

# A Constitutional Personality

## does the New Zealand public service possess one, and is it in good order?

*Constitution*, noun: a body of fundamental principles or established precedents according to which a state or other organisation is acknowledged to be governed.

*Acknowledged*, adjective: accepted as valid or legitimate.

*Constitutional*, adjective: relating to an established set of principles governing a state.

*Personality*, noun: the combination of characteristics or qualities that form an individual's distinctive character.

### The first part

On 4 May 2016 the *Dominion Post* published an editorial, as it is wont to do on matters it deems of sufficient importance. This editorial was entitled 'Servants of the people, not govt'. For the purposes of this article it is tempting to reproduce the editorial in its entirety.

Typically such pieces are written with an efficiency of expression that generates maximum impact. Such was the case here. The point of departure was an announcement by the government of the appointment of Peter Hughes as the next state services commissioner, with his appointment to take effect following

the end of the term of the incumbent on 4 July 2016. The editorial praised the appointment and Hughes, and was somewhat critical of the incumbent, Iain Rennie. Others can judge.

In the second paragraph the editorial notes that:

The commissioner's job is very tough. They must uphold the independence of the civil service while remaining the loyal servant of the government. This is a difficult balancing act and not all Hughes' predecessors have managed it.

The real import of the editorial is to be found in its title, which is quite provocative. A more tempered (and some would no doubt say constitutionally accurate) title might have read: 'Servants of the people and the government'. But editorials are about making a point, and this one does. Having rehearsed the

putative strengths of the appointee and the limitations of his predecessor, it goes on to state:

The Key Government has shown a certain disdain for the civil service. Its set of goals for the bureaucracy is pitched high, as it should be.

This is not a Government that encourages its advisers to proffer unwelcome advice. In that it is not alone, of course, but sometimes officials should be brave and tell the minister something he or she doesn't want to hear. Hughes' job as commissioner is to show some spine and to back top officials who do likewise.

The Government has also shown a cynical attitude towards its responsibilities under the Official Information Act, with ministers regularly taking the maximum amount of time allowable to respond to requests. This is to flout the spirit of the law. Here, too, Hughes' approach will be watched with interest.

Good judgement is essential in government, although most voters would laugh at anyone who suggested it. People are rightly cynical about politics; in the struggle for power, however, the greatest political virtue is wisdom – and it's also the rarest.

The role of the sage adviser might seem outmoded. It's not.

The editorial goes on to note, approvingly, the appointment of Principal Youth Court Judge Andrew Becroft as the children's commissioner.

When we deconstruct the editorial it contains both positive and normative elements. Both can be discerned from the following summary:

- The public service has a duty of service to the people of Aotearoa/New Zealand. That duty takes the form of some measure of independence.
- The public service has a duty of loyalty to the government of the day, including to seek to realise the objectives or results set for it by that government.

- The duty is codified, in part by statute.
- The duty is not being discharged as it should be.
- The state services commissioner needs to ensure that the civil service is able to meet the duties and responsibilities it carries.

At the risk of doing considerable violence to what I would describe as an extremely well-crafted editorial, let me distil it down to a single statement: the New Zealand public service enjoys a constitutional personality (or identity) and as such it is vital to the integrity, efficiency and effectiveness of our system of government and governance that the personality is recognised, respected and

protected. It is this that forms the thesis, provocation or disruption that this article advances. The objective – as perhaps also of the writer(s) who produced the *Dominion Post* editorial – is to encourage a conversation.<sup>1</sup>

#### **The second part: of constitutions and the public service**

What then of the constitution of Aotearoa/New Zealand and what it says about the public service? As often stated, New Zealand is a member of a small club of three (the other two being the United Kingdom and Israel) whose constitutions are not codified into a single document, typically a 'higher' law. It is incorrect to say that the New Zealand constitution is largely uncodified. It is correct to say that the codification takes many forms, and the law is but one.

That leads us to a second characteristic of New Zealand's constitutional arrangements, although this is a common feature of a number of nations: that the constitution combines law and convention. One of the 'go to' readings

for the constitutional innocents one encounters in university classes (and it is noteworthy that these 'innocents' are not confined to undergraduate classes) is the impressive essay which acts as an extended introduction to the New Zealand *Cabinet Manual* – itself one of the more important elements of New Zealand's constitutional arrangements.<sup>2</sup> That introduction, entitled 'On the constitution of New Zealand: an introduction to the foundations of the current form of government', is by Sir Kenneth Keith. It notes the many sources of the constitution, including the conventions. It is perhaps for legal scholars to debate, but one might assert that the *Cabinet Manual* itself is, by way of its content and its status, a convention of the

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constitution. It is not a legal document, and on that basis not enforceable before a court. And as Sir Kenneth notes:

Constitutional conventions are of critical importance to the working of the constitution, even though they are not enforceable by the courts. In 1982, the Supreme Court of Canada summarised the constitutional position in that country in an equation: constitutional conventions plus constitutional law equal the total constitution of the country. (Cabinet Office, 2008, p.2)

This is, of course, an interesting formula for the purposes of engaging others in discussion about the nature of the constitutional arrangements of Aotearoa/New Zealand. An invitation to consider whether the formula 'works' for New Zealand provides a useful segue into considering the status of the Treaty of Waitangi. That is outside of the scope of the present discussion, but, solely for the record, adding the treaty to the

formula does, in my view, provide a more complete picture.

Sir Kenneth does note the public service in his introductory essay, thereby indicating that it is part of the constitutional fabric. Moreover, he notes that a number of statutes set out in some detail the role of the public service, including the State Sector Act 1988, the Public Finance Act 1989 and the Official Information Act 1982. He goes on to observe that:

Constitutional principles and that legislation support four broad propositions (among others).

Members of the public service:

- are to act in accordance with the law;
- are to be imbued with the spirit

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- of service to the community;
- are (as appropriate) to give free and frank advice to Ministers and others in authority, and, when decisions have been taken, to give effect to those decisions in accordance with their responsibility to the Ministers or others;
- when legislation so provides, are to act independently in accordance with that legislation.

Public servants meet those obligations in accordance with important principles such as neutrality and independence, and as members of a career service. (ibid., pp.4-5)

The tenor is consistent with the normative thrust of the editorial reviewed earlier. What is clear is that there is acceptance that such matters do form part of the constitutional fabric, and that they are manifest in both law and convention.

### The third part

At an informal seminar in which I first attempted to present these issues to colleagues and seek comment and guidance, one colleague posed the question: 'Have you read and reflected on Scott's *The New Zealand Constitution?* ... you may find it is useful given the kinds of issues you have an interest in.' I replied that I had not but that I would, and I did. It was excellent advice.

It is the case that constitutions that are porous, flexible, iterative, not fully codified in law and almost exclusively not entrenched are likely to evolve over time. Indeed, that is one of the arguments advanced in support of the kind of constitutional arrangements we are endowed with. And so we do find constitutional change, and some of it of

a very significant kind: the Electoral Act 1993 is an exemplary case in point. One might add parenthetically that there is also at times some disquiet as to how 'low' the threshold is – in terms of procedural requirements – to change or modify those constitutional arrangements. Indeed, the *Cabinet Manual* is, one might argue, the province of the executive branch of government, and – presumably by convention – is ratified by an incoming government at the first meeting of the Cabinet. It is in no way to question the integrity of the document – it is a document of substance and its status appears to be acknowledged and respected by political and administrative actors across the board – to note that it can be, and indeed has been, modified without reference to the legislative branch of the state.<sup>3</sup>

But to return to Scott. Scott characterised his work in his preface as an 'essay in constitutional analysis'. The author died on 19 July 1961, and a

publisher's note indicates that he was not able to manage the final stages of proofing.<sup>4</sup> I suspect that Scott might well also have added some additional prefatory comments. One dives into the issues as one would into a cold bathing pool. There is no introductory chapter. Chapter 1, entitled 'The Constitution', provides an overview of the Constitution Act 1852 – an act repealed by the Constitution Act 1986, which may, in the fullness of time, be itself subject to further repeal. Certainly, the principal architect of the 1986 legislation makes no secret of his desire to prosecute a change of this kind.

Scott's 'essay' consists of seven chapters. What is interesting is that institutions and not broad branches or functions provide the chapter titles. And so chapter 2 is 'Parliament', not 'The Legislative Branch' or something similar. The head of state – as an institution – is granted a chapter in its own right. Chapter 4 is on 'Cabinet'. Chapter 5 is on 'The Public Service', and it is this chapter that I want to comment on here. The fact that the public service features in an essay on the constitution of New Zealand is in itself a significant statement. It is not my intention to traverse all of the issues that Scott addresses in this chapter. What can be said, however, is that the provenance of these issues is to be found in the settlement that produced the 1912 Public Service Act. And what should also be emphasised is that, in very large part, it is that settlement that continues to underpin the constitutional role of the public service in New Zealand. So, notwithstanding the organic nature of New Zealand constitutional arrangements, there is, at least in respect of the nature of the public service and attendant constitutional rights and responsibilities, an unbroken thread that has been in place for over a century. There is on that basis nothing improper in following that thread back to 1962 and dwelling on Scott's reflections at that time.

Scott observes that

The central *constitutional facts* about government employment in New Zealand are the absence of political patronage and the correlative neutrality of the public

service. Appointment depends on qualifications, and promotion depends on merit and seniority. (Scott, 1962, p.137, emphasis added)

A perennial tension is between a duty of service to the government of the day and a duty of care to the public interest. It is worth quoting Scott at some length:

Public servants owe a duty of loyalty to their minister and to the government generally ... Statements of the content of the duty of loyalty are seldom precise, but those that are precise are often contradictory. The extreme views are: (1) that the duty of loyalty is subject to the exception that public servants should protect the public interest from the marauding activities of politicians; and (2) that public servants should do all they can to help the government to win the next election. (p.140)

For his part, Scott is highly dismissive of the first and much more accepting of the second. Where the public interest lies is a matter of opinion. What matters more is that it is ministers who are responsible:

The case for giving political power to ministers in a parliamentary democracy is not that they can always be guaranteed to know with a mechanical perfection where the public interest lies, but that they are responsible; so our constitutional system is not subverted by the errors of judgement that ministers, being human, are bound to make, but is subverted by the obstruction of ministerial wishes by politically irresponsible public servants. (ibid.)

For Scott, the protections against overt politicisation in policymaking (and he uses the example – more important under a first-past-the-post electoral system, but still material – of advantaging ‘marginal electorates’) are to be found in the capacity of an opposition to expose

it. However, there is something noble, but one might argue considerably naïve, in Scott’s assertion that:

If a government neglects long-term considerations, and is returned at the next general election (as is usual in New Zealand), it will suffer during the next parliamentary term. Whether it is re-elected or not, it will be criticised for taking a short-term view ... For a public servant who feels that the government is taking any kind of partisan attitude instead of promoting the national interest, the best tactic is to co-operate loyally in the administration of government policy, and leave the electors to punish the government. (p.141)

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One is tempted to reflect on both how much times have changed and how much they have not.

Scott then turns to ‘advice on policy’. Here, one might argue, there is less naïvety and a greater measure of acuity:

A permanent head’s duty is to see that his minister receives the best information and advice his department can offer. To say no more would be to leave the matter nebulous, for value-free social science is a chimera, and so is a social technology that could infer the line of policy development from the logic of the situation. (ibid.)

But Scott then takes the argument into undisputedly constitutional terrain by posing the question ‘whether the permanent head should take account of the anticipated reactions of citizens’ (p.142). He then proceeds further into what he characterises as even more difficult territory in examining the tension between the imperatives of partisan

considerations and robust policy advice, and on these matters he is unequivocal:

Where a permanent head thinks the minister is wrong about the merits of a policy, or wrong in allowing himself to be influenced by considerations of political principle or of political interest, he owes it to the minister to say so. He owes the duty of offering disinterested and fearless advice, and should argue as strongly as he feels is justified. (ibid.)

And so, in a somewhat different institutional context – but arguably one that is constitutionally little changed – we have a strong articulation of the doctrine, or perhaps more correctly convention, of

free, frank and fearless advice.

And what of independence? For Scott this is clearly problematic, and he cites a case where advice provided by a government department to a tribunal (the Price Tribunal) was at variance with the stated policies of the government of the day.

The doctrine of responsible government appears to have been overlooked in a recent instance where comment was made that certain submissions were the views of the Department concerned and not necessarily the views of the Minister in charge. Constitutionally, such comment is fallacious and tends to undermine the convention that the public servant is anonymous and only the Minister has identity. (p.147)

For the purposes of this article, the word personality might be substituted for identity. There may well be a constant and unbroken thread that starts with the Public Service Act 1912, but on the matter

of 'independence' there is continuity in some respects, and a marked discontinuity in others.<sup>5</sup>

**The fourth part: a duty to whom?**

A leading Canadian legal scholar, Lorne Sossin, has written extensively on the constitutional status of the public service (see, for example, Sossin, 2005). That body of work is relevant to the present discussion, and will be the subject of further examination. But we have narrowed our theme down to independence, or more correctly constitutional independence, and Sossin's work speaks directly to this.

servants' duty to the Crown to uphold the public interest permit, or even require, them to refuse instructions from the government of the day? What constitutional doctrines enable bureaucrats to remain protected from the undue interference of their ministers? What safeguards ensure that civil servants cannot use their positions to partisan ends? Is bureaucratic independence, to the extent it is safeguarded, consistent with democratic principles? Could it be used to frustrate the legitimate

the day? And what of 'the state': is that synonymous with the Crown?

**The fifth part**

In February 1985 the head of the British civil service, Sir Robert Armstrong, issued what is known as the Armstrong Memorandum. Paragraph three reads as follows:

Civil Servants are servants of the Crown. For all practical purposes the Crown in this context means and is represented by the Government of the day. There are special cases in which certain functions are conferred in law upon particular members of or groups of members of the public service, but in general the executive powers of the Crown are exercised by and on advice of Her Majesty's Ministers, who are in turn answerable to Parliament. *The Civil Service as such has no constitutional personality or responsibility separate from the duly Constituted Government of the day ...* (quoted in Maer, 2015, emphasis added)<sup>6</sup>

## Constitutional reviews ... have resulted in recommendations identifying weaknesses in the present constitutional arrangements relating to the role and functions of the public service.

Sossin argues that in the Canadian context:

the civil service is subject to a dense network of constitutional provisions, conventions, and principles and that our democratic institutions and practices would be meaningfully enhanced if these rules, principles, and conventions were more fully elaborated. Civil servants are the guardians of a public trust underlying the exercise of all public authority. Their ability to maintain the integrity of that trust and, when called upon, to 'speak truth to power' depends on a measure of independence from undue political influence. Neutrality, integrity, professionalism, and trust, on this view, are inextricably linked to the norm of bureaucratic independence. (Sossin, 2005, p.1)

This leads Sossin to pose a number of questions:

To what extent, and in what circumstances, does public

goals of democratically elected governments that rely on the civil service to implement their policies? (ibid., p.3)

These are all questions worthy of serious consideration.

To anticipate the conclusion Sossin arrives at: it is not to vest in the public service as an institution a distinctive constitutional personality, but instead to confer on those with particular responsibilities within the public service (most notably the public servant 'whosoever by reason of their discretionary or decision-making authority has a duty to discharge a public trust through conduct or action that political interference might undermine' (ibid., p.19)) certain constitutional obligations. Suffice to say I disagree, but that is for another time.

The other important question Sossin poses in more general terms is, if independence is to be sought for the public service, then independence from whom? Public servants discharge their responsibility to the Crown, but is that synonymous with the government of

The Armstrong Memorandum was a direct result of the acquittal of a senior British Ministry of Defence official, Clive Ponting, who was prosecuted under the Official Secrets Act. Ponting had found evidence that directly contradicted the official government account of the decision to sink the Argentinian cruiser the *General Belgrano* in the course of the Falklands war. When his ministerial superiors declined to act on his advice, and continued with the official justification that the Argentinian vessel constituted a threat to the British naval taskforce as it was heading towards the taskforce and was within an 'exclusion zone' (both of which were untrue), Ponting provided his analysis to a parliamentary select committee. After an 11-day trial the jury reached a not guilty verdict over a lunch break.<sup>7</sup>

Ponting's summary of his own defence is illuminating in that he argued that he acted on what he saw as an obligation or duty to the interests of the British state – perhaps the Crown – and that these were not prescribed by and identical to the

interests of the government of the day. Outside the court following the decision Ponting declared:

I did what I thought was right in leaking the documents ... a civil servant is not, in the final analysis, at the beck and call of ministers only. We also serve the wider national interest (quoted in Dalyell, 2003).<sup>8</sup>

### The sixth and concluding part

The *Dominion Post* editorial would have it that all is not as well as it might be in the state of Aotearoa/New Zealand. Perhaps the appointment of a new state services commissioner will assist; that remains to be seen. However, the argument advanced here is that the malady identified in that editorial is bigger than one person. The matters are fundamentally constitutional, and if the present constitutional arrangements – whether in the form of statute or convention – are not fit for purpose, then perhaps a constitutional remedy needs to be found. Constitutional reviews, including the most recent (Constitutional Advisory Panel, 2013), have resulted in recommendations identifying weaknesses in the present constitutional arrangements relating to the role and functions of the public service. It is regrettable, not least because of the considerable investment honourable people have made in such

reviews, that there has to date, in terms of a response from government, been a grateful silence and inaction. But there are constitutional architects among us, and there are portents of things to come. Let us hope that the public service features in any emergent constitutional architecture.

- 1 We who have chosen – albeit for a time – to locate ourselves in universities cannot but look on with envy at the impact editorial writers are able to achieve, and hope that one day the metric used to measure the ‘impact’ of what it is that we do in universities will share more than it currently does with measurements of the reach of the print and other media.
- 2 The *Cabinet Manual* also contains a foreword, written by former prime minister Helen Clark, and a preface by former secretary of the Cabinet Diane Morcom.
- 3 A former secretary to the Cabinet, and at the time the deputy secretary, addressed this issue in a paper presented in 2006: ‘The executive is entitled to amend its own working rules, and it is entitled to official support in doing so. The Cabinet Office officials responsible for working with the Manual are responsible to the Prime Minister and the Governor-General for its content, for applying its guidance to particular fact situations, and for policy related to the Manual. We are, of course, also subject to the usual public service accountability mechanisms, including the Official Information Act, select committee appearances and media scrutiny’ (Kitteridge, 2006). That said, it is the case that an important component of New Zealand’s constitutional arrangements can be modified by the executive alone, and it is a legitimate question whether this should, in effect, form part of the prerogative powers of that body.
- 4 It might be argued that, in the light of the earlier observation that the constitution of Aotearoa/New Zealand is an organic work in progress, seeking insight from a work published in 1962 is questionable. There is some merit to that. The world has changed significantly since then and so has New Zealand, in myriad ways, including in its constitutional arrangements. And there is in some respects a dated quality, in the language, but also in comments on political culture (itself not an irrelevant consideration in matters constitutional). The following extract is a case in point. Posing the question of whether a change of government may present difficulties when ministers are required to work with senior officials who have enjoyed a long-standing relationship with the ‘other side’, Scott comments that this is unlikely: ‘Part of the explanation is that changes of government are relatively infrequent in New Zealand; but a more important part of the explanation is the remarkable continuity of policy from one government to another’ (p.143). The first part of that observation is perhaps as relevant now as it was in 1962, but some might question whether the same can be said of the latter part.

- 5 For example, the independence afforded the Reserve Bank pursuant to the Reserve Bank Act 1989 enables and may even encourage that institution to operate at variance with the preferences of the government of the day, and more specifically the responsible minister. While in an ideal situation monetary and fiscal policy will operate in a mutually reinforcing manner, informed by a shared assessment of the environment and agreement on forecasts, that has not always been the case. Moreover, while the practice has not been adopted by recent governors, there have been cases where the governor of the bank has interpreted the institutional independence afforded to the bank as a personal licence to comment on a wide range of policies, not always directly related to the bank’s mandate. Similarly, the Public Finance Act provides a measure of independence to the secretary of the New Zealand Treasury when it comes to matters of economic and fiscal transparency. Section 26W(2)(b) of that act provides that economic and fiscal updates must include ‘a statement by the Secretary that the Treasury has supplied to the Minister, and to any other Minister designated for the purpose of this paragraph, an economic and fiscal update’ and that this must incorporate ‘the fiscal and economic implications of the decisions and circumstances’ referred to in the statement. The detail here is far less important in the current context than the general principle, and it is a principle that I would assert is a constitutional one: specifically, that there are circumstances in which the public service is required to operate independently of ministers in furnishing advice that is public in nature.
- 6 Maer notes that the Armstrong Memorandum was eventually incorporated into a civil service management code. ‘The Treasury and Civil Service Committee report in November 1994 summarised contemporary thinking on the status of the Armstrong Memorandum and argued for its replacement: It recommended the establishment of a civil service code of ethics (para. 103–107) and an independent appeals procedure based on a strengthened Civil Service Commissioner body (para. 108–112). It also called for a Civil Service Act to provide statutory backing to maintain the essential values of the Civil Service (para. 116). It included a draft Code at Annex 1 of its report, upon which it invited detailed comments from the Government. The Government response published in *The Civil Service: taking forward continuity and change* accepted the proposal for a new Civil Service Code, and provided a revised version of the Committee’s draft as an Annex’ (Maer, 2015, p.6).
- 7 For a detailed and insightful analysis of this matter and the issues raised regarding the ethical obligations of civil servants see Uhr, 2005, pp.164–81.
- 8 And it is from this case that we draw the Ponting principle: ‘Loyalty to one’s superiors is only provisional, loyalty to the public interest and to the democratic process are the ultimate obligations of functionaries’ (Uhr, 2005, p.167).

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