Politics and Public Sector Employees: What's gone wrong with the relationship between ministers and public servants - why it matters, and what needs to be done to fix it

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Tena koutou katoa.

This is the third of three addresses that I have been invited to give by different organisations since last April on the topic of the relationships between Ministers and public servants. And I will traverse some of the key messages of the earlier two addresses (which are available on a website if anyone is interested), but I also want to add to them by proposing some constructive steps to assist in systemic ways the ongoing maintenance of healthy relationship between Ministers and public servants.

Some might see three invitations to speak on such a topic as a signal that there is, in Wellington, an unending supply of eager public servants wishing earnestly to hear more about accountability. Others might think there are many angry public servants who are demanding an outlet for their frustrations. Or, perhaps the opportunity cost for public servants of attendance is relatively low because lunchtimes are otherwise dominated by the ongoing improvement requirement to manage performance going forward in order to achieve impact on KPIs and land system wide result areas so as to enhance organisational

effectiveness and efficiency in preparation for the next PIF, within the context of the BPS, and with the strategic intent of achieving the next excellence horizon; as Sir Humphrey might say, today.

In fact, I do think that the prevalence of “management speak”, as I think of it, is indicative of a tendency now to privilege generalist management skills over specialist subject matter expertise. To be clear about that, I endorse the need for good management, and better management than we had in what some may erroneously regard as the past “glory days” of the public service. And improvements in management have led us to enjoy significantly improved operational effectiveness in government, in my humble opinion.

But I also happen to think that Ministers, and through them the public of New Zealand, are best served by being advised on policy issues by senior, experienced officials of unquestioned loyalty to whoever is the government of the day, who have deep knowledge and defined perspectives about the subjects on which they advise, and are prepared to call those shots as they see them; despite the potential anger of those who should not be thought of as “customers” or “clients” or “consumers” but who are Ministers who need free and frank advice whether they know it, or whether they like it, or not.

**Constitutional Relationships**

And this is where the constitution comes in. This is not just a genetic affliction of mine. Though it may be that. But although many public servants do not realise it, it is constitutional conventions which govern the relationships between Ministers and public servants. There is a series of constitutional conventions, reinforced by statute, which provide the key animating dynamics of this system.

First, the convention of individual ministerial responsibility is the keystone foundation for executive government in New Zealand. This is not about the arid debate about when or whether ministers must resign, but in the simple but crucial attribution of responsibility for an area of government activity to an individual Minister. Because of this convention, and only because of this convention at the moment, we know who is responsible: the
Minister. We know who the Minister is responsible to: the House of Representatives. We know what the Minister is responsible for: matters within his or her portfolio. And we know that the Minister has to discharge that responsibility by explaining decisions or events that occur within his or her portfolio and ensuring that things are fixed when they go wrong.

Because individual portfolios of Ministers of the Crown span the entirety of the Crown’s activity, this doctrine assigns responsibility in a fundamental way within our executive. The doctrine of collective Cabinet responsibility which, in particular, through the unanimity element of that doctrine, aggregates all of the individual ministerial powers to Cabinet as a collective. So this is the second constitutional element which I need to touch on. This is the element which gives us Cabinet government. Because every Minister, according to this doctrine, must publicly support Cabinet decisions, including decisions within their own portfolio. And if you think about that for a minute, that is what means that Cabinet acquires and can use the power of every individual Minister’s portfolio as a collective entity and override if it wishes an individual minister (barring statutory exceptions).

The other element of this doctrine is the confidence element which ties the Cabinet collectively to the democratic will of the people as manifested through their elected representatives. It is this element which requires that, if a government loses the confidence of the House of Representatives, it must resign.

So individual ministerial responsibility assigns to individual Ministers responsibility to the House of Representatives. Collective cabinet responsibility enables Cabinet to sweep up those responsibilities aggregate them to itself, and holds the Cabinet collectively responsible to the House for its very existence.

Now I come to the constitutional conventions relating to the public service. I think of these as the public service corollaries to the doctrine of individual ministerial responsibility. The two most important of them are loyalty and political neutrality. These are intertwined in a way which, to adapt the metaphor of English constitutional lawyer Geoffrey Marshall, is similar to the procreation of eels.
Public servants are required to be loyal to their Minister. As its corollary this is what gives the doctrine of individual ministerial responsibility much of its power; because public servants have to do what ministers say. But there are exceptions: one exception is if the law provides otherwise. If there is a statute that is passed, for example the State Sector Act that says that chief executive must make decisions in relation to individual public servants’ employment, independently, then that is an exception from the requirement to be loyal to your minister.

And some public servants, such as the Government Statistician, have significant statutory responsibilities that must be exercised independently of ministers.

Note though, just in passing, that Chief executive powers for the management and operation of departments are not legally excepted from the duty of loyalty, despite what some thought in the 1980s. Ministers, and Cabinet, still have the legal power to direct chief executives in relation to the operation of their departments.

The other exception to the duty of loyalty is the corresponding corollary of political neutrality. All public servants must discharge their duty of loyalty to a minister in such a way as to preserve their ability to similarly discharge that duty to a new minister of a different political party. You must be politically neutral.

And here, finally, I come to free and frank advice, which is a subject which I understand the State Services Commissioner will address this forum on next month. I have previously expressed my view that here has been an appreciable dimunition in the willingness of public servants to give free and frank advice. I think that there is too much second guessing of the political incentives on Ministers and too much pulling of punches in the provision of advice. Ministers, and some senior public servants, may not notice that going on. Some Ministers will like not having inconvenient advice given to them; that’s natural. But in my experience the better Ministers want free and frank advice. It protects them. It gives them an alternative point of view especially to their own political advisers. Sometimes it gives them a point of view. Sometimes it gives them the right point of view; not always.
I am not one to suggest that there was a golden age of free and frank advice. I worked in the Treasury in the 1980s and 1990s and I saw frequent examples of officials putting up advice that bore so little relationship to its ministerial audience that it was counterproductive. And I think that that needed to change. We did need to be more aware of the political incentives on Ministers. But the pendulum has, in some departments, swung too far. Being careful about tone and style does not require asking the Minister what to think before a public servant puts a view. It does not require putting up draft papers to the Ministers before putting up final advice that happens to reflect the Minister’s feedback. That, in my humble suggestion, is an abrogation of a public servant’s responsibility as a policy adviser.

There is a difference that I want to note between policy advice and operations. The essence of operations, of operational management in government, is doing things. The essence of policy advice is advising. The responsiveness to ministerial demands that is required for operational decision-making cannot be unthinkingly translated into simple responsiveness to a Ministers’ policy preferences about advising on policy. Of course Ministers make the decisions in both cases. But Ministers do not decide what policy advice public servants put to them. Chief executives and senior managers who have significant operational responsibilities need to be able to switch gears, in terms of responsiveness to the Minister, when they engage ministers over policy advice. And ministers, in my suggestion, ought to expect, ought to welcome, free and frank advice from officials on policy matters.

This is anecdotal and impressionistic. But my view is that there was a diminution in the willingness of public servants to give free and frank advice, that I think started sometime in the late 1990s and was cemented in under the Clark administration. I saw it reasonably starkly in the period between leaving the public service in at the end of 2000 and returning at the beginning of 2008.

I don’t think the Key administration has made that problem any worse. But neither do I think it has made it much better. And I suggest that it should. Because in the longer term the health of our system of government will suffer if our public service becomes
politicised or if our public service tells ministers only what they want to hear. Capable public servants who specialise in policy analysis will leave if they cannot do what they are meant to do. And there is a risk of a creeping trend to politicisation through changing expectations of both public servants and Ministers.

Options

Having identified the constitutional underpinnings as a framework for analysis, and diagnosed the problem, I ought now to identify some policy options for addressing it.

First, I should mention an aspect of these issues which I have discussed before: the effect of the Official Information Act 1982. The OIA is an important constitutional protection against wrongdoing in Government. It ensures, if it works well, that wrongdoing will out.

But fear by Ministers of the release of advice that is not convenient to them, and sensitivity to this by public servants, has distorted the way in which advice is provided. Sensitive advice tends to be provided orally rather than in written form, in particular.

Last April I raised for discussion the option of the Ombudsman, or even Parliament, tightening the criteria for disclosing free and frank policy advice so that it is not disclosed so readily. But the problem with that is that there are instances where such advice needs to be known, in the public interest. And that is the essence of the judgment that the Ombudsman makes now. So I do not now suggest restricting or impeding disclosure of free and frank advice.

Instead, I think that leadership is required across the state sector to ensure that all actors in the system accept the provision of free and frank advice as a core element of the system and, where its disclosure is required in the public interest, that is also an element of the system of governance. Obviously, leadership is required in two different places. Firstly, at the top level of the public service. Which is why Iain Rennie’s willingness to address this forum on this topic next month is such a valuable thing. Leadership at the top level of the Cabinet is also required. Senior Ministers need to engage over the long term health of the system of government. In my opinion, they need to be prepared to
give systemic assurance, credible commitments that endure across political crises, that no public servant will be penalised for giving free and frank advice that is expressed appropriately. Such an assurance, in order to endure, in my view needs written expression. It could be in the Cabinet Manual, which each administration signs up to on assuming office. I think that would be useful.

But I also tend to think that such a document should be a stand alone Code of Conduct, or Guidance for Relationships between Ministers and Public Servants. Perhaps that is what the PSA is talking about occasionally in relationship to what they call a Charter. In being both stand alone and also the Cabinet Manual it would be similar to the Cabinet Directions on the Conduct of Crown Legal Business and I think it would have an influence. Such a document should not be convoluted or legalistic (if those two things are different which they may not be). It should be simple and principles based. It should be interpreted jointly by the State Services Commissioner (acting statutorily independently) and by the Prime Minister. Such a document could be the basis for training and for new public servants and new Ministers role understanding the nature of their responsibilities when they arrive in office.

A document alone, of course, is insufficient. It is, I think, necessary – in order to give enduring voice to mutual expectations. But more is required. Leadership of cultural change in my view is required. Which means an expression of expectations should be supported by reinforcing mechanisms. Perhaps – and I offer this as a suggestion for discussion - there should be feedback mechanisms which allow public servants to report, safely, instances of breach of such expectations. This might be a hotline – which, actually, I see no reason why the PSA could not establish right now. Richard. A hotline could be an source of support, assistance and advice to anonymous public servants who experience problems. It might also be useful way of collecting anonymised information about the prevalence or lack of prevalence of problems. And identifying patterns of behaviour of particular Ministries and particular Ministers. It may also give Ministers and more senior public servants pause for thought about their own behaviour. And, with that, our system of government may be improved.
No reira, I thank you for listening so politely, to my free and frank advice.