April 23, 2013

Ministerial Responsibility and Chief Executive Accountability: The Implications of the Better Public Services Reform Programme

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Address to the Institute of Public Administration of New Zealand

23 April 2013

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E nga mana, e nga iwi, e nga reo, tena koutou, tena koutou tena koutou.

Significance of the Topic

Today I examine the current state of our constitutional conventions of ministerial responsibility and their public service corollaries, in the context of the latest initiative to transform the public service: the Better Public Services reform programme. In particular I want:

• To look at what we can expect the BPS will do to the constitutional underpinnings of the relationships between Ministers and the public service; and

• To assess the current state of those relationships.

I do so in the conviction that this is an important topic. The government still possesses the most coercive force of any organisation in New Zealand – its military power, its police powers, its spying powers, its taxing power, its prisons, all have the potential to affect, very directly, the quality of life of New Zealanders.
And it is the executive branch of government which exercises these powers – while the legislature legislates and judiciary judges, the executive executes – it is the activist branch of government, in a nation that expects its governments to be active. Ministers, at the helm of the ship of state, plan the mission, chart a course and issue the orders they deem necessary; public servants (and Crown entities), in the engine room, implement those directions – they crank up the engine, or slow it down, action changes of course and, crucially, warn of impending storms and advise on potential changes of course. An effective relationship between Ministers and public servants is crucial for safe passage of the ship of state. Communication breakdowns, lack of trust, dysfunctional relationships, incompetence, can each be sufficient to lead the ship to drift off course, to fail in its mission, or to head into stormy weather, onto rocks, or even to sink.

I first worked in the New Zealand public service as a vacation worker in the Treasury in 1983 under Sir Robert Muldoon. I worked in the Treasury in the 1980s and 1990s, I was Deputy Secretary in the Ministry of Justice in the 1990s, and, more recently as Deputy Solicitor-General in Crown Law for almost five years from 2008. I believe in New Zealand’s public service as essential to its good governance. I have advised and observed Ministers’ work, up close, under the Lange, Bolger, Shipley, Clark and Key administrations. I believe New Zealand is surprisingly well served by the quality of its Ministers.

But I am worried that the relationship between Ministers and public servants has changed in practice since the late 1990s in subtle ways that constitutional theorists have not yet caught up with. Not all of these changes are for the better. In our unwritten constitution we need to be alert for unobserved changes in practice, in order to assess their implications and ensure that only changes that we collectively want, occur. So in this address I want to sound an alert – a constitutional warning to the New Zealand ship of state – that it needs to improve aspects of the effectiveness of the relationships between Ministers and public servants. This is vital and, in my view, urgent.

**Conventional Wisdom**

We need to start with some constitutional fundamentals. The constitutional conventions of ministerial responsibility come first: the doctrine of individual ministerial responsibility; and the
doctrine of collective Cabinet responsibility. Then, I examine the conventional corollaries to those conventions, of public service anonymity, loyalty and political neutrality.¹

It is worth pausing to note that these are constitutional conventions – practices, norms, behaviours – that generally acknowledged to be worthy of general acknowledgement. Unless specifically incorporated into law, they cannot be enforced by a court. Conventions are not law or rules in that sense. They derive their power from their normative force, ultimately resting on public opinion, reinforced by their alignment with the political and other incentives that ensure they are generally observed in practice.

There is much to be said for conventions – they can be difficult to change if there is widespread acceptance of the norm on which they are based. But they are also vulnerable – to changes in practice that can go unobserved.

**Individual Ministerial Responsibility**

The doctrine of individual ministerial responsibility is the foundation stone for executive government in New Zealand. In the longer paper I am writing based on this address I suggest that it is usefully viewed as having three distinct elements.

- Explanatory responsibility;
- Amendatory responsibility; and
- Culpable responsibility.

The distinctions are insufficiently appreciated. There is a tendency for “ministerial responsibility” to be assumed to refer to whether Ministers should resign for things that go wrong within their portfolio. This assumption is usually, and understandably, then instantly associated with the suggestion that “ministerial responsibility” is, accordingly, dead.

This perspective is fundamentally misconceived. Whether a minister should resign is one possible option under the third of my senses of responsibility. But the essence and primary value of the convention of individual ministerial responsibility lies in the first and second elements.

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¹ Much of the content of this section, and the next, are based on an unpublished conference paper I gave in 2001: Matthew S R Palmer, “Ministerial Responsibility and Chief Executive Accountability: Conflict or Complement?” (“Analysing and Understanding Crucial Developments in Public Law”, Institute for International Research, Wellington, 4 April 2001).
They establish that:

- It is the Minister who is responsible.
- The Minister is responsible to the House of Representatives.
- The Minister is responsible for matters within his or her portfolio.
- The Minister is responsible for explaining.
- The Minister is responsible for making amends.

It is these elements of explanatory and amendatory responsibility that allocate responsibility for executive government – that put Ministers on the bridge of the ship of state. They ensure that our democratically elected representatives, in the House of Representatives, and we the people, know to whom to turn to understand what has gone wrong in executive government, and how it will be fixed. This is a powerful force that animates government. Together, Ministers are responsible in these explanatory and amendatory senses for all of the activities of executive government.

Culpable responsibility is different. This is about what sanction is suffered when something goes wrong. Perhaps in New Zealand our convention requires that if a Minister is personally guilty of impropriety then resignation is required – a number of examples spring to mind for that proposition. But it is less clear whether the impropriety needs to relate to the Minister’s portfolio. And I suggest that there is no longer any justification in theory or practice for the proposition that a Minister must resign on the basis of vicarious responsibility – for the actions of his or her officials. Sometimes it occurs; most times it does not. There is no obvious reason why it should.

I suggest that the culpable responsibility element of the doctrine of individual responsibility should be seen in the same way that it is seen in relation to the confidence element of its sister doctrine of collective responsibility. This principle says that a government must resign when it loses the confidence of the House of Representatives. Instead of devising abstract and complex criteria for resignation it places that discretion in the hands of an institution: the House. Similarly, I suggest that
the culpable element of individual ministerial responsibility, in theory and practice, holds that a Minister must resign when he or she loses the confidence of the Prime Minister.

**Collective Cabinet Responsibility**

I have already mentioned the doctrine of collective responsibility. It is also composed of three elements:

- The confidence element: as mentioned already.
- The unanimity element: that all Ministers must publicly support Cabinet decisions.
- The confidentiality (or Vegas) element: that what is said in Cabinet stays in Cabinet.

I don’t propose to spend much time on these elements in this address.

I do note that while the confidence element can bring down a government, the unanimity element is also crucial. Is it that element that gives us Cabinet government. Because every Minister must publicly support Cabinet decisions, including decisions within his or her own portfolio, Cabinet can acquire and use the power of every Minister in government (barring statutory exceptions).

But, more importantly for this address, I will use the third element, confidentiality, to segue cunningly into the public service corollaries.

It used to be that detailed Minutes of Cabinet discussions were kept and kept secret; and that Cabinet papers were never seen. I found in the archives a Cabinet paper from 1971 in which the then National Government asked for advice on why the Treaty of Waitangi had not been put into law and whether it should be (the paper recommended it should not). To my knowledge the existence of this paper was secret until I wrote about it in 2008.

The Official Information Act 1982 dramatically changed the confidentiality of Cabinet papers and Minutes. It presumes that information should be released unless there is good reason why not; and it focusses on information, not classes of document. The result is that, now, Cabinet papers and minutes are routinely released.

I think this is a good thing. It is consistent with open government. It makes it harder for governments to hide proposals and decisions to do wrong.
But its limits are also a good thing. While Cabinet Minutes are now routinely released, or at least available under the OIA, the nature of Cabinet discussions are not. My understanding is that the practice of keeping detailed notes of Cabinet discussions, including who said what, ceased around 1981 – not coincidentally. And, to me, that is appropriate. If it were known what positions individual Ministers took in Cabinet discussion then Cabinet unanimity would be negated, the government would appear divided, Ministers would start staking out positions with an eye to future public reactions, Cabinet decision-making would be impeded. In short the efficient secret of executive government would be rendered inefficient.

I think there is a legitimate argument that exactly that has happened in relation to the confidentiality of public service advice to Ministers.

The Public Service

Let me explain. Again, the conventional public service corollaries of ministerial responsibility are tripartite:

- Anonymity;
- Loyalty;
- Political neutrality.

These features of the New Zealand public service, as in other Westminster systems, are rooted in constitutional convention, though they are now reflected in statute and codes of conduct.

It used to be that public servants were supposed to be unknown grey and faceless bureaucrats; the Minister spoke on behalf of the department. The simple fact is that Official Information Act 1982 has overridden public service anonymity. That, in itself, is not a problem. When chief executives are entrusted with independent statutory powers – as all are in relation to the employment of their staff, by virtue of section 33 of the State Sector Act – they, and not the Minister, must be publicly accountable for the exercise of those powers.

I do pause to note here that the popular, even the supposedly informed perception, that Chief Executives have more extensive independent statutory powers for the management and operations of their departments is not reflected in law in the way it is usually understood. Ministers individually, and the Cabinet collectively, still have the legal power to direct the chief executives in relation to the
operation of their departments; the rhetoric and statutory amendments of the 1980s reforms notwithstanding.

But my problem for present purposes is that the overriding of public servant anonymity has also extended to the overriding of confidentiality of public servants’ free and frank advice. Advice is routinely available, at least written advice, under the OIA. And Ministers often hate it. They feel exposed if they don’t follow the advice – they’re ignoring the experts – and they feel exposed if they do – they don’t know their own minds!

**The Paucity of Free and Frank Advice**

I suggest that ministerial sensitivity has grown appreciably under MMP. I suggest this for two reasons. First, I think MMP has exposed Ministers to political attack from all directions – not just one. Second, I noticed ministerial sensitivity to official advice increase most dramatically in the change between the Bolger and Shipley administrations in 1998. In terms of culture and behaviour in government, if not in terms of constitutional formality, I think that is the change of administration that reflected the introduction of MMP government. And it was then, for the first time as a public servant, that I was handed back a final report by a Minister who had scrawled “draft” on it.

I’d have to say that the style of the Clark administration only intensified ministerial paranoia about the exposure of officials’ advice. And that pattern, over 10 years, of consistent messages from Ministers to public servants about the potential for official advice to cause political embarrassment has left its mark. I was a senior official in the first year and in the last year of the Clark administration. From Crown Law I saw a wide variety of policy advice across government departments. I was shocked at the change in the behaviour of the public service. In the late 1990s public servants would frequently put their policy advice firmly, clearly, sometimes expressively, in writing. In the late 2000s, they would not.

I do not suggest that there was some golden age of the public service. In the 1980s and 1990s I used to think that public servants usually did not sufficiently appreciate the political context of the environment in which their advice must be considered. But the pendulum has now swung too far the other way.

After I left the public service for the first time, in 2001, I gave a conference paper which warned that fear of timely premature disclosure under the OIA can lead to undesirable behaviour by both officials
and Ministers which did not honourably serve the tradition of Westminster government nor the need for Ministers to receive free and frank advice of the highest quality.

In Nicola White published a research-based book which found that:  

there is now reasonable evidence that:

- blunt advice is offered less easily, and obfuscation and softer language are widely preferred;
- wide-ranging advice is restricted, with written documentation tending to stick to the safe middle ground and more adventurous thoughts being tested in discussion;
- if issues are delicate or difficult, they are dealt with orally;
- many people working at the centre or at sensitive levels of government work largely without creating records and, for example, will avoid email completely because of a lack of any assurance that their comments could be protected;
- documents that are clearly going to become publicly accessible tend to be written with that fate in mind, so they do not contain anything that could attract a headline or create a story in itself – the ‘front page of the Dominion test’ is becoming a public service norm equal in status to ‘no surprises for the minister’;
- the public record suffers from incomplete documentation and from papers that are written for the record rather than for the moment;
- relationships can be damaged when people, particular ministers, perceive a group of officials to be ‘writing for the record’ or ‘setting them up’ by creating paper trails;
- dissection of the exact role of officials and ministers in any overall piece of government policy work or decision-making can destabilise relationships, and create intrigue out of the ordinary business of supporting a politically responsible executive; and
- the fishbowl nature of working at senior levels in the public service appears to have made it more difficult to attract and retain staff.

I agree with all of this. There is now, in my view, far too much second guessing by public servants of the political incentives on Ministers – and too much pulling of punches in the provision of advice. That is now, in my quarters, true almost as much for oral advice as it is for written. It is now routinely the public servants that write “draft” on their policy advice reports, to test the Minister’s reaction before giving them the advice they want. And public servants now seem more sensitive about this than do some Ministers. Some Ministers, usually the less confident ones, want only the advice they favour. But in my experience, the more confident and competent Ministers would prefer

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that public servants told it like it is. I had experiences as a legal adviser where my unvarnished advice on legal issues was seized upon and engaged with by Ministers hungry to grapple with real views whereas the policy advice had been rendered so blandly insipid as to be meaningless. I note, not coincidentally, that legal advice is (still) protected from release under the OIA on the grounds of legal professional privilege.

The decline of free and frank policy advice is bad for the governance of New Zealand. Good quality decision-making depends on the decision-maker having a clear understanding of all the options available to them and a straight up and down analysis of those options irrespective of which ones they think they favour. In my view, that is not what the New Zealand public service is routinely delivering. There are still pockets of it. But my contention, based on anecdotal and impressionistic evidence only, is that there has been a systematic decline in the quality and frankness of policy advise across government since the late 1990s.

There is a further effect. The best public servants choose their career path in order to give something back – to contribute to the public interests of our society, and to work on stimulating policy issues. If they are not able to give free and frank advice they will be less interested in working at the top levels of government. The job of a chief executive of a policy ministry used to value policy expertise. It seems to me that, now, operational competencies of chief executive roles are valued more than policy competencies. More concerningly, you will now find in many policy ministries that the top three layers will be selected for their “managerial” capabilities – rather than their substantive policy expertise. I have written elsewhere that the “language” of the public service is policy analysis, compared with the language of politicians being politics and the language of the judiciary being law. I am now concerned that that is no longer true. The first language of the public service seems to me now to be management-speak. I know my view isn’t fashionable, but I have my doubts how much value managerialism adds to the public service. And I think the quality of policy advice has suffered accordingly. But my point for present purposes is that the decline in the value put on free and frank advice in the public service seems to me likely to contribute to a decline in policy capability amongst the senior public service, a narrowing of the pool of chief executives, and a capability problem over the longer term.

I will even go one step further. I don’t think it is clear that this problem exists yet, but I worry that the decline in free and frank policy advice in the public service opens the way to politicisation. Political neutrality has been a core value of New Zealand’s public service for 101 years, since
legislative reform in 1912. It has become a constitutional convention. It is a delicate balance – a
tightrope to be walked, because public servants must be completely loyal to and trusted by their
Minister while at the same time preserving their ability to be, and be seen to be, completely loyal to
and trusted by their next Minister of a different political persuasion. The political neutrality of New
Zealand’s public service has been firmly upheld for many years – to a greater extent than that in
Australia, for example. And it is a major contributing factor to our proud position in the
Transparency International rankings.

But I worry that a decline in the willingness of public servants to give free and frank advice could
become associated with an expectation by Ministers of their ability to select those public servants –
and that seems to me a slippery slope towards politicisation. It is the role of all public servants, all
Chief Executives, the central agencies and most particularly and ultimately that of the State Services
Commissioner in particular, to resist politicisation – both blatant politicisation and the more creeping
kind of politicisation that can result from too much of a habit of giving Ministers only advice they
want. I’m sure the Commissioner is alive to this concern.

And, as I say, I don’t think we’re there yet. And I do not include in my concerns the recent kerfuffle
about the Prime Minister’s input into the selection of the Director of the GCSB. That office, and a
handful of others, is not that of a public service chief executive. It is, at law, entirely proper for the
relevant Minister to be intimately involved, and indeed the Minister is “responsible” for, appointment
of the chief executive. Whether that should be so is different issue. I also wonder whether
constitutional convention puts a limit on the legal power here too – I suspect that most commentators
and Ministers would regard it as improper to appoint people to even that small handful of directly
appointed CE positions on party political grounds. That doesn’t happen and nor should it.

I am more concerned that it is thought appropriate for a senior official to be on a party list – an MP in
waiting - and to move straight from being a politically neutral official to being a politically partisan
Member of Parliament, as is happening this week. This is not a good look for the public service.

But overall I am here sounding a note of future caution regarding politicisation, rather than the
outright alarm I am sounding over the decline of free and frank advice.
Better Public Services

What then, of the Better Public Services? Last week, the Secretary to the Treasury characterised this as “a multi-year major renovation while living and working on-site” – a reform comparable to that of the 1980s.

What does it involve? In summary, as far as I can discern the key elements of BPS are:

- focussing on achieving results rather than producing outputs – so there are 10 measurable results the government wants delivered;
- cross-sectoral cooperation between departments: so sectoral strategies and approaches re being taken in various areas;
- designing services around what people need;
- lifting efficiency and capability to produce higher quality advice, analysis and services;
- strengthening leadership across departments by increasing the legal powers of the State Services Commissioner and by allocating cross-departmental functional leads, for example in ICT, procurement, and property management.

I also note that, in the Performance Improvement Framework process, central agencies have developed an effective mechanism by which to run the ruler over each department, benchmark them against each other, and give them incentives to improve performance. Though I note that the report this month, of lead reviewers’ insights from the PIF process across the government, is particularly opaque about the quality of policy advice. Their only conclusion I could regarding policy capability was that operational agencies tend to be more effective at their core businesses than the ministries with policy and sector leadership roles.3

If I am right about what the BPS is, then what effect does it have on the constitutional relationship between Ministers and Chief Executives?

The BPS initiatives seem to me to involve a bunch of what are undoubtedly good ideas. But, and I’m open to feedback on this, they don’t seem to me to pose much of a challenge to the existing

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3 SSC, Treasury and DPMC, Core Guide 3: Getting to Great; Lead Reviewer insights from the Performance Improvement Framework (Wellington, 2013) at 12.
relationships between Ministers and Chief Executives. They seem to be primarily managerial in focus, taking the constitutional underpinnings for granted.

The current State Sector and Public Finance Reform Bill is, perhaps, the sharp end of reform – where you could expect to see any accountability changes. There is, there:

• an increased emphasis on the collective interests of government, including in section 32 of the State Sector Act that provides for Chief Executives’ responsibilities. But that sits within constitutional orthodoxy – the convention of collective responsibility readily encompasses that.

• The creation of a creature known as a “departmental agency” but that seems simply to regularise the position of semi-autonomous agencies that have existed for years, such as CCMAU and OTS.

• The power of the Commissioner to veto appointments to “key positions” so designated because they are critical to the public service or for their potential to develop senior leaders.

• The statutory independence of a CE in decisions on individual employees is preserved, subject to the Commissioner’s new power and subject to having regard to the wishes of the relevant Minister in relation to appointments to ministerial staff. CEs’ powers are not widened to extend to other operational matters – so they may still be directed by Ministers and the Cabinet.

So the BPS seems to me largely to leave the constitutional underpinnings and the 1980s reforms in place but to build on them by emphasising, both in law and in practice, the collective interests of government. To me this is perfectly appropriate and desirable. It responds to the need, identified in the early 2000s by Allen Shick and others and oft-repeated in conversations on Lambton Quay, to break down the siloes of public service departments.

This is all good stuff. It doesn’t fiddle about in ill-conceived ways with our core accountability relationships between Ministers and public servants.
But neither does it address the problem that I have identified in the course of this address. There is a distinct managerial tinge to the BPS reforms. The functional leads mentioned are focussed on back-office functions. The sector strategies are often dominated by fiscal concerns.

For myself, with a policy background, I ask where are the strategic policy frameworks? Where is the enhancement of policy capacity. What will encourage public servants to give free and frank advice? If the essential character of the 1980s reforms was captured by the refrain “let the managers manage”, I suggest we now need also to ask to “let the policy advisers advise”.

So, for example, what has happened to Graham Scott’s 2011 Review of Policy Expenditure and Advice?

Graham, and Pat Duignan and Patricia Faulkner found that:

The measures and assessments of quality, that have been done, show that quality varies widely. The information available also shows that there is no apparent relationship between unit cost and quality. The keys to improved quality lie in improved commissioning of policy projects, leadership and management of policy staff, improved processes around consultation, better knowledge management and development of the professional skill base.

There are pockets of good practice in policy advice across the New Zealand public service and if all agencies adopted these practices, there are both efficiencies and quality improvements to be gained. Unless there is a substantial improvement, New Zealand will fall behind countries which share our aspirations in its ability to anticipate the complex issues that face national governments and shape timely and thoughtful responses that are both rational and politically feasible.

The Treasury website reports that the government has agreed to a “suite” of actions that respond to it by focussing on:

- producing better financial and management information to drive value for money and efficiency;
- improving the leadership and management of policy advice within agencies;
- driving stronger central agency stewardship of the State sector to support cross-agency collaboration, performance improvement, capability building and focus on medium and longer term policy changes.

I’m sorry but to me, this is management-speak; it does not speak of action. And one year later, as demonstrated by a paper of 30 April 2012 the “Heads of Profession” trial – a key feature
recommended by Graham “to professionalise policy advice across the state sector” – is reported to have been discontinued “given other priorities and initiatives, including the Better Public Services work”. The other projects emanating from the Review also seem to be disappearing into ineffectiveness, based on the update of the same date.

**Conclusion: The State of the Public Service**

So, to summarise, I have suggested that:

1. The relationship between Ministers and public servants is vital - to the effective functioning of government, which matters.

2. The constitutional underpinnings of those relationships are still in place – individual ministerial responsibility, collective Cabinet responsibility, and their public service corollaries of loyalty and political neutrality.

3. The BPS does not disturb those underpinnings - though it puts a useful, and overdue, emphasis on the need to act in the collective interests of government.

4. But the BPS does not address the problem of the paucity of free and frank advice and wider problems with the quality of policy advice. Again, in my view, since the late 1990s the combination of MMP and the OIA has led to increased ministerial sensitivity about the transparency of public service advice, and a greater reluctance by public servants to give free and frank policy advice. This tendency is associated with an appreciable systemic diminution in the quality of policy advice, and capability to provide high quality policy advice, across the public service. It also runs the risk of engendering the future politicisation of the public service.

My conclusion is that the BPS is all very well, and it is consistent with and doesn’t damage the constitutional underpinnings of the relationship between Ministers and public servants.

But there is another problem that needs fixing: how to encourage and require public servants again to give, and Ministers to receive, high quality free and frank policy advice? Don’t get me wrong, I am an advocate of both MMP and the OIA – both are key and desirable elements of our constitution.
I don’t suggest changing MMP which necessarily exposes Ministers to political attack from all directions.

I do suggest a change in the OIA. There are already, explicitly in the OIA, provisions for withholding information to maintain the constitutional conventions which protect the confidentiality of advice tendered to Ministers and the free and frank expression of opinions by or between Ministers - sections 9(2)(f)(iv) and (g)(i). But they are interpreted out of practical existence by the Ombudsmen. I think there should be legislative change to even up the balance.

In 2001 in relation to the same, but more nascent, version of the problem, I suggested the OIA be clarified to provide that there may be good reason to withhold advice or exchanges of views between officials and Ministers, and between Ministers themselves, if it relates to an issue currently under active consideration. Nicola White’s book suggests that changes to the OIA are needed to address this problem too.

I won’t spell out how that might work tonight. And I don’t expect that, on its own, a legislative amendment to the OIA will solve the problems of free and frank and high quality policy advice – which have become matters of attitude and culture. There is a bigger problem here which needs addressing.

I conclude simply by saying that what this problem really needs is a good high quality, free and frank policy analysis and advice.

Postscript: The audience comments in response to this address indicated support for my diagnosis of the problem; but a lack of comfort with the solution proposed in the fourth to last paragraph above. The suggestion was that transparency under the OIA is too much valued by the public to be restricted now; but that Ministers and chief executives should commit to the value of free and frank advice even when it is likely to be exposed under the OIA. If such commitment were to occur, and lead to a cultural change of attitudes in government, I believe that would be a superior solution to an amendment to the OIA.

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For this reason, the recommendations by the Law Commission that the drafting of the relevant grounds be tweaked, but that the Ombudsmen’s Guidance would remain relevant, does not solve the problem I identify. See Law Commission, <i>The Public’s Right to Know: Review of the Official Information Legislation</i> (NZLC, R125, 2012) at ch 3.