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MINISTERS' PERSONAL APPOINTEES: PART POLITICIAN, PART BUREAUCRAT

*Lucy Hare**

This paper examines the constitutional position of personally appointed advisers to Cabinet Ministers. Personal appointees are formally employed as public servants on events-based contracts. In practice, however, they work as partisan ministerial assistants and are thus not subject to the public service constitutional convention of political neutrality. Drawing on the Australian and United Kingdom experiences, this paper recommends a range of reforms to better regulate the distinctive (and useful) constitutional position occupied by personal appointees.

I INTRODUCTION

Who is the real Minister of Health? Annette King or the Prime Minister's senior adviser Heather Simpson?¹

[New Zealand High Commissioner in London, Russell] Marshall's account of the chemistry between Clark and Simpson—her closest adviser and *éminence grise*—is telling. "If I'd had someone as good as that, who knew my instincts, who could go into another room and meet someone else and whom I could trust absolutely to say what I think and pick up the essence of it, who could be another pair of legs, ears and eyes for me, I'd have grabbed her — or him."²

* This is an edited version of a paper presented in partial fulfilment of the LLB (Hons) degree, Victoria University of Wellington, 2003.

1 Rt Hon Wyatt Creech MP, New Zealand National Party "Will the Real Health Minister Please Stand Up?" (4 May 2000) Press Release.

2 Carson Scott "Carson Scott Talks to Russell Marshall (Our Man in London)" (21 June 2003) *The Listener* Auckland 13.

It's hardly a novel observation—O what a tangled web we weave, when first we practise to deceive—but modern statecraft has increasingly devoted itself to the (how appropriate the verb) spinning of threads from which those webs are woven. ... [T]he lesson should be simple: spinning makes you dizzy, then you fall down.³

Over the last 20 years, personally appointed advisers to Ministers' offices have become a well-established feature of New Zealand politics. Personal appointees are employed to provide high-level political and policy advice to Ministers. This advice is often of an explicitly partisan nature. Thus, within a Minister's office, personal appointees are interposed between the Minister and the public servants they work alongside. Despite their often influential status in government, the existence of these advisers is not well-known publicly, and there has been little academic or public discussion of their constitutional status.

The role of the personally appointed adviser gives rise to tensions in the political framework. On the one hand, the effectiveness of a personal appointee depends on confidentiality and their ability to determine a Minister's viewpoint and act on his or her behalf, without requiring detailed and time consuming instructions.

On the other hand, constitutional principle demands that any exercise of government power be accountable to Parliament and the public. Ministers are responsible to Parliament for the actions they undertake as Ministers and for acts performed on their behalf. Yet full accountability where personal appointees are concerned may be impeded by the secrecy of their role—particularly where a personal appointee undertakes functions without explicit instruction from the Minister. There is thus a tension between political reality and the constitutional imperative of accountability.

Issues also arise in relation to the public service. Personal appointees may control public servants' access to their Minister, and consequently undermine the public servant-Minister relationship. Public servants must remain apolitical; working alongside overtly political staff within a Minister's office may undermine their neutrality. Further, personal appointees who deal with media issues may be perceived as controlling communications in a manner that is misleading to the public.

This paper seeks to clarify the constitutional position of personal appointees. It begins by examining the behavioural norms relating to Ministers and public servants. Clarifying their roles throws light on that of the personal appointees who work alongside them. The paper goes on to address the constitutional status of personal appointees by reference to Ministers, public servants, and the constitutional conventions that guide their behaviour.

3 Finlay McDonald "Murder Will Out" (2 August 2003) *The Listener* Auckland 7.

Personal appointees make a valuable contribution to the New Zealand political system, but their role gives rise to the potential for abuse of power and constitutionally inappropriate behaviour. Consideration of the United Kingdom and Australian experiences reinforces the importance of addressing these potential problems, and provides possible solutions.

This paper recommends that personal appointees be legally distinguished from public servants. It advocates the adoption of separate codes of conduct for personal appointees and public servants, training for incoming personal appointees, and the creation of a formal procedure for complaints about personal appointees' conduct.

II THE CONTEXT IN WHICH PERSONAL APPOINTEES ACT

Several types of staff may be found in government Ministers' offices, including administrative staff, public servants seconded from government departments, and personal appointees.⁴ All three types are employed in the same way, under the State Sector Act 1988 by the Ministerial Services branch of the Department of Internal Affairs. But in practice their roles are different. Administrative staff provide secretarial and administrative support.⁵ Public servants on secondment are employed as politically neutral policy advisers and ministerial assistants. Personal appointees, on the other hand, are generally employed to provide Ministers with explicitly partisan advice and to deal with political risk management.⁶ They typically act as all-purpose assistants, undertaking intra-coalition and intra-party negotiations, managing media issues, providing policy advice, and acting as a conduit between the Minister and departmental public servants.⁷

4 Colin James *The Tie that Binds: The Relationship between Ministers and Chief Executives* (Institute of Policy Studies/New Zealand Centre for Public Law, Wellington, 2002) 59.

5 James, above n 4, 59.

6 Richard Shaw "Advisers and Consultants" in Raymond Miller (ed) *New Zealand Government and Politics* (Oxford University Press, Auckland, 2001) 153.

7 Ministerial Services *Job Profile: Ministerial Advisor* (Wellington, 2003) identifies the following as "Key Responsibilities/Tasks":

1. Providing political oversight and independent advice on policy proposals and submissions received.
2. Monitoring relevant cabinet committee papers/minutes to ensure that any issues of significance are drawn to the Minister's attention.
3. Managing the Ministerial office relationship with Coalition and support party spokespeople and working with Prime Minister's Office on relevant support party consultation issues.
4. Liaising with government members on select committees on relevant legislation to ensure the government is kept abreast of developments.

Personal appointees in New Zealand act within a broadly Westminster-style democracy, underpinned by the notion of government by or with the consent of the people.⁸ The political system is predicated on responsible government, with governments drawn from and responsible to an elected Parliament, and in turn responsible to the people through their parliamentary representatives. This chain of responsibility is the key means by which democratic accountability is maintained. In practice, much executive power is delegated to public servants,⁹ for whose actions Ministers are responsible to Parliament.

New Zealand has a largely unwritten, and therefore convention-based and evolutionary, constitution. The behaviour of Ministers and public servants is primarily constrained by constitutional conventions: norms of political practice which have become so significant as to be regarded as binding principles.¹⁰ Constitutional conventions ensure that the behaviour of government actors remains within the bounds of constitutional propriety. Because personal appointees are positioned between Ministers and public servants, the behaviour of these two sets of actors impacts on them.

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5. Managing OIA requests, including being able to identify potential political issues which may arise and liaising with Prime Minister's office as required.
 6. Ensuring the Minister is appropriately briefed for all House responsibilities.
 7. Liaising with Caucus Committees and Research Units.
 8. Risk management of issues within Minister's portfolios and ensuring the Prime Minister's office is kept informed about potential risks and opportunities.
 9. Attending meetings with officials, sector organisations, and any other relevant meetings as required.
 10. Where required, providing input into the government's strategic planning.
 11. Liaising with portfolio advisors, Senior Private Secretary, Press Secretary and other office staff on the implementation of portfolio plans.
 12. Working with appropriate Associate Ministers' and Under-Secretaries' staff in relation to the Minister's portfolios.
 13. Effective liaison and relationship development with key stakeholders in Minister's portfolios.
 14. Other duties as required.
- 8 Richard Mulgan *Democracy and Power in New Zealand: A Study of New Zealand Politics* (Oxford University Press, Auckland, 1984) 8, 13.
 - 9 Sir Ivor Jennings *The Law and the Constitution* (5 ed, University of London Press, London, 1959) 200.
 - 10 Philip Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 273.

The conventions surrounding the Minister-public servant relationship have been influenced over the last two decades by three key reforms: the move to more open government, state sector reforms directed at increasing efficiency and accountability in the public sector, and the adoption of a proportional electoral system which has created more representative, complex, and (potentially accountable) government.¹¹

III THE MINISTER-PUBLIC SERVANT RELATIONSHIP

A Changes to the Political Context

1 Open government

The Official Information Act 1982 (OIA) seeks "to make official information more freely available".¹² The Act reversed the existing presumption regarding the release of official information,¹³ by providing that information should be released if there is no good reason to withhold it.¹⁴

The OIA was prompted by the report of a special committee on official information. The Committee's recommendations, which were largely adopted in the final legislation, reflect the principles underpinning a shift towards open government. A participating and well informed public enhances the accountability of politicians and administrators.¹⁵ Transparent government processes allow the public to "follow and scrutinise the actions of government or the advice given and options canvassed".¹⁶ Open government enhances government effectiveness by encouraging a more participatory and better informed policy process, and greater cooperation between government and citizens.¹⁷

Related reforms in the move towards more open government include the establishment of the Office of the Ombudsman in 1962,¹⁸ a range of other statutory requirements

11 J Boston *Governing under Proportional Representation: Lessons from Europe* (Institute of Policy Studies, Wellington, 1998) 2-3.

12 Official Information Act 1982, long title.

13 See the Official Secrets Act 1951, s 6, repealed by the Official Information Act 1982, s 51.

14 Official Information Act 1982, s 5.

15 New Zealand Committee on Official Information General Report *Towards Open Government* (Government Printer, Wellington, 1981) 14.

16 New Zealand Committee on Official Information, above n 15, 14-15.

17 New Zealand Committee on Official Information, above n 15, 15-16.

18 Parliamentary Commissioner (Ombudsman) Act 1962; see now Ombudsmen Act 1975.

providing for freedom of information,¹⁹ the enactment of the New Zealand Bill of Rights Act 1990, and the strengthening and development of administrative law.²⁰ The combined effect of these reforms is that the principles of open government are now an established part of the New Zealand system.²¹ In particular, they expose the behaviour of Ministers and public servants to a much greater degree of public scrutiny.

2 State sector reforms

Broad reforms to the core public sector in the late 1980s and early 1990s²² have also had a significant impact on the Minister–public servant relationship. Among other things, the reforms introduced fixed-term appointments for departmental chief executives. The advisory and delivery elements of the public service were separated.²³ Outputs produced, rather than policy outcomes sought, became the measure of the bureaucracy's performance.²⁴ Commercial activities were contracted out or released from direct government control.²⁵

The reforms, based on public choice theory, agency theory, and contractual analyses,²⁶ were designed to improve the efficiency and the effectiveness of the public service.²⁷ The restructured public sector is thought to be capable of much greater cost-effectiveness, as well as better delivery of services.²⁸

19 See for example the Local Government Official Information and Meetings Act 1987; Public Finance Act 1989; Privacy Act 1993; Fiscal Responsibility Act 1994.

20 New Zealand Law Commission *Review of the Official Information Act 1982* (NZLC E31AC, Wellington, 1997) 145–146.

21 Cabinet Office *Cabinet Manual 2001* (Wellington, 2001) 1.

22 Allen Schick *The Spirit of Reform: Managing New Zealand's State Sector in a Time of Change* (Report Prepared for the State Services Commission and the Treasury, Wellington, 1996) 2; John Martin "The Public Service" in Miller *New Zealand Government and Politics*, above n 6, 132–133.

23 Martin "The Public Service," above n 22, 133–134; John Martin "Advisers and Bureaucrats" in Miller *New Zealand Government and Politics*, above n 6, 111.

24 Schick, above n 22, 74; Graham Scott and Peter Gorringer *Reform of the Core Public Sector* (The Treasury, Wellington, 1988) 6.

25 See Martin "The Public Service," above n 22, 134.

26 Scott and Gorringer, above n 24, 2–3.

27 Schick, above n 22, 11; Martin "The Public Service", above n 22, 133.

28 John Roberts *Politicians, Public Servants and Public Enterprise* (Victoria University Press for the Institute of Policy Studies, Wellington, 1987) 14–15; Scott and Gorringer, above n 24, 1.

The state sector reforms also sought to enhance the accountability of government officials,²⁹ by strengthening public servants' personal accountability over and above the accountability imposed on them through Ministers.³⁰ The separation of governance and operation has placed responsibilities on departmental chief executives personally, rather than on Ministers.³¹ For example, the State Sector Act 1988 gives chief executives authority in relation to human resources.³² Similarly, the Public Finance Act 1989 gives chief executives responsibilities regarding the financial management of their departments.³³ The state sector reforms thus signal a fundamental shift in the way accountability is viewed within the administrative system, with Ministers and public servants no longer always regarded as a single entity.

3 Electoral system change

In 1993, New Zealand adopted a mixed-member proportional (MMP) electoral system. The previous first-past-the-post (FPP) system was based on simple plurality elections in single member constituencies, and was thus strongly biased towards single-party majority government.³⁴ MMP, which was first employed in the 1996 general election, is a proportional, party-based system (which nevertheless retains some single member geographical constituencies). Unlike FPP, it tends to produce coalition majority, single party minority, and coalition minority governments.³⁵ New Zealand has experienced minority government almost invariably since the introduction of MMP. Proportional representation has also led to increased diversity—especially in relation to gender and ethnicity—in Parliament.³⁶

MMP purports to improve the accountability of governments to Parliament in a number of ways. Government majorities—if they exist at all—are likely to be small, making governments more vulnerable to the House. A greater diversity of viewpoints in

29 Martin "The Public Service," above n 22, 133.

30 Joseph, above n 10, 299.

31 Scott and Gorringer, above n 24, 15.

32 State Sector Act 1988, s 33.

33 Public Finance Act 1989, s 33.

34 Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand Government under MMP* (3 ed, Oxford University Press, Auckland, 1997) 12; Boston, above n 11, 2.

35 Palmer and Palmer, above n 34, 12; Boston, above n 11, 2-3.

36 Boston, above n 11, 1; Bernie Steeds "MMP: Here to Stay? Questions about the Review" (19 April 2000) *The Press* Christchurch 9.

Parliament allows for greater accountability.³⁷ Further, governments are constrained from within, given the necessity of working with coalition partners.³⁸

B Ministers' Conventions

Executive power is primarily exercised by Ministers and Cabinet.³⁹ Ministers must be elected members of Parliament,⁴⁰ and are appointed by the Governor-General on the advice of the Prime Minister.⁴¹ These two features of the constitution mean that Ministers are accountable to the electorate both directly, as elected MPs, and indirectly, through Parliament. The accountability of Ministers to Parliament is effected through the constitutional conventions of collective Cabinet responsibility and individual ministerial responsibility.

1 Collective Cabinet responsibility

Collective Cabinet responsibility is the principle that Cabinet as a whole is responsible to Parliament for its actions and decisions.⁴² Although it has an important influence on Ministers' behaviour, this convention does not impact directly on the Minister-public servant relationship. As such, it is only briefly examined here.

Collective Cabinet responsibility is fundamental to Cabinet government and to the Westminster constitutional structure.⁴³ Its primary function is to allow Parliament to hold the Government to account for its actions, by enabling Parliament to dismiss the Government through a vote of no confidence. This permits democratic control of government action between elections. Collective Cabinet responsibility also empowers

³⁷ This occurs because of the increased number of parties and societal groups represented in Parliament.

³⁸ Elizabeth McLeay "Cabinet" in Raymond Miller (ed) *New Zealand Politics in Transition* (Oxford University Press, Auckland, 1997) 91.

³⁹ Elizabeth McLeay *The Cabinet and Political Power in New Zealand* (Oxford University Press, Auckland, 1995) 9-10.

⁴⁰ Constitution Act 1986, s 6.

⁴¹ The method of appointment to Cabinet varies according to the political party of the particular Prime Minister. For example, Labour Party Ministers are voted in by the party caucus, while National Party Ministers are appointed at the leader's discretion: McLeay *The Cabinet and Political Power in New Zealand*, above n 39, 17. In the context of coalition government, ministerial appointments are also subject to cross-party negotiation.

⁴² Sir Ivor Jennings *Cabinet Government* (3 ed, Cambridge University Press, Cambridge, 1959) 277.

⁴³ McLeay *The Cabinet and Political Power in New Zealand*, above n 39, 2; Cabinet Office *Cabinet Manual 2001*, above n 21, 45; A V Dicey *Introduction to the Study of the Law of the Constitution* (10 ed, MacMillan, 1959) 419-420.

Cabinet to exert control over Ministers and the public service, which is fundamental to the Government's capacity to act.⁴⁴

Collective Cabinet responsibility may be divided into three elements: confidence, unanimity, and confidentiality.⁴⁵ The confidence element requires that the Government always enjoy the confidence of Parliament.⁴⁶ This is supported by the unanimity principle, which requires that all Ministers publicly support Cabinet decisions.⁴⁷ Except where unanimity is waived, a Minister is expected to resign from Cabinet before disagreeing publicly with a Cabinet decision or policy.⁴⁸ In turn, Cabinet discussions must remain confidential in order to uphold the appearance of unanimity.⁴⁹ This also facilitates the effectiveness of the confidence convention.⁵⁰

44 McLeay *The Cabinet and Political Power in New Zealand*, above n 39, 200.

45 Geoffrey Marshall *Constitutional Conventions: The Rules and Forms of Political Accountability* (Clarendon Press, Oxford, 1984) 55.

46 Dicey, above n 43, 420; Jennings *Cabinet Government*, above n 42, 18. The increased likelihood of minority government and majority or minority coalition government under MMP makes the confidence of Parliament less assured than was the case under FPP. In practice, Cabinet has never lost the confidence of Parliament under MMP. However, the issue of confidence has been the subject of intense negotiations. For example, between 1996 and 1999, the National-led Government variously had to rely for support on NZ First as coalition partner, ACT New Zealand and the United Party as support parties outside government, and independent MPs. The confidence element has thus been revitalised in the modern political context.

47 Jennings *Cabinet Government*, above n 42, 277.

48 O Hood Phillips and Paul Jackson *O Hood Phillips' Constitutional and Administrative Law* (7 ed, Sweet and Maxwell, London, 1987) 125. A developing exception to unanimity can be attributed to MMP's promotion of coalition government. In particular, the 1999 Labour-Alliance coalition agreement included a clause, which stated that, on matters of "party distinction", parties within the coalition Cabinet may agree to disagree: Coalition Agreement between the Labour and Alliance Parties <<http://www.executive.govt.nz/coalition/>> (last accessed 22 April 2003); see also Cabinet Office *Cabinet Manual 2001*, above n 21, 46. However, this exception does not undermine the purpose of unanimity; all Cabinet members are still required to implement in good faith the decisions on which they have disagreed. Thus, they are still accountable publicly and in Parliament for the effects of decisions.

49 Matthew S R Palmer "Ministerial Responsibility versus Chief Executive Accountability: Conflict or Complement?" (Paper presented at the Institute for International Research conference on Analysing and Understanding Crucial Developments in Public Law, Wellington, 4 April 2001) 5.

50 The confidentiality principle has undergone some change. Cabinet papers, minutes, and discussions are now subject to release under the OIA, s 12. Because the OIA opens up government to a much greater degree of scrutiny, confidentiality and unanimity may be eroded. However, oral Cabinet discussions are usually withheld under provisions protecting constitutional conventions. These may relate to collective and individual ministerial responsibility (s 9(2)(f)(ii)), or to the confidentiality of advice tendered by Ministers of the Crown and officials (s 9(2)(f)(iv)). Alternatively, information may be withheld because release would prejudice the effective conduct

2 Individual ministerial responsibility

Cabinet Ministers are individually responsible to Parliament for matters within their portfolios.⁵¹ This convention reinforces Parliament's role in holding government to account. It allows individual ministerial action to come under the scrutiny of the House. It empowers Ministers in respect of public servants. And it reinforces collective Cabinet responsibility by allowing Cabinet to override individual Ministers,⁵² and thus to control and coordinate the public service and implement coherent policy.⁵³

But what is a Minister responsible for? This is usually divided into three categories.⁵⁴ *Primary* responsibility denotes responsibility for ministerial actions and decisions. *Personal* responsibility refers to personal actions that may impact on the office. Ministers also have *vicarious* responsibility for the actions of departmental public servants.

The personal responsibility element has undergone change in recent years. Claims of a breach of personal responsibility have in several cases been founded on *allegations*, rather than *proof*, of impropriety.⁵⁵ This may indicate a strengthening of personal responsibility. During the first Clark Government, breaches founded on allegations alone led in several cases to loss of ministerial portfolios.⁵⁶

Vicarious responsibility has also evolved. There have been recent publicised instances of Ministers' refusing to accept blame for the actions of public servants in their

of public affairs, either by deterring the free and frank expression of opinions between government actors or by exposing those actors to improper pressure or harassment (s 9(2)(g)). Thus, the OIA does not go to the heart of the convention. Cabinet as a collective must in general publicly support and be responsible to Parliament for all decisions. Making Cabinet documents available for public inspection does not undermine this principle.

51 Hood Phillips and Jackson, above n 48, 126; Palmer, above n 49, 10.

52 Jennings *Cabinet Government*, above n 42, 134.

53 Palmer, above n 49, 2.

54 Jennings *Cabinet Government*, above n 42, 498–499.

55 Palmer, above n 49, 8.

56 For example, in June 2000, Dover Samuels lost the Maori Affairs portfolio "in light of sexual allegations against him": "Ultimatum to Samuels: Resign, or be Sacked" (28 June 2000) *The Evening Post* Wellington 1. See also Ruth Berry "No Questions if I Had Stayed with Woman, Says Samuels" (28 June 2000) *The Evening Post* Wellington 3; Jonathan Milne "Maori Leaders who Pushed for Change" (29 June 2000) *The Dominion* Wellington 2. On the other hand, enforcement of the principle in this way may in the long run turn out to have been an aberration rather than evidence of evolution.

departments, and publicly criticising them.⁵⁷ This may be attributable to more transparent departmental processes and the move towards some direct accountability of public servants.⁵⁸ In the changed political context, it may no longer be appropriate for a Minister to accept responsibility for errors that are publicly known to be the fault of or within the sphere of responsibility of public servants. This does not, however, lessen the Minister's obligation to make an explanation to Parliament and attempt to correct the error. The convention of vicarious responsibility is still generally regarded as governing ministerial behaviour. It and the other elements of individual ministerial responsibility remain elements of the political framework.

C Public Servant Conventions

Public servants are employed under the State Sector Act 1988. Their role is to provide expert policy advice to Ministers and to implement government policy.⁵⁹ Constitutional conventions relating to the public service seek to safeguard the integrity of advice given to Ministers, and to ensure that the powers of government are exercised by Ministers and not by public servants. Since there must be democratic accountability for the exercise of government power, it would be inappropriate for unelected public servants to usurp that power from responsible Ministers.⁶⁰ The constitutional conventions that guide the work of public servants are loyalty, neutrality, and anonymity.

1 Loyalty

Public servants have a duty to be loyal to the government of the day. They must carry out the valid commands of their Minister in good faith and to the best of their ability.⁶¹ They should not bring the Minister into disrepute in any way.⁶² Underlying these principles is the rule that the actions of public servants lack legitimacy without valid authority. Responsible Ministers, and not public servants, must exercise the power of

57 For example, Prime Minister Helen Clark publicly criticised Ministry of Defence officials after they leaked information to Opposition MPs, saying that "pimping" happens "whenever there is some kind of hissy-fit going on in defence headquarters": Phil Taylor "A Very Modern Major General" (23 September 2001) *Sunday Star Times* Auckland 11. See also James, above n 4, 27.

58 Joseph, above n 10, 289.

59 State Services Commission *Public Service Code of Conduct* (State Services Commission, Wellington, 2001) 8–9.

60 Jennings *Cabinet Government*, above n 42, 118–119; Dicey, above n 43, 325.

61 Cabinet Office *Cabinet Manual 2001*, above n 21, 34; State Services Commission *Public Service Code of Conduct*, above n 59, 19–20; Palmer, above n 49, 12.

62 Palmer, above n 49, 12.

government. The principles also allow effective and properly informed development of policy and running of government.

Two key reforms described earlier have impacted on the convention of loyalty. The first is the adoption of MMP. In the context of coalition government, public servants are often under the command of Ministers belonging to two or more political parties. This may result in their being faced with conflicting instructions.⁶³ In such cases, public servants may notify other Ministers or the Cabinet in order to resolve the issue. However, coalition government creates a particular tension within the convention of loyalty to the government of the day, and is one which may have repercussions in the other two main public service conventions.

The second important political change in this regard is the reform of the state sector. The separation of governance and operation has bestowed responsibilities on departmental chief executives personally, and has thus created a specific exception to the duty of loyalty, at least for chief executives. Moreover, as public servants are often personally accountable for their actions, they face incentives to act in their own interests, and not solely in those of their Ministers. In addition, the question of who has responsibility for a given issue may not always be easy to answer. These factors complicate and weaken the loyalty convention.

While the loyalty convention has come under increased strain, generally speaking it still guides the behaviour of public servants.⁶⁴ Indeed, the inroads into the convention may be justified by the corresponding enhancement of other constitutional principles and of government effectiveness, efficiency, and accountability generally.

2 *Neutrality*

Public service loyalty is tempered by the obligation to act in a politically neutral manner.⁶⁵ All New Zealand public servants are theoretically apolitical and their employment is not connected to a particular government: their loyalty to the government of the day must not affect their ability to be loyal to future governments.⁶⁶ Neutrality allows for a permanent public service, with the advantage that each department holds "a

⁶³ James, above n 4, 20–21.

⁶⁴ James, above n 4, 71–72.

⁶⁵ Cabinet Office *Cabinet Manual 2001*, above n 21, 34; State Services Commission *Public Service Code of Conduct*, above n 59, 9; Jennings *Cabinet Government*, above n 42, 127–128.

⁶⁶ Palmer, above n 49, 13.

body of knowledge and experience—a corporate memory".⁶⁷ This accumulated experience is of benefit to a government, particularly at the beginning of a parliamentary term.

Like the principle of loyalty, the neutrality principle has arguably been modified, or at least strained, in recent years. MMP has given rise to different pressures on public servants. In particular, coalition government has drawn them into political negotiations and partisan policy disputes much more than was the case under the previous system of single party majority government.⁶⁸ This should not be overstated; politicking is not generally carried out by public servants,⁶⁹ but the risk remains.

Requests for official information under the OIA can expose public servant advice to public scrutiny, which may evidence differences of opinion among public servants and between Ministers and public servants.⁷⁰ This may undermine the public perception of officials' neutrality.⁷¹ However, the Act allows the withholding of information to protect neutrality.⁷² In reality, although public service neutrality may be at risk from time to time, it has not come under serious challenge from the move to more open government. Neutrality remains a relevant constitutional convention, and one which does in fact guide the behaviour of public servants.

3 *Anonymity*

The principle of anonymity is closely related to individual ministerial responsibility. It requires that the relevant Minister speak for and defend the actions of public servants.⁷³ This convention reflects the idea of a seamless relationship between Ministers and public servants, and buttresses loyalty and neutrality: by avoiding personal publicity, public servants avoid appearing to have personal political persuasions.⁷⁴

67 Sir Richard Wilson (Speech, 26 March 2002) 2 <<http://www.civilservant.org.uk/srwspeech0302.pdf>> (last accessed 25 June 2002). See also Jennings *Cabinet Government*, above n 42, 123.

68 Palmer, above n 49, 13.

69 James, above n 4, 62.

70 Arnikka MacIntyre-Daly "The Political Neutrality of the Public Service" (LLB(Hons) Research Paper, Victoria University of Wellington, 2002) 38.

71 Shaw, above n 6, 149.

72 Official Information Act 1982, s 9(2)(f)(iii).

73 Marshall, above n 45, 66.

74 Joseph, above n 10, 298–299; Palmer, above n 49, 13.

The state sector reforms have had particular consequences for anonymity.⁷⁵ Chief executives have responsibilities for which they are personally answerable to the media and the public.⁷⁶ This increases the likelihood of their becoming well-known. Open government has also contributed to an erosion of anonymity since it allows departmental processes to be scrutinised by the public.⁷⁷ In practice, it is still exceptional and frowned upon for a public servant personally to establish a public profile;⁷⁸ the few cases that have arisen appear not to have brought the loyalty or neutrality of the public service as a whole into question.⁷⁹

In addition to these institutional changes, it has been argued that there is a general trend towards Ministers' publicly naming and criticising public servants,⁸⁰ with a corresponding undermining of anonymity and increased risk of politicisation of officials.⁸¹ This argument should perhaps not be overstated: instances of attack of public officials have been relatively few and have mainly occurred under the Clark Government,⁸² and it may be premature to conclude that the convention has been significantly eroded. Nevertheless, like the other constitutional conventions discussed here, it has been placed under strain, with a resultant impact on the relationship between Ministers and public servants.

D Conclusion

In theory, the Minister-public servant relationship is a seamless one, founded on openness and trust.⁸³ Such a relationship facilitates government accountability and ensures the Government's ability to act. Ministers must be able to be held to account, through Parliament, for the actions of public servants within the scope of their portfolios; Ministers

75 See Joseph, above n 10, 299; Martin "Advisers and Bureaucrats", above n 23, 108.

76 MacIntyre-Daly, above n 70, 21; Palmer, above n 49, 14.

77 Joseph, above n 10, 288; James, above n 4, 16.

78 A (rare) example is that of former Chief Executive of the Department of Work and Income, Christine Rankin, criticised for creating a notorious public profile. See Simon Beattie "Agony but no Ecstasy for Public Servants" (4 August 2001) *Sunday Star Times* Auckland 5.

79 MacIntyre-Daly, above n 70, 43, 56.

80 "Loyalty Has to be Earned" (27 September 2002) *The Dominion Post* Wellington 4; Palmer, above n 49, 15.

81 MacIntyre-Daly, above n 70, 37.

82 "Loyalty Has to be Earned," above n 80; Bernie Steeds "Prophet's Recipe for Egg on the Face" (11 January 2002) *The Evening Post* Wellington 4.

83 Jennings *Cabinet Government*, above n 42, 126.

must also have a strong relationship with the public servants who serve them, to allow for effective communication and implementation of government policy.

The relationship has become more politicised, as a consequence of the MMP environment, increased media and public scrutiny in the context of open government, and direct accountability mechanisms.⁸⁴ Coalition government has on occasion drawn public servants into political negotiations, due to the need for bargaining and compromise.⁸⁵

Related to this change, there has been some undermining of the trust between Ministers and public servants. Of course, the degree of trust depends in any case on the particular individuals involved. Nevertheless, it can be argued that a more participatory policy process and the fear of policy capture by public servants have harmed the Minister–public servant relationship—particularly under the Labour-led Government, which following its assumption of office in 1999 displayed a certain mistrust of public servants, due to lengthy periods in Opposition.⁸⁶ This in itself is not evidence of a more general decline in the relationship: trust has built up over the course of the current Government's period in office.⁸⁷ It is, however, clear that an incoming Minister will not necessarily have a close and trusting relationship with public servants—particularly where the Minister was previously the Opposition spokesperson on the subject of his or her ministerial portfolio, and in that capacity was critical of the department concerned.⁸⁸

A strained relationship may impact on the effectiveness of policy advice and implementation, and may limit the extent to which Ministers can be responsible for the actions of public servants. Further, public servants' becoming linked to a party-political agenda runs counter to the basis of their relationship with Ministers, and undermines the constitutional framework. Hence, while the guiding constitutional conventions still hold, there are problems in the relationship between Ministers and their public servants—problems which need to be addressed. Mitigating the strain in this relationship would both

84 The relationship between Minister of Maori Affairs, Hon Parekura Horomia, and Te Puni Kokiri Chief Executive Leith Comer was the subject of political debate in mid-2003. In particular, Comer publicly took responsibility for giving the Minister incorrect answers to parliamentary questions. See Nick Venter "Where Controversy Strikes, Often" (20 June 2003) *The Press* Christchurch 11; MacIntyre-Daly, above n 70, 44–45.

85 Palmer, above n 49, 13.

86 James, above n 4, 61; Nick Venter "Are You Listening, Minister?" (4 October 2000) *The Dominion* Wellington 11.

87 Interview with Chris Eichbaum, former Adviser to Hon Steve Maharey (the author, Wellington, 8 September 2003); MacIntyre-Daly, above n 70, 43; James, above n 4, 61.

88 Interview with Hon Murray McCully MP (the author, Wellington, 6 August 2003).

increase the effectiveness of government and lessen the strain on the guiding constitutional conventions.

It is in the context set out above that Ministers' personal appointees act. The next section of this paper traces the emergence of personal appointees and seeks to identify their constitutional position.

IV PERSONAL APPOINTEES

A *The Development of Personal Appointees*

The practice of making personal appointments to Ministers' offices first emerged in New Zealand in 1984, when the incoming Fourth Labour Government appointed "advisers" to many portfolios.⁸⁹ These appointments were made on the basis that they were "compatible with the Minister rather than because of party allegiance";⁹⁰ but on the other hand, the advisers were not the usual variety of neutral public servants seconded from departments. The Bolger-led National Government, which came to power in 1990, also appointed advisers to Ministers' offices, if to a somewhat lesser extent than the previous Labour administration.⁹¹ From about the late 1980s, press secretaries have tended to be personal appointees rather than secondees.⁹² More recently, personal appointments have been made on the basis of specific policy expertise.⁹³

The number of advisers in Ministers' offices has expanded considerably in recent years. From December 1989 to October 1999 many Ministers' offices employed no advisers; for those that did appoint them, the maximum number in any office did not exceed three.⁹⁴ It is possible that during that time other staff under different job titles may have been performing advisory roles;⁹⁵ but in any event, recent data shows a clear upwards trend, with a total of 11 ministerial advisers by October 2000, 14 by September 2001, 17 by October 2002, and 25 by June 2003. Over that period, the average adviser's salary increased from \$65,333 to \$71,396. This means the total cost of advisers' salaries as at October 2000

89 Interview with Peter Harris, former Economic Adviser to Hon Dr Michael Cullen (the author, Wellington, 25 September 2003).

90 Simon King *Regulating the Behaviour of Ministers, Special Advisers and Public Servants* (The Constitution Unit, London, 2003) 51.

91 King, above n 90, 51.

92 McCully interview, above n 88.

93 Harris interview, above n 89.

94 This data was obtained as a result of a request under the OIA to Ministerial Services, Department of Internal Affairs.

95 Richard Lodge, Executive Manager, Ministerial Services (letter to the author, 18 September 2003).

was around \$718,663, and as at June 2003, about \$1,798,400. In contrast, between December 1989 and June 2003, the total number of ministerial press secretaries varied between 20 and 27.

Thus, since the 1980s and particularly in the last few years Ministers have increasingly included personal appointees as part of their office staff as a matter of course.⁹⁶ The personal appointee is a new actor in New Zealand's constitutional structure, whose role may not entirely conform with fundamental principles of our system of government.

B The Constitutional Position of Personal Appointees

Clear distinctions between the various types of staff employed in Ministers' offices are not always easy to draw. Some private secretaries, for example, act in a politically neutral manner and are employed under governments of different political persuasions. But many are political appointees with a particularly close advisory relationship with their Ministers.⁹⁷ Likewise, some ostensibly political appointees, for example many executive assistants, in practice undertake few functions that a neutral departmental secondee could not legitimately fulfil. There is a continuum, between absolute neutrality and overt political partisanship.⁹⁸ Further blurring of the political and the administrative stems from the fact that work is often undertaken by the staff as a team, with neutral and partisan staff working closely together.⁹⁹

Personal appointees are formally employed in the same way as public servants, except that they are usually employed on events-based contracts rather than permanently.¹⁰⁰ They may perform similar functions to public servants: for example they may provide Ministers with policy advice.¹⁰¹ But the position of a personal appointee otherwise differs markedly from that of a public servant seconded from a department to a Minister's office:

96 James, above n 4, 59; John Henderson "The Prime Minister" in Miller *New Zealand Politics in Transition*, above n 38, 76.

97 Interview with Luke MacMahon, Senior Adviser to Hon Phil Goff (the author, Wellington, 10 September, 2003).

98 McCully interview, above n 88; Harris interview, above n 89.

99 MacMahon interview, above n 97; Eichbaum interview, above n 87.

100 James, above n 4, 60; Chris Eichbaum and Richard Shaw "A Third Force? Ministerial Advisers in the Executive" (unpublished paper, Victoria University of Wellington School of Government, 2003); King, above n 90, 51.

101 McCully interview, above n 88.

departmental secondees remain employees of and retain strong links with their ministries; personal appointees work directly and solely under the command of their Ministers.¹⁰²

Public servants are subject to the constitutional conventions discussed earlier: loyalty, neutrality, and anonymity. But are personal appointees subject to the same conventions?

Sir Ivor Jennings formulated a three-part test for determining the existence of a constitutional convention:¹⁰³ (1) What are the precedents? (2) Did the actors in the precedents believe that they were bound by a rule? (3) Is there a reason for the rule? These questions can also be used to assess the behaviour of personal appointees against the public servant constitutional conventions.

What, then, are the precedents? The evidence indicates that personal appointees act in a partisan rather than a politically neutral manner. The ministerial adviser job profile includes responsibilities and tasks of an inherently political nature, such as "providing political oversight" and "providing input into the government's strategic planning".¹⁰⁴ The most trusted and high-powered personal appointees may even be involved in influencing the strategic direction of government.¹⁰⁵ On the other hand, when it comes to loyalty to the Minister, personal appointees appear to act as public servants. Most are perceived as being completely loyal to their Minister.¹⁰⁶ They are also, like public servants, largely anonymous: the Minister is the public face of the ministerial office, and there is an almost total lack of public awareness of the role of personal appointees. Unlike in the United Kingdom, no personal appointee in New Zealand to date has established a personal public profile.¹⁰⁷

The second question is whether personal appointees believe they are bound to act loyally, anonymously, and neutrally. As to the first two, it appears that they almost invariably do. Their ability to perform politically sensitive functions demands that they remain anonymous and loyal—the latter being of particular importance given that Ministers may be held to account for the actions of personal appointees. But when it comes to the neutrality element, personal appointees clearly believe they are not bound in the same way.¹⁰⁸ Indeed, political neutrality would undermine their functions of providing

¹⁰² James, above n 4, 60.

¹⁰³ Jennings *The Law and the Constitution*, above n 9, 136.

¹⁰⁴ Ministerial Services *Job Profile: Ministerial Advisor*, above n 7, 3.

¹⁰⁵ Ministerial Services *Job Profile: Ministerial Advisor*, above n 7, 3.

¹⁰⁶ Eichbaum interview, above n 87.

¹⁰⁷ McDonald, above n 3, 7.

¹⁰⁸ MacMahon interview, above n 97.

explicitly partisan advice and managing political risk.¹⁰⁹ On this point, personal appointees, while legally identical to public servants, are constitutionally distinct. While subject to the public servant conventions of loyalty and anonymity, they are *not* subject to that of neutrality.

The functions and degrees of influence of particular personal appointees vary widely, given their different prior expertise and involvement in political life, and the different characteristics and qualities of government departments and Ministers themselves.¹¹⁰ Nevertheless, three broad types of personal appointee may be identified.¹¹¹

The first is that of the political adviser, such as a party leader's chief of staff. The role of political advisers may include responsibility for intra-coalition and intra-party negotiations: policy positions, coalition disputes, party disputes, disciplinary matters in respect of Ministers and MPs. The role may also involve management of media issues on behalf of the Minister, including putting a party political perspective on policy and on answers to parliamentary questions.¹¹² Personal appointees of this type are usually experienced and respected, and may therefore become closely involved in influencing the strategic direction of government.

The second type of personal appointee is the policy adviser. Policy advisers usually undertake a role similar to that of a public servant, with the difference that the advice they give to the Minister is openly partisan. They may also put a party political slant on public servant policy advice and assess its political implications. Policy advisers are also likely to be involved in managing media issues and in mediating and transferring messages between Ministers and public servants.

The third, and least influential, type of personal appointee (often a recent university graduate or other junior member of the office) carries out mainly administrative functions such as maintaining the Minister's diary.

All three types of personal appointee make a valuable contribution to the modern New Zealand political framework. They fulfil a distinctive and important function in the changed political context, which neither politicians nor public servants are able to undertake, and in so doing are of benefit to both Ministers and public servants.

109 Shaw, above n 6, 153.

110 Ministerial Services *Job Profile: Press Secretary* (Wellington, 2003) 1.

111 Eichbaum interview, above n 87; MacMahon interview, above n 97.

112 Shaw, above n 6, 153; James, above n 4, 20.

C *The Role and Value of Personal Appointees*

1 *The New Zealand political framework*

The real difficulty with the Prime Minister's office is that it has insufficient people to deal with the amount of work. Chief of staff Heather Simpson has really acted as a sieve on all policy issues and she has had the job of keeping the Coalition together and managing that as well. If political management is to be effective, the Leader needs a strong office and MMP has added to the problems of co-ordination enormously. There are so many different groups that now have to be consulted that the amount of work has expanded exponentially.¹¹³

Given the reduction in the size of the public service since the 1980s, and given that earlier governments functioned effectively without the help of personal advisers, are they really necessary? Are they an unjustified burden on the taxpayer?¹¹⁴ Is their proliferation a desperate response to the declining fortunes of governing parties?¹¹⁵ Or are they in fact an indispensable feature of the modern political context?

(a) Open government

Open government and the mass media place great pressure on Ministers' offices to explain and defend government policies. Traditionally, this work has been undertaken by public servants. Increasingly, however, Ministers require political assistance in responding to media and parliamentary questions.¹¹⁶ Requiring public servants to put a political "spin" on such issues would call into question their neutrality and place strain on their relationship with Ministers. Such functions may in fact be better undertaken by openly partisan personal appointees.¹¹⁷

(b) State sector reforms

Public sector reforms have also had repercussions for the use of personal appointees – particularly as chief executives of government departments have been given explicit responsibilities. This has implications for the theoretically seamless relationship between Ministers and public servants, with some senior public servants being thrust into the

113 Chen Palmer and Partners *Wellington Watch* (11 October 2002) 3 <<http://www.brookers.co.nz/wellingtonwatch/issues/2002/111002.DOC>> (last accessed 2 August 2003).

114 Hon Roger Sowry MP "Beehive Staff List Grows as Labour's Luck Runs Out" (Media Release, National Party, 1 June 2003) <<http://national.org.nz/wcontent.asp?PageID=100015414>> (last accessed 3 June 2003).

115 Sowry, above n 114.

116 Joseph, above n 10, 299.

117 Martin "Advisers and Bureaucrats", above n 23, 114–115.

public eye in relation to particular policy issues.¹¹⁸ Here, personal appointees can be valuable to both Ministers and public servants in lessening the tensions on the guiding constitutional conventions.

(c) Electoral system change

The change from FPP to MMP has had a significant impact on the need for personal appointees. Coalition formation and management are now an important feature of New Zealand politics. These are areas into which it would be constitutionally inappropriate for politically neutral public servants to enter; indeed, State Services Commission guidelines provide that, as a matter of principle, "[o]fficials are not involved in or present during actual [coalition] negotiations".¹¹⁹

2 *The contribution of personal appointees*

(a) Political advice

Personal appointees are often instrumental in a government's intra-coalition negotiations. For example, Jim Anderton's chief of staff Andrew Ladley played a key role in drafting the Labour–Alliance coalition agreement following the 1999 general election. This experience illustrates the advantage of having personal appointees, rather than politicians, construct such an agreement: Ladley brought the experience of a constitutional law expert to the task of coalition formation. The coalition agreement resulted in the successful modification of the constitutional convention of collective Cabinet responsibility, by incorporating an "agree to disagree" exception.¹²⁰ It would therefore appear that Ladley materially contributed to developing processes of successful government formation. He and the Prime Minister's chief of staff, Heather Simpson,

118 MacIntyre-Daly, above n 70, 36; James, above n 4, 72.

119 State Services Commission *Negotiations between Political Parties to Form a Government: Guidelines on Support from the State Sector* (Wellington, 2002) 1.

120 The Coalition Agreement between the Labour and Alliance Parties includes the following (<<http://www.executive.govt.nz/coalition/>> (last accessed 22 April 2003)):

Where either party leader considers that a distinctive policy matter raises an issue of importance to the party's political identity, the leader will raise this with the coalition management committee which will resolve an appropriate course of action, including possibly identifying the matter as one of "party distinction." In this event there may be public differentiation between the parties in speech and vote which will not be regarded as being in breach of the convention. Such issues are expected to be infrequent and the parties recognise that dealing with them openly and responsibly is critical to the credibility of the coalition. Differentiation on such issues will not detract from the overall acceptance that the two parties are taking joint responsibility for the actions of the government.

subsequently dealt with ongoing negotiations between the Labour and Alliance coalition partners.¹²¹

Personal appointees undertake vital work in the coalition arena, to which other government actors are ill-suited.¹²² While each party in a coalition has a vested interest in ensuring the coalition is successful, each party also attempts to distinguish itself from the other in order to maximise electoral appeal. Party discipline conventions do not apply between parties, so disagreement cannot be as readily quashed as it can be in the case of intra-party disputes. Having Simpson and Ladley strike the deals may have been advantageous in that they were removed from immediate political tensions and incentives. In this sense they can be seen as mediators between politicians. Being in a close and trusting relationship with Clark and Anderton also allowed them easy access to Ministers. The substantial role played by Simpson and Ladley and the relatively smooth running of the Labour-Alliance coalition suggests that personal appointees can have a positive impact on intra-coalition processes.

In the current environment of open government, corporate departmental structures, and MMP, chief executives occasionally come under attack from Ministers as well as the general public. In these situations, personal appointees undertake political tasks that would otherwise fall to public servants. For example, it was suggested when MMP was first introduced that public servants may be required to facilitate coalition formation.¹²³ This would be undesirable, since it is a highly political function, far better suited to personal appointees.¹²⁴

The political work of personal appointees also includes answering or putting a party-political spin on answers to parliamentary questions, and managing media issues.¹²⁵ These are areas in which it may be difficult or even inappropriate for a public servant to engage.¹²⁶ It is also important that a Minister be able to convey his or her policies and views to the public through the media.¹²⁷ Many public servants will not have the media

¹²¹ James, above n 4, 20.

¹²² McCully interview, above n 88.

¹²³ Martin "Advisers and Bureaucrats", above n 23, 114.

¹²⁴ MacMahon interview, above n 97.

¹²⁵ Eichbaum interview, above n 87; James, above n 4, 20.

¹²⁶ Interview with Matthew Palmer, former Deputy Secretary for Justice (Public Law) and former Manager of the Law and Treaty section at Treasury (the author, Wellington, 16 September 2003).

¹²⁷ McCully interview, above n 88.

expertise required for these tasks—and deliberate politicisation of policy advice by public servants would run counter to the neutrality convention.

The media work of personal appointees is seen by some observers as inherently objectionable "spin" that only misleads the public. This is especially so when skilled personal appointees are perceived to have influence over reporters or a dominant voice in the media.¹²⁸ An example of this arises out of the "Corngate" scandal of 2000, following an accidental release of genetically modified corn. A parliamentary inquiry investigated whether Prime Minister Helen Clark and other key Ministers knew of the release but kept it from the public.¹²⁹ As the scandal unfolded, Clark stated that she would not hide any information and in fact released about 1800 pages of documents to the media.¹³⁰ However, Mark Prebble, Chief Executive of the Department of Prime Minister and Cabinet, withheld several crucial documents on the grounds of constitutional convention.¹³¹ Clark claimed that these were withheld against her instructions;¹³² a claim supported by a memo from adviser Ruth Wilkie, which expressed disapproval at Prebble's decision to withhold the information.¹³³

What the Corngate scandal indicates is that the advantage of having ministerial staff undertake media work must not be allowed to undermine the public's interest in balanced and accurate information about the workings of government. Corngate also revealed that ministerial staff may in fact exercise some executive powers autonomously—a matter discussed below.

The media work of personal appointees does not appear to create tensions in relationships between personal appointees, public servants, and Ministers. This is because the various roles are well defined, and also because the personal appointees who are involved with the media tend to respect the neutrality of public servants.¹³⁴

The most important objection to the nature of the work of political advisers arises from their degree of influence. Personal appointees in this capacity are said to undermine the relationship between Ministers and public servants: because they are interposed between

128 McDonald, above n 3, 7.

129 "MPs Point to Corngate 'Cover-up'" (28 August 2003) *The Dominion Post* Wellington 3.

130 Tracy Watkins "Seeds of Distrust" (1 September 2003) *The Dominion Post* Wellington 5.

131 "Difficult Issue" (29 August 2003) *The Press* Christchurch 10.

132 Leah Haines "Did the Prime Minister Know?" (29 August 2003) *The Dominion Post* Wellington 1.

133 Haines, above n 132.

134 Palmer interview, above n 126.

these two actors, they may issue instructions to public servants that do not reflect commands from Ministers.¹³⁵ This tendency may also work in the opposite direction. This objection has far-reaching implications and lies at the heart of the constitutional tensions surrounding personal appointees. Insofar as personal appointees issue their own instructions to public servants, they are usurping the role of the Minister.

The exercise of government power must be democratically accountable. However, if personal appointees exercise government power themselves, that accountability is lost, since they are not responsible to Parliament. Nor will government policy be implemented as intended if it is not conveyed as intended. On the other hand, it is entirely legitimate and practically necessary for Ministers to use staff as filters on the advice they receive, due to the volume and variety of issues with which they must deal. Instructions to a public servant from a personal appointee acting autonomously may be justified. Personal appointees will often instinctively know a Minister's preferences due to their close professional and personal proximity to the Minister; in many cases, a Minister will have implicitly authorised instructions issued on this basis.¹³⁶ This is an efficient use of a personal appointee; indeed, the ability to know the preferences of the Minister is an important measure of a personal appointee's capability.¹³⁷ Ministers would have little use for personal appointees if they were forced to give explicit instructions regarding every task they performed.¹³⁸

Implicit approval as an efficiency device must be distinguished from the situation of a personal appointee asserting ministerial power without authority. Ministers and advisers interviewed in the preparation of this paper maintained that the exercise of independent power by personal appointees happens extremely rarely, if at all.¹³⁹ But usurpation of executive power in this way is a potential problem within the current framework,¹⁴⁰ and the public perception that it does happen creates tensions between public servants, Ministers, and personal appointees.

¹³⁵ James, above n 4, 60–61.

¹³⁶ Eichbaum interview, above n 87.

¹³⁷ McCully interview, above n 88.

¹³⁸ Interview with Hon Steve Maharey MP (the author, Wellington, 24 September 2003).

¹³⁹ Maharey interview, above n 138; Eichbaum interview, above n 87; MacMahon interview, above n 97.

¹⁴⁰ Palmer interview, above n 126; Maharey interview, above n 138.

(b) Policy advice

A key function of many personal appointees is the provision of policy advice additional to that provided by public servants.¹⁴¹ Many personal appointments are based as much on expertise in a policy area as they are on political skill.¹⁴² Thus, while these appointees share the broad political philosophies of their Minister, they may be primarily concerned with providing balanced expert policy advice.¹⁴³ This places their role close to that of a seconded public servant. To the extent that they are openly partisan, they can provide a useful party political perspective on policy—a perspective which would be inappropriate coming from a public servant.

Policy advice from someone whom the Minister trusts and whose ideological and personal views are known to the Minister may provide a useful alternative to public service policy advice.¹⁴⁴ A personal appointee with policy expertise can also ensure the Minister is being given well-formulated and credible advice. In fact, "[a] good part of the reason Ministers bring in personal appointees is that they feel they do not get quality advice from their departments".¹⁴⁵

Policy advice from outside the public service is also valuable from a public choice theory perspective. Public choice theory assumes that bureaucrats' advice is tailored towards securing benefits for their department.¹⁴⁶ Advice from a personal appointee, who does not have the same vested interest in the resulting policy, may thus balance public service advice.¹⁴⁷ In 1998–1999, for example, the Minister in charge of the accident compensation portfolio, Hon Murray McCully, sought to introduce competition from private sector insurers to the accident compensation scheme.¹⁴⁸ It would have been problematic for public servants to have given policy advice on this issue: for one thing because of its potential effect on their personal interests; for another because the departmental chief executive decides on the role a secondee will take up when he or she

141 James, above n 4, 61.

142 Eichbaum interview, above n 87; MacMahon interview, above n 97.

143 McCully interview, above n 88.

144 James, above n 4, 61.

145 James, above n 4, 67.

146 William A Niskanen *Bureaucracy: Servant or Master?* (Institute of Economic Affairs, Great Britain, 1973) 22; Peter Self *Government by the Market? The Politics of Public Choice* (MacMillan, Hong Kong, 1993) 33; Shaw, above n 6, 147–148.

147 Maharey interview, above n 138.

148 Hon Murray McCully MP (email to the author, 24 April 2003).

returns to the department, and this may taint a secondee's advice where, as in this situation, the chief executive has a vested interest in policy outcomes.¹⁴⁹

Regardless of the actual motivations of public service policy advice, Ministers may lack the personal specialist expertise to evaluate that advice, particularly in the New Zealand system in which Ministers are first and foremost politicians and not usually experts in the field of their portfolio.¹⁵⁰ Access to specialist advice from outside the public service is therefore useful to facilitate effective government.

Another aspect of the role of personally appointed policy advisers is that of acting as an intermediary between Ministers and public servants. Relationships between Ministers and public servants can be tense. An advantage of placing personal appointees between them is that a personal appointee can provide a buffer when advice is unpopular. Personal appointees may also mediate between Ministers and public servants, allowing arms-length conflict resolution in delicate situations.

Due to the need to work to other pressures, Ministers are not in constant contact with public servants in their departments, and are likely to have a direct relationship with only the chief executive. Personal appointees can provide Ministers with a link to public servants (and vice versa),¹⁵¹ acting as a preliminary check on messages passed between department and Minister and engaging with officials at all levels of departments.¹⁵² This is of significant benefit to both Minister and officials; personal appointees are also able to distil important policy issues before they are presented to a Minister, reducing demands on the Minister's time.

On the other hand, personal appointees as policy advisers may undermine the relationship between Ministers and public servants. Policy advice from personal appointees may be perceived to be usurping the role of public servants,¹⁵³ especially where personal appointees provide advice instead of, rather than as well as, public servants.¹⁵⁴ This situation is not constitutionally problematic, since public servants have no monopoly on providing Ministers with advice and influence. But it may impact on the Minister-public servant relationship. An example of this occurred in the office of Hon Dr Michael Cullen following the 1999 election. Despite being Minister of Finance, Cullen

149 McCully email, above n 148.

150 Jennings *Cabinet Government*, above n 42, 113. See also Boston, above n 11, 124-125.

151 Eichbaum interview, above n 87.

152 Eichbaum interview, above n 87.

153 James, above n 4, 61.

154 Shaw, above n 6, 155.

refused to employ a secondee from the Treasury in his office, relying instead on a personally appointed economic adviser.¹⁵⁵ Such situations create tensions in the Minister–public servant relationship.

Where Ministers feel as though public servants are not completely loyal to them, they may rely more on their personal appointees.¹⁵⁶ This may itself undermine the loyalty of public servants. It can also be argued that there is no evidence that receiving advice from more sources has contributed to the overall quality of advice. In fact, it may be seen as detrimental to government policy coherence,¹⁵⁷ as politically affiliated policy advisers are arguably more likely than neutral public servants to tell Ministers what they want to hear rather than what they need to hear.

Instead of conveying messages, personal appointees may block public servants' access to their Minister—something which is seen as a problem by many public servants.¹⁵⁸ In reality, blocking access seems to be more a function of constraints on Ministers' time than deliberate thwarting of public servants' objectives.¹⁵⁹ To the extent that "blocking" does occur, this is likely to be the wish of the Minister rather than that of the personal appointee.¹⁶⁰ Clearly, where a Minister needs to communicate information to public servants that may be received unfavourably, such as turning down a policy suggestion or a request for a meeting, it is expedient to delegate this task to a personal appointee.¹⁶¹ But the relationship of openness and trust between Ministers and public servants is inevitably eroded where this occurs.

To the extent that a personal appointee is increasingly likely to be consulted and included in discussions with the Minister, public servants may be left out.¹⁶² As a result, they may be ill informed as to the Minister's thinking. This will impact on their ability to implement government decisions and to formulate policy based on the Minister's objectives.

155 Harris interview, above n 89; Venter "Are You Listening, Minister?", above n 86, 11.

156 James, above n 4, 30.

157 Shaw, above n 6, 154.

158 Palmer interview, above n 126.

159 MacMahon interview, above n 97.

160 Palmer interview, above n 126.

161 Eichbaum interview, above n 87.

162 James, above n 4, 61; Venter "Are You Listening, Minister?", above n 86.

More broadly, it has been suggested that the presence of personal appointees undermines the neutrality convention in respect of public servants seconded to the Minister's office: working closely with officials who openly "share the Minister's political stance"¹⁶³ may raise questions about seconded public servants' neutrality.¹⁶⁴ Maintaining the neutrality of seconded public servants appears to be something that is at least attempted in Ministers' offices.¹⁶⁵ However, it has been suggested that some personal appointees' lack of understanding of the system of government may impede the ability to uphold public servants' neutrality.¹⁶⁶ If a personal appointee is not aware of the neutrality convention, he or she is unlikely to consider whether tasks being asked of public servants abrogate that convention. Many personal appointees are considered more senior than their public servant colleagues, and public servants may not feel easily able to decline work on the basis that it would conflict with the neutrality convention.¹⁶⁷ While it is arguable whether neutrality does in fact suffer under these circumstances, there is a clear risk that public perception may be affected – a risk exacerbated by the secret nature of the personal appointee's role.

In general, personal appointees play a useful role in the policy development process. The major concern with personally appointed policy advisers relates to the exacerbation of tensions between Ministers and public servants. This concern may be based more on a perception of deceptive dealings by personal appointees than on reality. However, the fact that tensions may often lack a real basis does not lessen their seriousness.

(c) Administrative functions

The administrative functions of personal appointees are the least controversial, since they are the least politically important and influential. An increased number of organisational staff is warranted by the greater complexity of government, as Ministers face more commitments and come under more intense pressure than ever before.¹⁶⁸ Administrative functions are usually undertaken by junior members of the office who are unlikely to have much influence over the Minister; their role need not be further considered here.

¹⁶³ James, above n 4, 28.

¹⁶⁴ Michael Wintringham *Annual Report of the State Services Commissioner* (State Services Commission, Wellington, 2002) 10.

¹⁶⁵ Eichbaum interview, above n 87; MacMahon interview, above n 97.

¹⁶⁶ Palmer interview, above n 126.

¹⁶⁷ Palmer interview, above n 126; Maharey interview, above n 138.

¹⁶⁸ James, above n 4, 61.

3 *Evaluation*

"Spin doctors", or those personal appointees who deal with media relations, may be seen as misleading or hiding information from the public. This erodes the public's confidence in its democratic representatives, especially given the perceived lack of accountability. Personal appointees can also be seen as usurping the constitutional function of Ministers, undermining the ability of Cabinet and Parliament to hold Ministers to account. Individual ministerial and collective Cabinet responsibility are undermined accordingly.

Personal appointees can also be detrimental to government in two other major ways, both stemming from the tendency of personal appointees to undermine the relationship between Ministers and public servants. First, a poor relationship impedes government effectiveness by preventing the smooth formulation and implementation of policy. Secondly, a poor relationship weakens the effectiveness of the constitutional controls on both Ministers and public servants: the loyalty and neutrality of the public service is eroded (or at least appears to be eroded). The latter problem is of particular concern since in any case it may not be clear which staff members are meant to be political and which neutral.

The next section examines the experiences of Australia and the United Kingdom, two countries whose systems of government are closely related to New Zealand's but with a more strongly established use of personally appointed ministerial advisers. As such, they provide guidance as to how the constitutionally and politically problematic aspects of the personal appointee's role may be ameliorated.

V PERSONAL APPOINTEES IN THE UNITED KINGDOM AND AUSTRALIA

A *Australia*

1 *Context*

As in New Zealand, the Australian Federal Government is based on responsible government, with power being exercised by a Cabinet regulated by the conventions of collective Cabinet responsibility and individual ministerial responsibility. As in New Zealand, individual ministerial responsibility has recently become attenuated as a result of direct scrutiny of public service actions. This has occurred through the establishment of "numerous procedures to scrutinise official actions, such as inquiry by the Ombudsman or parliamentary committees".¹⁶⁹

¹⁶⁹ Suri Ratnapala *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, South Melbourne, 2002) 39.

The Australian public service is governed by the Australian Public Service Act 1999 and is, like its New Zealand counterpart, theoretically apolitical. It has undergone reforms similar to those that have occurred in New Zealand,¹⁷⁰ including the devolution of some responsibilities to departmental chief executives.¹⁷¹ The reforms have also enhanced public service accountability and attempted to improve efficiency.¹⁷² Pressures on Ministers, public servants, and the relationships between these two actors are thus similar to those in New Zealand.¹⁷³

2 *Position and functions of personal appointees*

Personal appointees in Australia, first instituted under the Whitlam Government from 1972,¹⁷⁴ are commonly referred to as "ministerial advisers". Apart from seconded public servants, all ministerial staff in Australia are employed under the Members of Parliament (Staff) Act 1984 (Cth) (MoPSA).¹⁷⁵ They are thus explicitly distinguished from public servants. As in New Zealand, there has been almost continuous growth in numbers and influence of ministerial advisers since that time.¹⁷⁶ By 2003 there were over 370 government staff employed under the MoPSA.¹⁷⁷

There is general acceptance that ministerial advisers are a well established feature of federal Australian politics. They are seen as useful to government and the civil service,¹⁷⁸

170 King, above n 90, 23.

171 See for example Public Service Act 1999 (Cth), ss 20, 57; King, above n 90, 24.

172 King, above n 90, 23–24. See also Public Service Act 1999 (Cth); Financial Management and Accountability Act 1997 (Cth).

173 Parliament of Australia Senate Select Committee *Inquiry into a Certain Maritime Incident* (2002) 176 <http://www.aph.gov.au/senate/committee/maritime_incident_ctte/report/contents.htm> (last accessed 29 September 2003).

174 Maria Maley "Too Many or Too Few? The Increase in Federal Ministerial Advisers 1972–1999" (2000) 59(4) AJPA 48, 48.

175 *Inquiry into a Certain Maritime Incident*, above n 173, 174; Members of Parliament (Staff) Act 1984 (Cth) pt III.

176 Maley "Too Many or Too Few? The Increase in Federal Ministerial Advisers 1972–1999", above n 174, 48; Ian Holland "Accountability of Ministerial Staff?" (Research Paper no 19, Department of the Parliamentary Library, Canberra, 2001–2002) 19 <<http://www.aph.gov.au/library/pubs/rp/2001-02/02rp19.pdf>> (last accessed 10 September 2003).

177 Parliament of Australia Senate Finance and Public Administration References Committee *Staff Employed under the Members of Parliament (Staff) Act 1984* (2003) xi <http://www.aph.gov.au/Senate/committee/fapa_ctte/mops/report/report.pdf> (last accessed 28 August 2004).

178 "Shergold Speaks Out on the Quiet Revolution" (15 June 2003) *Canberra Times* Canberra 50; John Halligan and others *The Australian Public Service: The View from the Top* (Coopers and Lybrand, University of Canberra, 1996) 71.

and as central to the policy process to a much greater extent than is the case in New Zealand.¹⁷⁹ They offer a significant alternative to public service advice as well as facilitating relationships among other actors in the policy making process.¹⁸⁰

On the other hand, the objections raised in relation to personal appointees in New Zealand also apply in Australia. For example:¹⁸¹

"The activities of ministerial advisers can now significantly overlap those of both ministers and public servants, leading to confusion as to who should be responsible for what," [Meredith Edwards, head of the University of Canberra's National Institute of Governance and former Deputy Secretary at the Department of the Prime Minister and Cabinet] said. "The main factor leading to confusion would appear to be the assumption by ministerial advisers of executive authority. The increase in the roles and power of ministerial advisers can be argued to have contributed to a breakdown in governing processes."

And:¹⁸²

Rather than seek out the truth, staffers seek the best "spin" on an issue, whether it's the children overboard claim or Senator Bill Heffernan's allegations. Any information that does not fit with the spin is ignored or distorted. ... I wonder whether the PM's staff is capable of establishing the facts about anything. The spin-doctor culture encourages laziness and an inability to deal with the real world.

The assumption of executive authority is an important concern in respect of ministerial advisers. It has been suggested that some advisers' level of influence is such that in practice they are able to exercise executive authority independently of their Minister: that is, they are no longer purely the agents of their responsible Minister.¹⁸³

Ministerial advisers in Australia have been the subject of more academic and media scrutiny than is the case in New Zealand. Despite this, there has been little acknowledgement of their existence within the constitutional and political framework. The Prime Minister's *Guide on Key Elements of Ministerial Responsibility* refers to them only in

179 Maria Maley "Conceptualising Advisers' Policy Work: The Distinctive Policy Roles of Ministerial Advisers in the Keating Government, 1991-96" (2000) 35(3) *AJPS* 449-470; King, above n 90, 29.

180 *Inquiry into a Certain Maritime Incident*, above n 173, 175; King, above n 90, 29.

181 "Accountability: An Increasingly Vexed Question" (21 July 2002) *Canberra Times* Canberra 21.

182 "Political Culture Goes into a Spin" (23 March 2002) *The Weekend Australian* Australia 18.

183 *Inquiry into a Certain Maritime Incident*, above n 173, 173.

terms of avoiding conflicts of interest.¹⁸⁴ However, as mentioned, they are legally distinguished from neutral public servants.

Perceived problems with ministerial advisers in Australia have come to light as a result of scandals. Interestingly, given their prominence in the policy process, there has been much less public debate about the policy advice aspect of their role; rather, the focus has been on manipulation of the public through the media and illegitimate exercise of executive power.

An example of this occurred in relation to the "children overboard" affair.¹⁸⁵ The scandal arose several days prior to the 2001 election, after Ministers released pictures to the media which were said to show asylum-seekers on a ship off the coast of Australia threatening to throw children overboard in protest at not being allowed to enter Australia. It was subsequently revealed that no such threats were made; rather, the boat was sinking.¹⁸⁶

A Senate select committee inquired into these events. A request to question ministerial staff in the course of the inquiry was refused, by extension of the principle that MPs may not be compelled to appear before select committees.¹⁸⁷ Nevertheless, the committee found that ministerial staff were instrumental in either deliberately using the story for political advantage or at least failing to correct it promptly and publicly when it was found to be untrue.¹⁸⁸

The report concluded that there was "a serious accountability vacuum at the level of ministers' offices".¹⁸⁹ Accountability of advisers through their Ministers was found to be inadequate given that they were not always acting on the direction or with the knowledge and consent of Ministers.¹⁹⁰ The reformed Australian public sector incorporates separate accountability mechanisms for public servants beyond their accountability through their Minister. The committee considered that there was no reason why this should not extend

184 *A Guide on Key Elements of Ministerial Responsibility* (Prime Minister, Canberra, 1998) 20–21; *Inquiry into a Certain Maritime Incident*, above n 173, 173.

185 See David Solomon "Unelected Rulers" (16 March 2002) *Courier Mail Queensland* 32; "Accountability: An Increasingly Vexed Question", above n 181; "Ministers' Staff Get a Hiding" (27 October 2002) *Canberra Times* Canberra 52.

186 King, above n 90, 29; *Inquiry into a Certain Maritime Incident*, above n 173, chs 3–6.

187 *Inquiry into a Certain Maritime Incident*, above n 173, 177–178.

188 *Inquiry into a Certain Maritime Incident*, above n 173, 177.

189 *Inquiry into a Certain Maritime Incident*, above n 173, 173.

190 *Inquiry into a Certain Maritime Incident*, above n 173, 173, 186.

to Ministerial advisers, and concluded that the importance and influence of ministerial advisers, and the potential for abuse of power, justified their being subject to separate accountability mechanisms.¹⁹¹

The report made two specific recommendations. First, it advocated making advisers subject to parliamentary committee scrutiny in the same way as public servants. Secondly, it recommended that a legislative code of conduct and set of values be enacted, setting out the behavioural requirements for ministerial advisers and providing for redress for breach of the code.¹⁹²

Publicised political scandals involving ministerial advisers, such as the children overboard affair, have prompted further discussion on the regulation of advisers. The Senate Finance and Public Administration references committee reported on this issue in October 2003.¹⁹³

191 *Inquiry into a Certain Maritime Incident*, above n 173, 183.

192 *Inquiry into a Certain Maritime Incident*, above n 173, 187.

193 *Staff Employed under the Members of Parliament (Staff) Act 1984*, above n 177. The terms of reference of the Finance and Public Administration references committee's inquiry addressed:

- (a) the adequacy and appropriateness of the framework for employment and management of staff under the Members of Parliament (Staff) Act 1984 (the MOPS Act);
- (b) the role and functions of MOPS staff in assisting and advising their employers and interacting with the Australian Public Service and other stakeholder groups;
- (c) the remuneration and conditions of employment of MOPS staff;
- (d) the means by which MOPS staff are accountable to government, the Parliament and the public;
- (e) suitable means by which the accountability of MOPS staff could be enhanced;
- (f) the merits of introducing a code of conduct for MOPS staff reflecting the Values and Code of Conduct of the Public Service Act 1999, the key elements such a code should contain and the process by which such a code should be developed and introduced;
- (g) suitable means by which the accountability of the Government for the employment of MOPS staff can be enhanced;
- (h) the role of departmental liaison officers and their interaction with MOPS staff and departments; and
- (i) appropriate amendments to the MoPS Act flowing from the above.

The report, following an Inquiry into Members of Parliament Staff, addressed appearances by ministerial staff before select committees,¹⁹⁴ and recommended that Parliament and the Government agree on parameters to allow ministerial advisers to appear before select committees. This was not intended to weaken Ministers' obligations to take responsibility for their advisers' actions, but rather to strengthen accountability and transparency.¹⁹⁵

The report made several further recommendations. First, Government and Opposition office holders should be legally distinguished, to clarify that ministerial advisers are employed to implement government policies.¹⁹⁶ Further, MoPS staffing information should be available in the same way as for the public service and parliamentary service, by means of an annual report.¹⁹⁷ In addition, ministerial offices should be required to keep appropriate records.¹⁹⁸

The report also recommended that a code of conduct be implemented for ministerial staff.¹⁹⁹ The code would be promulgated by the Prime Minister and not incorporated into legislation.²⁰⁰ It would clarify that Ministers are responsible for their staff.²⁰¹ A position of ethics adviser should also be established. The position would have an educative role, helping ministerial staff adhere to their code of conduct.²⁰²

Finally, the report addressed the relationships between public servants, Ministers, and ministerial advisers.²⁰³ Of relevance is a recommendation that training be provided to inform public servants and ministerial staff about their respective roles.²⁰⁴ In particular, a mandatory induction process should be introduced for incoming ministerial staff. This

194 *Staff Employed under the Members of Parliament (Staff) Act 1984*, above n 177, 25–40.

195 *Staff Employed under the Members of Parliament (Staff) Act 1984*, above n 177, 19–24, 39–40.

196 *Staff Employed under the Members of Parliament (Staff) Act 1984*, above n 177, 41.

197 *Staff Employed under the Members of Parliament (Staff) Act 1984*, above n 177, 46–47.

198 *Staff Employed under the Members of Parliament (Staff) Act 1984*, above n 177, 51.

199 *Staff Employed under the Members of Parliament (Staff) Act 1984*, above n 177, 59.

200 *Staff Employed under the Members of Parliament (Staff) Act 1984*, above n 177, 62.

201 *Staff Employed under the Members of Parliament (Staff) Act 1984*, above n 177, 64.

202 *Staff Employed under the Members of Parliament (Staff) Act 1984*, above n 177, 67.

203 *Staff Employed under the Members of Parliament (Staff) Act 1984*, above n 177, 73–86.

204 *Staff Employed under the Members of Parliament (Staff) Act 1984*, above n 177, 84.

would focus on political ethics, relationships with the public service, and record-keeping responsibilities.²⁰⁵

Australian ministerial advisers appear to wield greater power than their New Zealand equivalents. However, within New Zealand's unregulated framework, advisers have the potential to gain similar powers. It would be desirable for New Zealand to address any potential problems in advance of publicised abuses; in this regard, the Australian inquiries contain lessons for personal appointees in New Zealand, particularly in relation to regulation, training, and transparency.

B The United Kingdom

1 Context

The New Zealand and Australian constitutional arrangements around the role of personal appointees have their origins in those of the United Kingdom: the system of responsible, Cabinet government; the largely unwritten constitution; the conventions of collective Cabinet responsibility and individual ministerial responsibility.

The United Kingdom civil service is constituted differently from its New Zealand equivalent, being governed by Royal prerogative and a range of regulations and Orders in Council rather than by statute.²⁰⁶ Nevertheless, the key elements of the two systems are very similar. United Kingdom civil servants are apolitical; their employment is not subject to a particular government's fortunes.²⁰⁷ All members are subject to the constitutional conventions of loyalty, neutrality, and anonymity.²⁰⁸

United Kingdom constitutional conventions have come under increased strain in recent decades, as a result of state sector reforms mirroring the New Zealand experience. Similarly, government has become ever more complex and the media ever more

205 *Staff Employed under the Members of Parliament (Staff) Act 1984*, above n 177, 86.

206 Jennings *Cabinet Government*, above n 42, 147; Colin Turpin *British Government and the Constitution: Texts, Cases and Materials* (5 ed, Butterworths, London, 2002) 245. However, a civil service statute is currently being considered.

207 Jennings *Cabinet Government*, above n 42, 127–128.

208 Cabinet Office *Civil Service Code* (United Kingdom, 1996) <<http://www.cabinet-office.gov.uk/central/1999/cscode.htm>> (last accessed 28 September 2003); Turpin, above n 206, 248–252.

intrusive,²⁰⁹ with increased emphasis on accounting to the public for ministerial and civil servant actions.²¹⁰

The loyalty of civil servants has been at issue from time to time, although this appears to be based on specific and fairly isolated instances of civil servants' obstructing government policy.²¹¹ The neutrality of the public service has been questioned and the Minister-public servant relationship has become increasingly strained.²¹² However, while some "dilution" of these conventions has been observed,²¹³ they are still regarded as important guiding constitutional principles.²¹⁴

2 Position and functions of personal appointees

Personal appointees, known as special advisers, first appeared in the United Kingdom in the mid-1970s.²¹⁵ They are now an established and widely used element of British government. For example, there were 38 special advisers under the Major Government, 67 by April 1998,²¹⁶ and 81 by March 2002.²¹⁷ As in New Zealand, special advisers are formally employed as temporary civil servants.²¹⁸ They undertake political and policy functions similar to those of their New Zealand equivalents.²¹⁹ As in Australia, their policy work at times replaces rather than supplements that of the public service.²²⁰

209 House of Commons Public Administration Select Committee *These Unfortunate Events: Lessons of Recent Events at the Former DTLR* (2002) 18 <<http://www.publications.parliament.uk/pa/cm200102/cmselect/cmpubadm/303/303.pdf>> (last accessed 29 September 2003).

210 King, above n 90, 15.

211 Turpin, above n 206, 252–253.

212 King, above n 90, 15.

213 Turpin, above n 206, 221.

214 Cabinet Office *Ministerial Code: A Code of Conduct and Guidance on Procedures for Ministers* (United Kingdom, 2001) ch 1 <<http://www.cabinet-office.gov.uk/central/2001/mcode/contents.htm>> (last accessed 28 September 2003).

215 Turpin, above n 206, 254.

216 Turpin, above n 206, 255.

217 Robert Armstrong "Daylight Jobbery" (2 March 2002) *The Spectator* United Kingdom <<http://www.spectator.co.uk/article.php3?table=old§ion=current&issue=2003-08-02&id-1624&searchText=>>> (last accessed 7 August 2003).

218 King, above n 90, 11; Turpin, above n 206, 255.

219 King, above n 90, 11; Eichbaum and Shaw, above n 100, 2.

220 King, above n 90, 16.

The major concerns about personal appointees in New Zealand and Australia appear to be broadly shared in Britain, but with a great deal more controversy. Thus:²²¹

In general it appears that special advisers make a useful contribution in supporting ministers and are able to work in a constructive relationship with established civil servants. There have, however, been instances of friction and some blurring of responsibilities ... leading to a damaging breakdown of trust within the department and the discomfiture of the Secretary of State. Some observers perceive a threat to the tradition of a politically neutral civil service, bringing a collective experience and objective judgement to bear on government policy-making.

Further:²²²

The numbers of 'special advisers' have proliferated and their roles and responsibilities, their accountability, and their relationships to ministers and civil servants have been insufficiently thought through.

And:²²³

[Former head of the Treasury press office, Jill Rutter] warned that we could be turning the Government Information Service into "a powerful machine to secure the permanent advantages of incumbency."

On the other hand, special advisers are widely thought to be useful to government.²²⁴ The Committee on Standards in Public Life reported in 2000 that "[a]lmost all witnesses made clear their view that special advisers were valuable components of the machinery of Government".²²⁵ The problematic aspects of their role have been sought to be resolved by incorporating safeguards into the system, including a code of conduct containing behavioural standards similar to those of the civil service, with exceptions in terms of political neutrality.²²⁶

221 Turpin, above n 206, 255.

222 Armstrong, above n 217.

223 Ivor Gaber "A World of Dogs and Lamp-Posts" *New Statesman* United Kingdom (19 June 1998) 14.

224 Eichbaum and Shaw, above n 100, 3; *These Unfortunate Events: Lessons of Recent Events at the Former DTLR*, above n 209, 5, 14–15.

225 Sixth Report of the Committee on Standards in Public Life *Reinforcing Standards* (2000) para 6.26 <<http://www.archive.official-documents.co.uk/document/cm45/4557/4557-00.htm>> (last accessed 29 September 2003).

226 Cabinet Office *Code of Conduct for Special Advisers* (2001) <<http://www.cabinet-office.gov.uk/central/2001/codconspads.htm>> (last accessed 24 June 2003). See Appendix.

But effective accountability remains problematic. Public servant complaints about special advisers must be made to departmental permanent secretaries, who have little authority over special advisers, before eventually being passed on to the relevant Minister.²²⁷ Public servants are subject to personal accountability rather than being only indirectly accountable through ministerial responsibility. But special advisers are not subject to separate accountability mechanisms. There is no reason why direct accountability should not extend to special advisers. In any event, the nature and degree of power exercised by special advisers warrant closer scrutiny.

In 2002 the House of Commons Public Administration Committee issued a report on special advisers, in response to a scandal in the Department of Transport, Local Government and the Regions.²²⁸ The report recommended that boundaries be drawn around the role of special advisers in government communications. It suggested a merit-based system of recruitment and training courses for incoming special advisers on the machinery of government and the role of public servants, and urged the adoption of a procedure for dealing with disputes between Ministers, special advisers, and career civil servants to clarify who had final disciplinary responsibility for disputes. The report also recommended clarification of the Prime Minister's role in this process.²²⁹

Since November 2002, incoming special advisers in the United Kingdom have been given special training on "the roles and responsibilities of special adviser and Ministerial codes, their relationships within departments and with the Prime Minister's office and their balancing of their political role".²³⁰

In April 2003, the Committee on Standards in Public Life reported on the controls acting on the government executive, including Ministers, special advisers, and the

²²⁷ Cabinet Office *Code of Conduct for Special Advisers*, above n 226, para 22; King, above n 90, 11.

²²⁸ The scandal centred around an e-mail sent by special adviser Jo Moore to Stephen Byers, then Secretary of State for Transport, Local Government, and the Regions, in which Moore suggested that the 11 September 2001 terrorist attacks might be a good day to "get out anything we want to bury". The events which followed demonstrated a serious breakdown in the relationships between departmental civil servants, ministerial staff, and Ministers (*These Unfortunate Events: Lessons of Recent Events at the Former DTLR*, above n 209).

²²⁹ *These Unfortunate Events: Lessons of Recent Events at the Former DTLR*, above n 209, 22. It should be noted that the Prime Minister has little incentive to step in on disputes between civil servants and special advisers. Such a move could undermine the authority of the Ministers and senior public servants involved, and could expose the Prime Minister to adverse public attention.

²³⁰ King, above n 90, 15.

permanent civil service.²³¹ The Government responded to the report in September 2003.²³² The Committee acknowledged the valuable role played by ministerial advisers who are not politically neutral.²³³ It then made a number of recommendations relating to special advisers.

The Committee recommended that special advisers be "defined as a category of government servant distinct from the Civil Service",²³⁴ to enhance the benefits of special adviser training and induction.²³⁵ The Government rejected this recommendation on the basis of similarities between civil servants' and special advisers' roles.²³⁶

Secondly, the report recommended that the functions special advisers are allowed to perform be codified, and that the functions of particular special advisers be set out in individual employment contracts.²³⁷ The Government responded that codes of conduct were the best means of setting out what special advisers may and may not do, given the need for special advisers' roles to remain flexible and civil service legislation to be succinct.²³⁸ The Government further asserted that the Code of Conduct was already part of every special adviser's employment contract. As a result, their functions did not need to be written into individual employment contracts.²³⁹

Thirdly, the report recommended confirming that Ministers are responsible to Parliament and the Prime Minister for the actions of their special advisers.²⁴⁰ The Government agreed that the Ministerial Code should be amended for this purpose.²⁴¹

231 Ninth Report of the Committee on Standards in Public Life *Defining the Boundaries within the Executive: Ministers, Special Advisers and the Permanent Civil Service* (2003) <<http://www.public-standards.gov.uk/reports/9th%20report/report/report.pdf>> (last accessed 24 June 2003).

232 *The Government's Response to the Ninth Report of the Committee on Standards in Public Life* (2003) <http://www.cabinet-office.gov.uk/propriety_and_ethics/publications/pdf/9thgovres.pdf> (last accessed 5 November 2004).

233 Ninth Report of the Committee on Standards in Public Life, above n 231, 43.

234 Ninth Report of the Committee on Standards in Public Life, above n 231, 45.

235 Ninth Report of the Committee on Standards in Public Life, above n 231, 53.

236 *The Government's Response to the Ninth Report of the Committee on Standards in Public Life*, above n 232.

237 Ninth Report of the Committee on Standards in Public Life, above n 231, 48.

238 *The Government's Response to the Ninth Report of the Committee on Standards in Public Life*, above n 232, 10–11.

239 *The Government's Response to the Ninth Report of the Committee on Standards in Public Life*, above n 232, 11.

240 Ninth Report of the Committee on Standards in Public Life, above n 231.

The Committee also recommended that Ministers investigate allegations of breaches of the Code of Conduct by special advisers, and that provision be made for the Prime Minister to refer complaints for investigation in the same way as an alleged breach of the Ministerial Code.²⁴² The Government accepted these recommendations, but was of the view that the Prime Minister should have a discretion rather than an obligation to refer complaints for independent investigation.²⁴³

Finally, the report recommended greater transparency around the numbers, costs, and roles of special advisers, and a limit on numbers.²⁴⁴ The Government rejected the latter idea, asserting that it did "not believe that the issue of special advisers can be considered as a numerical issue" but rather was one of transparency.²⁴⁵

The Government also proposed an amendment to the Code of Conduct for Special Advisers. The amendment would allow special advisers to "convey to officials Ministers' views, instructions and work priorities, including on issues of presentation".²⁴⁶ The word "instructions" was removed following correspondence between the Government and the committee chairman.²⁴⁷ Further, the amendment would allow special advisers to "hold meetings with officials to discuss the advice being put to Ministers".²⁴⁸ These amendments clearly have the potential to exacerbate the problems with special advisers.²⁴⁹

Overall, the Committee on Standards in Public Life was disappointed with the Government's response to its report, complaining that "the Government's response represented a seriously missed opportunity to enhance public trust in the processes of

241 *The Government's Response to the Ninth Report of the Committee on Standards in Public Life*, above n 232, 11.

242 *Ninth Report of the Committee on Standards in Public Life*, above n 231, 49.

243 *The Government's Response to the Ninth Report of the Committee on Standards in Public Life*, above n 232, 11–12.

244 *Ninth Report of the Committee on Standards in Public Life*, above n 231, 50–51.

245 *The Government's Response to the Ninth Report of the Committee on Standards in Public Life*, above n 232, 12.

246 *Committee on Standards in Public Life Annual Report of the Committee on Standards in Public Life: November 2002–December 2003* (2003) 8 <http://www.public-standards.gov.uk/annual_reports/2003/2003.pdf> (last accessed 29 August 2004).

247 *Committee on Standards in Public Life*, above n 246, 8.

248 *Committee on Standards in Public Life*, above n 246, 8.

249 *Committee on Standards in Public Life*, above n 246, 7–8.

government".²⁵⁰ In light of the issues identified in this paper the Committee's view appears to be correct.

As in Australia, controversy surrounding special advisers in the United Kingdom has centred on particular instances of powerful but unaccountable special advisers' attempting to mislead the public. One example in particular gave rise to serious concerns about the power and lack of accountability of special advisers. In May 2003, Andrew Gilligan reported on BBC radio that he had been informed that the British Government had exaggerated the security threat posed by Iraq.²⁵¹ The dossier which set out the security threat was used to garner public support for invading Iraq. Gilligan subsequently claimed that Alastair Campbell, Prime Minister Tony Blair's director of communications, had asked that the threat be exaggerated. The Foreign Affairs Select Committee cleared Campbell of this allegation. However, Dr David Kelly, a Ministry of Defence weapons expert, was revealed to be the official who had informed Gilligan's story. Shortly thereafter, Kelly committed suicide. A judicial inquiry was instigated into the circumstances surrounding his death.²⁵² Alastair Campbell announced his resignation on 29 August 2003.²⁵³

In the inquiry's report, released in January 2004, Lord Hutton concluded that Alastair Campbell had "made it clear ... that 10 Downing Street wanted the dossier to be worded to make as strong a case as possible in relation to the threat posed by Saddam Hussein's [weapons of mass destruction]".²⁵⁴ A further finding, that "Mr Campbell recognised ... that nothing should be stated in the dossier with which the intelligence community were not entirely happy",²⁵⁵ largely exonerated him.²⁵⁶ Nevertheless, Campbell's alleged role in

250 Committee on Standards in Public Life, above n 246, 8.

251 See CBBC Newsround *David Kelly Inquiry* <http://news.bbc.co.uk/cbbcnews/hi/find_out/guides/2003/david_kelly_inquiry/newsid_3084000/3084395.stm> (last accessed 26 September 2003).

252 See "David Kelly: Death of WMD Mole" (22 July 2003) *CNN.com* <<http://cnn.worldnews.printthis.clickability.com/pt/cpt?action=cpt&expire=-1&urlID=695>> (last accessed 26 September 2003); Hutton Inquiry Website <<http://www.the-hutton-inquiry-org-uk/>> (last accessed 26 September 2003).

253 "Alastair Campbell Quits" (29 August 2003) *BBC News UK* <http://news.bbc.co.uk/2/hi/uk_news/politics/3191937.stm> (last accessed 26 September 2003).

254 Lord Hutton *Report of the Inquiry into the Circumstances Surrounding the Death of Dr David Kelly* CMG (2004) 320 <<http://www.the-hutton-inquiry.org.uk/content/report/huttonreport.pdf>> (last accessed 4 September 2004).

255 Hutton, above n 254, 320.

256 "Campbell Exonerated by Hutton Report" (28 January 2004) *BBC News UK* <http://news.bbc.co.uk/1/hi/uk_politics/3437403.stm> (last accessed 4 September 2004).

these events serves to highlight the potential seriousness of concerns relating to personal appointees. If the allegations had been found to be true (and Campbell appears to have had sufficient power and influence to have done what he was alleged to have done), he would have been instrumental in the Government's decision to go to war on the basis of an exaggerated threat.

The role of personal appointees in New Zealand is even less regulated than in the United Kingdom, and the potential for abuse thus at least as real. How are we to avoid problems in future?

VI ANALYSIS

Personal appointees play a valuable role in the New Zealand system of government, a role qualitatively different from that of public servants. Yet there is no legal distinction between a public servant and a personal appointee: the legal and constitutional positions have failed to keep up with the political reality. This gives rise to potential gaps in mechanisms of accountability.

Several issues have been identified in this paper regarding the role of personal appointees. The first is their potential unlawfully to exercise executive power. Another is that they may mislead or manipulate the public through the media. A third is that they may have a detrimental effect on the already fragile relationship between Ministers and public servants. A fourth is that they may interfere with the conventions that guide the behaviour of Ministers and public servants. Interviewees expressed the view that at least the former two of these problems are based more on a perception of inappropriate conduct than reality.²⁵⁷ Nevertheless, given the unregulated nature of their role, there is certainly the potential for these issues to arise: in light of the Australian and United Kingdom experiences, very real potential.²⁵⁸ The public perception of inappropriate behaviour is of itself an issue which ought to be addressed. And where public servants have such a perception, problems in their relationships with Ministers may be exacerbated.

In New Zealand, Ministers, and to some extent public servants, are accountable for the exercise of administrative power. Accountability mechanisms are also warranted for personal appointees. The problems are potentially serious. And the perception that the problems exist could significantly undermine the public's confidence in the system of government.

257 Palmer interview, above n 126; MacMahon interview, above n 97; Eichbaum interview, above n 87.

258 Eichbaum and Shaw, above n 100, 11.

On the other hand, accountability mechanisms should not be allowed to undermine government effectiveness. It is acknowledged that much of the work undertaken by personal appointees involves giving politically sensitive advice. It would be harmful to subject that advice to public scrutiny. But political sensitivity cannot justify the current level of secrecy surrounding the nature of the role of personal appointees. A degree of transparency would certainly serve to enhance public confidence.

Personal appointees should be legally distinguished from public servants, as they are in Australia. Given their role in the exercise of government power, they should also be distinguished from staff in Opposition offices. This would better reflect the constitutional distinctiveness of their role. A separate code of conduct along United Kingdom lines should also be developed for personal appointees,²⁵⁹ so as to further distinguish their role from that of public servants, in line with the reality of their position. This would require amendments to the current public service code, but would help reduce confusion on the part of public servants, Ministers, and personal appointees about the boundaries of their respective roles.

A New Zealand code should go further than the United Kingdom one on the limits of personal appointees' functions.²⁶⁰ Specifically, it should delineate what constitutes an unlawful usurpation of power; it should require that only the Minister's views be conveyed to public servants, not those of a personal appointee. The code should also specifically allow for recourse to the Minister if public servants are in doubt as to the authority on which a personal appointee is acting. Further, the code should seek to safeguard the Minister–public servant relationship by providing for public servants' access to the Minister. In terms of media relations, ethical conduct should be outlined as in the United Kingdom code.²⁶¹ It should also be made clear that spin-doctors should not engage in extracting political outcomes from departments.

Codes of conduct may have little practical effect in terms of preventing a personal appointee from overstepping the bounds of his or her role. Politicking in practice is more subtle and the lines more blurred than can ever be set out in a code. Personal appointees and public servants will frequently have to rely on discretion and judgment as to the appropriateness of particular actions. Moreover, as suggested earlier, many personal appointees are unfamiliar with the workings of the system of government, including how constitutional conventions may impact on what public servants are allowed to do. The more practically effective the safeguards the better.

259 See also the recommendations of Eichbaum and Shaw, above n 100, 11.

260 Cabinet Office *Code of Conduct for Special Advisers*, above n 226, paras 4–7.

261 Cabinet Office *Code of Conduct for Special Advisers*, above n 226, paras 8–10.

Training should be provided to new personal appointees regarding the boundaries of their role and the manner in which they should exercise their discretion.²⁶² It should address the general workings of the New Zealand system of government, and in particular the need to uphold the neutrality of public servants. The United Kingdom induction courses could be drawn on in this regard.

In addition, effective oversight of the behaviour of personal appointees is vital to the ability to hold them to account. Oversight of personal appointees is also necessary from a public servant perspective. Personal appointees are in many cases regarded as more senior than their public servant colleagues; certainly, they are likely to have a close relationship and a strong degree of sway with the Minister. Consequently, it may be difficult for public servants to maintain the integrity of their position in the face of pressure from personal appointees.

A complaints procedure is required in order to ensure personal appointees behave appropriately. In light of failures in the United Kingdom system, oversight by a government Minister, such as the Minister of Ministerial Services, is unlikely to be effective. Independent oversight would be preferable. One possibility would be something along the lines of the officers and processes set up under the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004.

VII CONCLUSION

In strict legal terms, personal appointees are public servants. But they occupy a distinctive constitutional position, between their employing Minister and their public servant colleagues. They may be regarded as being subject to the public service constitutional conventions of loyalty and anonymity, but not that of political neutrality.

In practice, there may be some tensions in personal appointees' relationships with public servants. Personal appointees also create tensions between Ministers and public servants. However, overall they can be regarded as making a positive contribution to government. As such, the problems with their functions identified in this paper should be addressed before scandal arises unnecessarily and public confidence is damaged.

Most importantly, the constitutional and legal position of personal appointees needs to catch up with the political reality of their role. This would allow for the implementation of appropriate regulatory controls. Such controls must include safeguards which protect the integrity of personal appointees and that of the other government actors with whom they associate.

²⁶² James, above n 4, 64.