

# Politics and administration: some reflections on the 'Setchell Affair' (or boundary riding in the purple zone)

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... the Government is taking an unprecedented step in New Zealand, in making a reciprocal commitment by Ministers to the State sector. Following the [State Sector Standard] board's recommendation, Ministers will formally sign up to their role as stewards of the State sector. We are recognising that the performance of the State sector will be substantially influenced by the actions and processes of Ministers acting collectively and individually.

*(Hon Trevor Mallard, 11 March 2001)*

## Introduction

United States Supreme Court Justice Louis Brandeis wrote in 'Other People's Money' that 'daylight is the best antiseptic'. The matters surrounding the initial employment of Madeleine Setchell by the Ministry for the Environment, and her subsequent departure under agreed (and confidential) terms, have certainly been the subject of a great deal of daylight (and political heat). But is not clear that the result has been an antiseptic one for the body politic and administration. Time will no doubt tell.

The Setchell case has raised a number of issues, including but not limited to the:

- nature of conflicts of interest in the public service, and how best to manage perceived and/or real conflicts of this kind.
- respective roles of chief executive and Minister in respect of employment decisions that are formally – by virtue of the State Sector Act – the domain of the former.
- nature of the obligations on a chief executive pursuant to the 'no-surprises' convention.
- role of political staff in ministers' offices.

## Political staff

Starting with the last of these, this is a matter that we have been researching for some time, and on which we have published a number of articles (see Eichbaum & Shaw, 2003, 2005, 2006, 2007a, 2007b, 2007c). The research has involved the dissemination of a questionnaire containing 125 items, and including both open-ended and forced-choice questions to senior public servants, 'political' staff in Ministers' offices, and former and present Ministers. We received coded and analysed responses

from 188 senior officials, 32 ministerial advisors, and 22 Ministers.

On balance our research has identified that:

- There is a clear, and broadly accepted role for political staff in Ministers' offices – Ministers (but in our sample not all Ministers) view them as adding value, as do a clear majority of senior officials.
- The move to a mixed member proportional representational (MMP) environment has added to the complexity of governance, and has also created spheres of activity (for example, inter-party negotiation over policy) which, if they were to be involved, would compromise the political neutrality of officials. Ministerial staff of the political kind are better suited to this kind of role.
- There are risks associated with the advent of political staff in Minister's offices, and some evidence that this development has created problems from time to time. These risks include the funnelling of advice, problems in officials gaining direct access to Ministers, and ministerial staff sometimes exceeding their authority. To the extent that it occurs, however, it appears that the risk of politicisation lies in matters of process rather than those of policy substance.
- There is presently a significant gap in the accountability arrangements for political staff in Ministers' offices. In theory they are covered by the State Services Code of Conduct, although in practice their role – in part at least – is at variance with the principle and practice of political neutrality. There is significant support on the part of both the advisers themselves and on the part of public servants for a dedicated code of conduct for political staff in Ministers' offices.

This final matter was one that we commented on in a presentation to an IPANZ seminar on 21 February 2007<sup>1</sup>

In that presentation we recommended that serious consideration be given to developing a code of conduct for political staff employed in Ministers' offices (as a first step, with consideration also to be given to specific codes for other classes of employee employed within the 'public service' broadly defined, but not required to fully meet the standard tests of political neutrality).

There is, as we noted in that seminar presentation, considerable support both from public servants and political advisers themselves, for such a code – only 4 % of the public servants surveyed for our research recorded some measure of disagreement with the proposition that 'there should be a special code of conduct for ministerial (political) advisers', and only 16% of the advisers themselves disagreed.

In concluding our February 2007 presentation we recommended that the Department of Internal Affairs (which has responsibility for the employment of ministerial staff through the Executive Government Support Branch) should issue a code of conduct covering political staff employed on 'event-based' contracts. We also recommended that specific reference should be made to that code of conduct in the Cabinet Manual. As to the kind of procedural remedies that might be included in any such code, we suggested that any breach or alleged breach of the code be would brought to the attention of the relevant Minister by a departmental/agency chief executive and/or to the attention of the Minister responsible for Ministerial Services (since 1999 this has been the Prime Minister) by the Chief Executive of the Department of Internal Affairs.

For the sake of clarity, the role played by political staff in the matters surrounding the recruitment and employment of Ms Setchell appears to have been relatively minor (i.e., simply as the conduit for the views of Ministers) and – so far as one can tell from the public record, not inappropriate. But in the New Zealand context this case, perhaps more so than any other, has brought the role (and accountability) of such staff to public light and made them a matter of public debate.

One senses that there is a view within the Government that to invite officials to draft advice on a code of conduct would be to admit that the actions of political staff (in respect of this matter or some other) had been inappropriate. Whether that is the case or not, it is regrettable that the opportunity has not been taken to address a deficit in the accountability arrangements for political staff. A recent Australian study on the role of ministerial staff in Australian Federal and State governments is entitled 'Power without Responsibility' (Tiernan, 2007); and in the absence of a code of conduct there is the risk that the power of political staff – who are at the end of the day public servants, albeit of a particular kind – will not be the subject of the necessary guidance, oversight, and redress that a code might offer. It is our view that a dedicated code would assist in addressing the present accountability gap that exists here. Moreover a code may provide a platform for other actions – for example, induction or in-service education and training relating to ethics, or to the relationship between (and specific responsi-

bilities of) the public service and political staff.

## Employment decisions, Ministers and chief executives

Of the issues raised by the Setchell case this is perhaps the most significant, and much of the initial debate centred on whether it was appropriate for a Minister to venture a view on such matters, and whether a chief executive should feel obliged to advise his or her Minister in respect of an employment decision which may involve some measure of political sensitivity or risk (and indeed whether advising a Minister is tantamount to inviting a view on the part of the Minister). The Institute of Public Administration/Institute of Policy Studies seminar on 30 August 2007 addressed these issues in some detail<sup>2</sup>.

Ross Tanner proffered the view that:

*... since a Minister will have views to express about the performance of a department, and of particular people within that department, then on occasion it may be useful, and even necessary, for the chief executive to advise the Minister before deciding on a particular senior appointment. It will be up to the chief executive to take the initiative and to determine the nature of the discussion, not the Minister: in this as with other situations the chief executive is required to ride the boundary between the political role of the Minister and the administrative role of the department. This sort of situation has previously been described as 'managing in the purple zone' (Tanner, 2007 p. 7).*

For his part, Jonathan Boston suggested that:

*... there are circumstances where it would be both prudent and appropriate for a CE to consult a minister prior to making a key appointment; he went on to say that, [s]uch circumstances are likely to be relatively rare, limited to senior positions in the department, and restricted to those cases where there are potential **political** risks or issues associated with the appointment (Boston, 2007 p. 11; emphasis in the original).*

Rob Laking was less inclined to entertain an active role for ministers:

*Chief executives may well do their Ministers the courtesy of advising them of any significant appointments – but the word used in the Cabinet Manual is indeed 'advise' and not 'consult'. So in making appointments chief executives have to have in mind their general duty to run the department efficiently and effectively; but they have no specific duty to Ministers on who they appoint. ... The corollary is that Ministers should keep out of passing judgement on their decisions (Laking, 2007 p. 13).*

While more 'black and white' than 'purple', in our view the Laking interpretation of the guidance provided by the Cabinet Manual is the correct one.

In early August 2007, the State Services Commissioner announced the terms of reference of his investigation into the recruitment and employment of Madeleine Setchell<sup>3</sup> and that he would be assisted in this investigation by an 'independent inquirer'. The Commissioner appointed Don Hunn as the

independent inquirer<sup>4</sup>

The Commissioner's report and that of Don Hunn were made public in November 2007 (SSC, 2007a, 2007b)

It is clear from Don Hunn's report that the Chief Executive of the Ministry for the Environment did much more than 'advise' his Minister, that the Minister did express a view, and that this view influenced the subsequent actions of the chief executive. The following extract from Mr Hunn's report speaks volumes (and raises the interesting question as to why the chief executive was not prepared to adopt the tenor of the 'colourful' advice on offer from the Deputy Commissioner):

**1 June.** *The CE called the Deputy Commissioner, SSC, to inform her he had decided the perceived conflict of interest was such that he must offer the Communications Manager another position where that issue would be more manageable. The Deputy Commissioner noted that this was a decision for the CE to make and advised him to seek legal advice: he confirmed he was doing so. The CE mentioned that one of the reasons for his decision had been the Minister's reaction to the Communications Manager's relationship with her partner. The Deputy Commissioner responded along the lines — "Well if the Minister does display concern, just tell him to get over it". (The CE did not find this particularly helpful: the remark may have been a little colourful but the CE could not have had a more succinct encapsulation of the SSC view of where the Minister's and the CE's responsibilities began and ended) (SSC, 2007b p. 24).*

Colourful indeed the advice may have been, but, again, more black and white perhaps than purple.

Turning now to the State Services Commissioner's report and the 'lessons learned' (see box below), the eighth of these

provides that, 'A Minister's request that they have no surprises does not override the Chief Executive's good employer responsibility to handle employment matters with discretion.'

The State Services Commissioner's conclusions on this particular point are worth quoting at length:

*Requests by Ministers that they be kept informed on a 'no surprises' basis cannot and do not mean that Chief Executives must inform Ministers of everything they do. Much of what Chief Executives do is not the business of Ministers and both efficiency and propriety dictate that such matters should not be brought to Ministers. Chief Executives should keep Ministers informed of anything with significance within their portfolio responsibilities, but there should be good and particular reason why the Chief Executive would bring matters that are the Chief Executive's statutory responsibility to the attention of Ministers.*

*The fact that different judgments have been made in this case is a reminder that standards and conventions need constant reinforcement. I will continue to ensure that opportunities are provided for public servants to absorb and discuss the conventions and guidelines relating to political neutrality in the Public Service, and to relations between public servants and Ministers. I intend to discuss such matters further with Public Service Chief Executives and, if necessary, in the New Year, I may issue further guidance on a 'necessity test' to assist in deciding when to inform or consult a Minister about an employment matter (SSC, 2007a).*

It remains to be seen whether guidance on a 'necessity test' will indeed be necessary. The State Services Commissioner's comments on the actions of the Chief Executive of the Ministry of Agriculture and Forestry do seem to suggest that Ministers might in

### The SSC Report – the nine 'broad lessons'

- **The political views of public servants are generally not a relevant factor in their employment; it is their behaviour that matters.**
- **For a small number of public servants in key jobs, any political alignments create a conflict with the job.**
- **There is nothing unique about communication positions, including communications manager positions, which sets them apart from the standard political neutrality considerations applying to all public service jobs.**
- **Family connections are relevant in considering conflict.**
- **All conflict must be managed, including political conflict.**
- **The management of conflict (especially involving family members) demands special sensitivity from employers.**
- **When managing a conflict (or any other employment issues) employers should only involve those who need to know.**
- **A Ministers request that they have no surprises does not override the Chief Executive's good employer responsibility to handle employment matters with discretion.**
- **There is an obligation on good employers to handle their relations with their employees with discretion, but sometimes employee confidentiality may be overridden by the public interest.**

certain circumstances be provided with *advice* relating to an employment decision, but after the event – advice from Ministers should not be sought in advance of decisions, properly those of a chief executive, being made (see SSC, 2007a pp. 6–7).

## The other side of the 'bargain'

Rising above the specific issues that are raised by the Setchell case, at the core the principal issue here is the nature of the Public Service Bargain (Hood & Lodge, 2006) that exists in New Zealand, or more to the point that in a normative sense *should* exist. Bargains change over time, but in the New Zealand context one can argue that since 1913 (and the passage of the Public Service Act) a variant of the Schafferian bargain has been in place for much of that time. Hood & Lodge characterise the Schafferian bargain in the following terms:

*[B]roadly ... civil servants gave up some of their political rights (such as the right to openly criticise the government of the day) in exchange for permanence in office. And for their part, elected politicians in their role as departmental ministers gave up their right to hire and fire civil servants at will in exchange for loyalty and competence (2006 p. 19).*

In the New Zealand context the public service side of the bargain has been less about giving up political rights (although this was the case until the passage of the Political Disabilities Act 1936) and more about a duty of service to the government of the day (and to any future government) captured by the notion of responsive competence. If there is a purple zone it is perhaps more at the point at which responsiveness (to the government of the day) and responsibility (to provide advice that the government of the day 'needs to hear', as much as 'wants to hear') intersect.

Viewed in this light, the actions of the Chief Executive of the Ministry for the Environment were more responsive (and less responsible) than they might have been. On the responsiveness measure, the chief executive acted perhaps, 'not wisely but too well'. Australian Treasury Secretary Ken Henry used the distinction between responsiveness and responsibility particularly effectively in an address to his staff (Henry, 2007), (one of the slides that he used with that presentation is included at the end of this article). The essence of Henry's argument is that, while responsive to the government of the day is necessary, it is by no means a sufficient feature of the required Public Service bargain. To be clear – the government of the day has a legitimate expectation that the orientation of the public service will be one of responsive competence. Our research suggests that 'departmentalism' is still alive and well in the New Zealand public service – while an overwhelming majority of the ministerial advisers we surveyed (88 %) agreed with the proposition that 'officials generally try to facilitate Ministers' policy objectives', a sizable majority, (53 %) was inclined to agree with the view that 'officials are selective in the advice they tended to Ministers' and 'officials assert departmental priorities at the expense of the government's agenda'. Equally the public service needs to operate with the legitimate expectation that it will be

permitted to meet its obligation to tender free, frank, and comprehensive advice.

In a constitutional sense a sound, principled, and transparent Public Service Bargain is of fundamental importance. The Setchell case centers in large part on the allegation that both political and administrative players acted at variance with the kind of bargain suggested by long-standing constitutional and administrative rules and conventions.

Clearly the State Services Commissioner's responsibilities – while they extend to good government and governance writ large – are confined in the main to the administrative branch of executive government, in effect to one side of the bargain. Matters relating to Ministers are typically the province of the Prime Minister, and at various times that particular demarcation line has been strictly policed. But the kinds of issues raised by the Setchell case are, as Ross Tanner observed on 20 August, on the 'boundary between the political role of the Minister and the administrative role of the department' (Tanner, 2007 p. 7). And so whatever the opportunities for public servants, 'to absorb and discuss the conventions and guidelines relating to political neutrality in the Public Service and to relations between public servants and Ministers', there is still the issue of to how best to ensure that ministerial principals, as well as their administrative agents, are clear on the nature of the Public Service Bargain that delineates appropriate spheres of action, responsibility, and accountability for both parties.

There is, as the State Services Commissioner notes in his report, considerable advice available to public servants on the kinds of issues raised by the Setchell affair:

*None of the lessons outlined above are new. None of these reflect any new understandings of public service. None of them have been affected by any change in society, political processes or technology. They can all be found in guidance offered in recent and earlier years by myself or predecessors, by the Auditor-General and in the Cabinet Manual. A review of the websites of those three organisations will find reference to all of these areas (SSC, 2007a p. 13).*

What of advice and guidance to Ministers? Clearly the Cabinet Manual is the principal and paramount source of such guidance (in a formal sense – and in the best of all possible worlds Ministers might seek advice from their ministerial colleagues, or indeed the Cabinet Office). But if we approach these boundary issues from the perspective of a Public Service Bargain, the need for both sides of the 'bargain' to be explicitly articulated has been raised, and in recent times. In March 2001 the former Minister of State Services, the Hon Trevor Mallard, announced that, in response to the first report of the State Sector Standards Board, the Government had decided to set out its expectations of the State sector in a *reciprocal* Statement of Expectations and Commitment<sup>5</sup>.



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The Statement of Expectations (by the Government of the State sector) includes reference to the following principle:

To Serve the Government by:

- *implementing its decisions effectively and with commitment;*
- *providing free, frank and comprehensive advice;*
- *keeping the Government advised of issues likely to impinge on its responsibilities; and*
- *being aware of and reflecting the Government's priorities.*

The Statement of Commitment (by the Government to the State sector) reads as follows:

- *The Government recognises the performance of the State Sector will be substantially influenced by the actions and processes of Ministers, acting collectively and individually.*
- *In its working relationship with the State Sector, the Government and its Ministers will:*
  - *acknowledge the importance of free, frank and comprehensive advice;*
  - *provide clear guidance about policy directions and outcome priorities;*
  - *participate effectively in accountability processes; and*
  - *treat people in the State Sector in a professional manner.*

Signed:

Minister of State Services

Responsible Minister

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What of the current status of the reciprocal statement? In October 2006, following an Official Information Act request, the State Services Commission advised that:

*The Statement of Expectations and Commitment was published as an enduring document, and the content has been accessible on the State Services Commission website. In March 2001, the Statement was sent by Ministers to the agencies for which they were responsible. The Statement has not been withdrawn, although to some extent the purpose of the Statement was superseded by enactment of the Crown Entities Act 2004 which specified duties for Crown entity board members, and the 2004 amendments to the State Sector Act which extended the integrity and conduct mandate of the State Services Commissioner.*

*The Statement has not been addressed by the current Government and unlike the Cabinet Manual was not formally endorsed following the 2005 general election. As a consequence there are no copies of the Statement signed by members of the current Cabinet.*

A December 2006 letter from the Minister of State Services recorded her view that a collective reconsideration of the Statement of Government Expectations and Commitment by Ministers would not have been appropriate following the 2005 election.

The Minister concluded by suggesting that:

*... the State Services Commissioner has announced that he will issue a new code of conduct next year which sets minimum standards of integrity and conduct for the State services. It may be unhelpful therefore, if public interest in the trustworthiness of the State services were to be diverted by a renewed focus on the concerns of 2001 which led to the recommendations of the Standards Board.*

Perhaps in the light of the Setchell case it would be entirely appropriate to revisit the recommendations of the State Sector Standards Board, particularly those in its first report that resulted in the Government issuing the reciprocal statement. We are not suggesting that had the reciprocal commitment, or a more recent iteration of it, been in place, that the events surrounding the recruitment and employment of Ms Madeleine Setchell might not necessarily have occurred. But perhaps an individual minister signing up to a reciprocal statement of expectations and commitment may have given pause for thought. For their part, chief executives might have been prompted to be clearer on the nature of their responsibilities (and on the balance between responsibility and responsiveness), to take independent decisions, and to be prepared to remind ministers ('with respect ...') of the boundaries that do need to be policed from time to time.

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## Notes

- <sup>1</sup> (PowerPoint presentation to IPANZ seminar, is available at <http://www.ipanz.org.nz/tools/events/details.aspx?SECT=2007&ID=2569>).
- <sup>2</sup> IPANZ/IPS – The political neutrality of the State services: issues and principles Seminar. Available at <http://www.ipanz.org.nz/tools/events/details.aspx?SECT=2007&ID=2420>.
- <sup>3</sup> Terms of Reference: Investigation into Public Service recruitment and employment of Madeline Setchell <http://www.ssc.govt.nz/display/document.asp?DocID=6087>
- <sup>4</sup> State Services Commissioner appoints Don Hunn to assist with investigation <http://www.ssc.govt.nz/display/document.asp?NavID=113&DocID=6100>.
- <sup>5</sup> See <http://executive.govt.nz/Speech.aspx?type=press&rid=33849>.



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