sense of a nuanced awareness of various pasts, but also how those antecedents have developed, been interpreted and refined or become engrained (sometimes unreflectively) in the current state sector system. It also entails an acute sensitivity to the fragilities in those inheritances, noting how and in what respect their assumptions might be less assured or reliable than previously thought. This temporal aspect applies in a variety of areas, including the inheritance that is the Treaty of Waitangi and its principles relative to the Crown, developed jurisprudentially in the ordinary courts since the well-known Court of Appeal decision in *New Zealand Māori Council v Attorney-General* in 1987.[68] Seemingly settled jurisprudence can shift, thereby requiring a dynamic, alert understanding of what stewardship might require – the sense of organisational or perhaps political liability to address certain strategic or tactical legal-policy requirements might alter considerably depending on the nature of the adjustment in legal understanding.[69]

A number of illustrations will have to suffice here, as I can only be brief within the limitations of this article. Some of these legal changes can be sudden or merely incremental and trending, posing novel or different questions of a landscape that once seemed quiescent or calm. Even if abrupt, the change might have been forecast or anticipated in scholarly writings or in offshore, extra-jurisdictional jurisprudence and even appreciated within parts of the state sector itself as an anticipated "risk" that might emerge in litigation (the Crown Law Office being a distinct possibility in this regard). Alternatively, an area of law might not have been stress-tested in the courts for some time, signifying an earlier court decision, on which much reliance might have been placed in policy circles historically, could have ceased to have maintained orthodox authoritative status over time through increasing fragility as circumstances have altered (legal and policy officials may not have observed this undermining trend or disagreed with it). In June 2003, the Court of Appeal decision in *Attorney-General v Ngāti Apa*,[70] concerning the foreshore and seabed (within the territorial sea), disrupted those state official understandings assuming that the three-judge Court of Appeal decision in *Re the*

68 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA). Ably discussed in Jacinta Ruru (ed) *"In Good Faith": Symposium Proceedings marking the 20th Anniversary of the Lands Case* (New Zealand Law Foundation and Faculty of Law, University of Otago, Dunedin, 2008).

69 Hickford, above n 47, at 621–622.

70 *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA).

Ninety-Mile Beach (dating from 1963)[71] remained sound legally and also Māori customary land status in submerged lands adjacent to the coast or within the broader territorial sea was rare, perhaps a diminished category at most or even non-existent.[72] The 2003 ruling confirmed that any subsisting indigenous proprietary entitlements continued uninterrupted at law until effectively extinguished.[73] The *Ngāti Apa* Court held that the Māori Land Court had jurisdiction to investigate the status of land in the foreshore and seabed pursuant to Te Ture Whenua Māori Act 1993 and that none of the legislative regimes cited on behalf of the Crown in argument, whether the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977 or the coastal marine area settings under the Resource Management Act 1991, were sufficient to extinguish any pre-existing Māori customary proprietary rights. That judicial decision in *Ngāti Apa* led to a significant sequence of policy and legislative responses (notably the Foreshore and Seabed Act 2004) with considerable repercussions, including a complete re-casting in the Marine and Coastal Area (Takutai Moana) Act 2011 as to how the foreshore and seabed was conceived in proprietary terms, with the "common marine and coastal area" being classified as not owned under s 11(2).[74] Even incrementally refined jurisprudential understandings can imply additional resource expenditure, as public service departments internalise the meaning or nuance of changing legal interpretations through court processes.

It is conceivable that seemingly normative-political conceptions of "honour of the Crown" could eventually be, nevertheless, transformed into sources of legally enforceable expectations through court litigation (as in Canada). An option is there. Certainly, the endeavour has been made in the recent past – namely, submissions before the Court of Appeal in 2007 – and there are sporadic, belated signs (perhaps) that it might re-emerge delicately and suggestively, as in *Proprietors of Wakatu v Attorney-General* in February 2017.[75] The observation is raised here simply to illuminate how the

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71 *Re the Ninety-Mile Beach* [1963] NZLR 461 (CA). In that instance, the Court of Appeal held that Native or Māori Land Court investigation of titles to landward coastal blocks also entailed the extinguishment of adjacent customary entitlements below high-water mark.

72 Note the argument for the Attorney-General observed in the Chief Justice's judgment in *Attorney-General v Ngāti Apa*, above n 70, at [50]:

> On behalf of the Attorney-General, however, it is contended that "the legal assumption of an original native title over the surface of New Zealand has always ended where the land ends and the sea begins" … The Court did not accept the contention in relation to foreshore land, and the Solicitor-General in the present case is content to limit it here to seabed land.

73 See for instance *Attorney-General v Ngāti Apa*, above n 70, at [34] and [37] per Elias CJ.

74 Subject, however, to the factors listed in s 11(5) of the Marine and Coastal Area (Takutai Moana) Act 2011.

75 See for instance *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17 at [344] (and specifically at n 389: discussing the official attitudes to United States jurisprudence on native title in the first decade of Crown colony government and Viscount Stanley's reference to "honour" burdening the Crown in 1845 as a political obligation) and [465]. For Viscount Stanley, as cited in *Wakatu*, see Mark Hickford *Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire* (Oxford University Press, Oxford, 2011) at 190.

varied subjects with which "stewardship" in the State Sector Act context must wrestle with, while remaining vulnerable to exogenous change, as interpretative communities or fora adjust their own conceptions of the relevant questions to be posed. The interactions and entanglements within and without the state sector are iterative and changeable. Spaces may be seen as having been reserved for future argument before the judicial branch. In one instance, a Supreme Court minute in November 2008 noted that the parties to the litigation, including the Crown, were agreed that the comments of the High Court and Court of Appeal concerning possible fiduciary obligations owed by the Crown to Māori under the Treaty of Waitangi in *New Zealand Māori Council v Attorney-General* (challenging the affiliate Te Arawa iwi and hapū deed of settlement) were to be treated as obiter dicta.[76] These instances in *Wakatu* or in the affiliate Te Arawa iwi and hapū situation a decade earlier, with latent potential for adjustments in jurisprudential understandings historical to New Zealand, have arisen out of, or alongside, anxieties around the Crown's policies concerning the settlement of Treaty of Waitangi claims. Ultimately, these settlements are given expression through legislative action, nicely illustrating the manner in which state sector stewardship must be mindful of interacting policy and legislative settings and external sources of feedback if it is to be efficacious.

Again, then, change not stasis is a critical part of appreciating, within official systems, the challenges to which "stewardship" (including legislative stewardship) contemplated under the State Sector Act must attend. As we have witnessed in past decades, certain historical assumptions of Crown proprietorship of particular resources or landscapes, such as the foreshore and seabed or navigable riverbeds (under statute), as in the *Paki* proceedings,[77] have been disputed and adjusted. New techniques have been developed to address the Crown's preoccupation with public interest values, such as public access, without requiring proprietorship, as had been the case in previous regimes. Natural resources or landscapes have been vested as juristic entities or legal personalities, as under Te Urewera Act 2014 and Te Awa Tupua (Whanganui River Claims Settlement) Act 2017. These innovations have since become layered additions to the terrain of what legislative stewardship addresses, not forgetting, of course, stewardship in the larger sense of the state sector system's continuing contribution to Crown-iwi-Māori relations. As stated, this discussion can only be preliminary and in passing, but it demonstrates how "stewardship" is also a statutory marker for indubitably complex interactions with sites of disagreement and contest, within and without the state sector system.

V CONCLUSION

Legislative stewardship is not just about regulatory practice, although it certainly connotes a thoroughgoing understanding or at least mindfulness of the relevant literature such as that of Martin

76 *New Zealand Māori Council v Attorney-General* SC 49/2007 and 50/2007, 4 November 2008. The Court of Appeal decision in these proceedings was reported in [2007] NZAR 569.

77 *Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67.

Lodge or John Braithwaite. The foregoing article has contended that legislative stewardship needs to be situated within a much broader setting of legal and non-legal phenomena. These include demanding expectations around appreciating legislative or regulatory and state sector systems holistically or integratively, addressing organisational and underlying interpersonal capabilities across domain expertise, remaining vigilant about ambient constitutional sensibilities across time and reflecting on how to incentivise preferred behavioural outcomes, not only within or through regulatory regimes, but also in the state sector system itself, particularly as circumstances change or informational understanding progresses. On-going monitoring and evaluation must occur. As evidenced in discussing the whey protein contamination incident in 2013 or the changeability of jurisprudence, external founts of feedback remain sources of challenge and insight as to systemic or transactional regulatory performance. An inter-temporal quality remains a vital element in actively stewarding the legislation administered by public service departments or departmental agencies. It is not only a future-minded orientation; it requires an astute understanding of historicity, of that which is inherited and perhaps passed on, refined or adapted. As observed at the outset, five core characteristics undergird and suffuse "stewardship", each of which must be seen as interwoven with the others. Ultimately, stewardship implies an iterative, work-in-progress culture, in a dynamic, watchful state of becoming and incompleteness, as it ought to be.

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