COMMENT ON RECENT DEVELOPMENTS IN THE LAW

MINISTERIAL RESPONSIBILITY AND THE MANIOTOTO IRRIGATION SCHEME

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The simplest statement of the principle of ministerial responsibility is that the minister should take responsibility for any errors within the department under his authority; that he should right any wrongs caused by such errors, and that he should not seek to transfer the blame to a civil servant who is unable to defend himself. In a related sense ministerial responsibility also means that the minister is responsible for any decision taken collectively by his colleagues, as if it were his own. These principles constitute the constitutional convention of ministerial responsibility and they were thought to be essential to the operation of the constitution. However, changing conditions appear to have caused such a simple statement of the principles to be no longer completely true. The issue arose recently, in New Zealand, when an irrigation project was crippled by cost increases caused, in part, by departmental errors.

I THE BACKGROUND

The Maniototo region lies about twenty-five kilometres northwest of Dunedin, in a wide plain formed by the Taieri River. One of the factors limiting agriculture in the region is the lack of water. Many areas in the South Island of New Zealand require irrigation to increase the viability of agricultural production. The long barrier of the Southern Alps interrupts the predominantly westerly winds, ensuring a high rainfall on the West Coast, but making summer drought a common condition east of the mountains. For this reason the provision or promise of irrigation schemes is an important local issue. When a scheme fails as dramatically as did the Maniototo Irrigation Scheme, local farmers see, at best, a greatly reduced future and a shadow is cast over the economic development of the entire region.

The Maniototo Irrigation Scheme began in 1976. Although it was a Ministry of Works and Development project, much of the cost of building the scheme, servicing the loan and maintaining the finished project was to be borne by the farmers gaining irrigation benefits.[1] Ministry figures

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1 The Public Works Amendment Act 1975, particularly s 13, gives details of the percentage of the cost of the scheme to be borne by the farmers. The headworks (the portion of the scheme which collects the water) were to be paid for by Government, while the balance of the distribution network was subsidised at the rate of 50 percent. A separate subsidy rate of 70 percent operated in respect of "on farm" work. The cost per irrigated hectare was calculated on the basis of a 40 year lifespan for the scheme.

put the cost of the scheme at 5.9 million dollars. The farmers were quoted an irrigation cost of $14.56 per hectare and they voted to proceed on that basis. Nine thousand three hundred hectares were to be irrigated.

The then Minister of Foreign Affairs, and member of Parliament for Otago, Mr Warren Cooper, has disclosed[2] that at the time the National Government decided to press ahead with the scheme, its Treasury advisers were against the move, because it was thought to be uneconomic. The Treasury has disclosed[3] that its report to Cabinet queried the Ministry evaluation of costs for the project. This concern was, unfortunately, not acted upon. The government, taking into account mutton and wool prices, decided that the increased stock-carrying capacity of the land would encourage growth in rural communities.

In August 1983 it became publicly known that the cost of the project was then estimated to be 43.9 million dollars. This would have involved, had the full scheme been implemented and the full costs passed on, a water charge of $143 per irrigated hectare.[4] Not surprisingly, there was considerable public concern.

Even before the Maniototo disclosures, public concern had arisen about the efficiency of the Ministry of Works and Development in the Dunedin area. There had been a number of problems on major works. The Commissioner of Works decided to establish a team to review the performance of the department in undertaking large projects. The review team was established on 14 September 1983. It was required to report to the Commissioner of Works by 14 October 1983, but this was later extended to 4 November, largely because of the complexity of the Maniototo problem. It was required to:[5]

(1) review procedures for investigating, promotion, programming, design, construction, and control of major works;
(2) examine cost estimating, financial budgeting, and related procedures;
(3) examine the management structure;
(4) examine personnel resources; and
(5) make recommendations where appropriate on any of the preceding items, or on any other relevant matters.

The report was made public, and laid much of the blame for the increased costs of the Maniototo project on the local staff of the Ministry of Works and Development. It said that the Ministry scheme "lacked well-investigated, co-ordinated, and monitored master programmes from the outset".[6] It said that the feasibility studies for all the local irrigation schemes were inadequate in terms of civil engineering, design, construction and cost accounting, and that construction suffered from an initial lack of understanding of the complexity and extent of the work. This was compounded, in the case of the Maniototo scheme, by unexpected contractual and

2 *Otago Daily Times,* 19 December 1983.
3 Ibid, 22 February 1984.
4 Ibid, 13 December 1983.
5 Ministry of Works and Development report: "Review of Major Works in the Dunedin District. October 1983." The passage is a condensed version of the list of objectives given to the review team in the opening pages of the report.
6 Supra n 2, 7 December 1983.

geological difficulties. The Minister of Works and Development, Mr Anthony Friedlander, when commenting on the report, stressed the unique geological problems, stated that many of the management difficulties had already been corrected and noted that any disciplinary action, if needed, would be the decision of the State Services Commission.[7]

The matter was referred to the Commission. Mr Cooper has implied that this was a Cabinet decision.[8]

On 13 December 1983 the Ministry announced that the irrigation scheme would continue, but in a substantially revised form. The 9,300 hectares of the initial scheme would be cut back to 3,853 hectares. The cost of the revised scheme would be 27 million dollars. A new water charge was set at fifty dollars per hectare.[9]

The Maniototo farmers were described as "angry, shocked, and dismayed". The Chairman of the Maniototo Irrigation Committee, Mr Paterson, accused the Minister of Works and Development, Mr Friedlander, of ignoring an undertaking to discuss any proposed changes to the future of the scheme with the irrigation committee.[10]

The decision of the State Services Commission, with respect to disciplinary action to be taken against any of the public servants involved, became public on 18 February 1984. Measures decided included the transfer of three senior management staff, while seven others were reassigned (some being promoted). Thirty-nine new positions were created in the Ministry. Although the internal Ministry report – and the comments of several ministers, including Mr Friedlander, Mr Cooper, and Mr MacIntyre – would seem to indicate that some of these public servants could have been disciplined,[11] none were. All transfers were made under section 37 of the State Services Act 1962, which permits the Commission to transfer any public servant, at any time, if it is in the best interests of the Service. There is no appeal, except on the grounds of extreme personal hardship.

The Dunedin office of the Ministry of Works and Development erupted, calling the transfers a "punitive act" and the staff involved "scapegoats".[12] They demanded a full public enquiry. The Public Service Association[13] joined in the cause of the three transferees and judicial review was sought

7 Ibid, 6 December 1983.

8 Ibid, 19 December 1983. Mr Cooper said that it was his job to ensure, as Cabinet had, that the question [of the culpability of the public servants] be referred to the State Services Commission.

9 Ibid, 14 December 1983. The charge was related to the $14.56, based on the original [wrong] estimate. It included a "construction cost index escalation" which increased this to $66. The delay caused by the addition of a power station to the scheme, estimated at twelve months, was taken into account; this lowered the figure to $55. Another $5 was removed on the representation of the Ministry of Agriculture and Fisheries, who thought that the maximum economic charge was $40.

10 Ibid, 13 December 1983. The undertaking referred to was in October, when Mr Friedlander asked the Irrigation Committee to consider various options, including curtailment.

11 "Inefficiency" is an offence under s 56(c) of the State Services Act 1962.

12 Supra n 2, 17 February 1984.

13 The Public Service Association is the association of, and for, public servants. It has been described, loosely, as the largest trade union in the country. One of its many functions is to attempt to defend public servants where it appears they may have been treated unjustly.

in the High Court, the allegation being that the Commission had abused the powers given to it under the Act.[14] The applicants were unsuccessful.

The public concern with the problems of the Maniototo irrigation scheme was, to some extent, out of proportion to the errors involved. The cost increase from 5.9 million dollars in 1976 to 43.9 million dollars in 1983 must be put alongside the cost escalation figures for the 1979 to 1982 period for other major development projects:

(1) the Marsden Point Oil Refinery: cost escalation 850 million dollars;
(2) the Motonui Synthetic Petrol plant: cost escalation 740 million dollars;
(3) the Kapuni Ammonia-Urea plant: cost escalation 50 million dollars;
(4) the Waitotara Methanol plant: cost escalation 65 million dollars.[15]

Factors causing the public concern in the Maniototo case included: the fact that it was an election year; the fact that the government appeared vulnerable; and the fact that the government had made political promises with respect to irrigation. However, perhaps the most important single factor was the fact that individual, identifiable people were expected to bear the burden of the cost increases. Although this issue caused widespread public discussion, and political turmoil, it did not, however, become the subject of a parliamentary debate on ministerial responsibility – as happened, for example, in England over the Crichel Down affair.[16]

Mr Friedlander declined to accept formal responsibility for the departmental errors. He declined to resign, as demanded by the Opposition Members. This paper is concerned primarily with that refusal to accept the responsibility. Mr Geoffrey Palmer, the Labour deputy leader, said on this occasion that ministers were responsible for, and must publicly account for, the actions of their public servants. He said:[17]

> Where gross negligence occurs the rules of the system are that the Minister is responsible, and he must resign.

This is the traditional view taken of the convention of individual ministerial responsibility.

II THE ISSUES

This paper does not attempt to discover whether the civil servants in the Ministry of Works and Development were in fact guilty of negligence in their work on the Maniototo irrigation scheme. It is rather an examination of two aspects of the doctrine of ministerial responsibility: the convention of collective ministerial responsibility and the convention of individual ministerial responsibility.

Mr Friedlander, the Minister of Works and Development at the time of the difficulties, made a statement to the effect that much of the responsibility could not be his, as he was not Minister when the decisions were

14 *Bullen and Another* v *State Services Commission,* unreported, High Court, Wellington, 18 April 1984, A 40/84, Davison CJ.
15 Supra n 2, 28 February 1984.
16 The debate in the United Kingdom Parliament was on 20 July 1954; and is in *Hansard* at 530 HC Deb cols 1182-1302.
17 Supra n 2, 15 January 1984.

taken.[18] The decisions he was referring to were policy decisions at Cabinet level, and his attempt to divorce himself from the decisions raises the issue of collective responsibility and the constitutional propriety of his position under that doctrine. Mr Friedlander's statement[19] that he would not accept responsibility for the mistakes of his department, that he was not going to be a "fall guy" for the mistakes of others, is contrary to what has always been understood to be the individual responsibility of a minister for his department.

I have attempted to examine these two related conventions; to decide if Mr Friedlander has breached them and, if so, if the lapse merits being termed "unconstitutional". It is important therefore to look at the present status of these conventions, and to ascertain the degree of compulsion which surrounds their operation.

Constitutional Conventions

Sir Ivor Jennings said constitutional conventions "provide the flesh which clothes the dry bones of the law".[20] This flamboyant analogy could perhaps be developed, to say conventions play the same role in law that the organic component plays in bone: they make the law stronger and impart a degree of flexibility; give a capacity to change shape under stress, and an ability to absorb sudden impacts.

Conventions have proved difficult to define. A definition could be 'a rule of law which, although binding, cannot be directly enforced in a court of law'. In Hart's terms they are a body of primary rules of obligation, unaccompanied by secondary rules of recognition and enforcement.[21] Although there are no legal sanctions – a minister cannot be sued for the breach of a convention – it is inaccurate to suggest that a breach must go unpunished. A minister, for example, relies upon the support of the general population every three years, in order to be re-elected; and he relies upon the support of his colleagues, and particularly of his prime minister, at all times. A severe breach of convention may jeopardise this support. Reciprocity may play a part: if the government were to ignore convention the opposition might do likewise, perhaps by cancelling the normal 'pairing' arrangements in Parliament.

Conventions make the law flexible because they can and do change to meet differing social conditions.[22] In addition to this process of change, conventions can be broken when necessary. If the breach is seen to be

18 Ibid, 22 February 1984.
19 Ibid, 18 February 1984.
20 *The Law and the Constitution* (5th ed) 81-82.
21 *The Concept of Law* (1961) ch V.
22 De Smith, *Constitutional and Administrative Law* (4th ed 1981), 51-52, gives an example of the formation of a convention: that the Prime Minister (in the United Kingdom) must be chosen from the House of Commons. This became apparent in 1923, when Stanley Baldwin was supported over Lord Curzon, apparently because the King thought he was obliged to make that choice. The changing social conditions requiring such a convention were the changes to the powers of the House of Lords recognised and formalised by the Parliament Act 1911. Section 1 reduced the rights of the House of Lords, in money bills, to vanishing point. Section 2 diminished their rights in relation to other legislation to a suspensory veto.

justified, there will be no lasting damage to the participants or the legal system. This would not, of course, be the case if a statutory rule were disregarded.

There are no definitive lists of existing constitutional conventions. Too careful an observation and recording of conventions could in fact damage their effectiveness, in that it could impede the process of change in response to external needs. De Smith suggested[23] that in cases of doubt the only way of determining the currency and force of a convention may be the practical test of 'break it and see' – the convention may then be assessed by the weight of protest. Some conventions are of pivotal importance in our legal system: an example is the subjugation of the powers of the monarchy or governor-general to ministerial advice. Others are much less important.

It is submitted that there are three essential characteristics of a functioning constitutional convention:

(1) it must be recognised (if not necessarily obeyed) by all parties to the occasion;
(2) it is not justiciable in a court of law;[24] and
(3) it must play some part in preserving the stability of the constitution, in that if it is not observed, there should be some identifiable detriment resulting from the lapse.

Although this last requirement seems obvious, I believe there is sometimes a tendency for constitutional writers to declare what may be no more than custom, or a strictly political rule, to have the force and obligatory quality of convention. This may be the case with the convention of collective ministerial responsibility. If so, it is unfortunate. There are only two authoritative sources to establish the existence of conventions: politicians, who develop, modify, and follow constitutional conventions; and legal commentary, including legal writers and the judiciary. The judiciary may debate or take account of constitutional conventions in reasoning out their judgments, but the judges cannot create constitutional conventions.

The pronouncements of politicians on what is constitutional behaviour and what is not are frequently biased in favour of their own political interests at the time[25] (something from which constitutional lawyers are not necessarily immune).[26] There are two main reasons why the assessment of a possible breach of convention should be such as to give the politician the benefit of any doubt:

23 Ibid at 55.

24 The existence of a convention may be recognised by the court, however, and may carry weight in the court's decision. For example: *Liversidge* v *Anderson* [1942] AC 206.

25 Compare the statements by Mr Palmer, the Deputy Leader of the Labour Party, reported in the *Otago Daily Times,* 22 February 1984: "The concept of a politically neutral public service, with ministerial responsibility, has been endangered;" 29 June 1984, "How much better for the dead doctrine of ministerial responsibility." The differing focus of Mr Palmer's views results from the differing intention of the statements: in the first he was attacking the Government; while in the second he was explaining the changes Labour planned to make in the system. He accepted ministerial responsibility as a current rule which had been broken, in the first quotation, while, in the second, he took the view it was a rule long defunct.

(1) as with the boy who cried 'Wolf!', branding a minor deviation from normal practice as "unconstitutional" must lessen the effectiveness of the criticism when a serious breach occurs;
(2) public comment is an important part of whatever sanction exists for the breach of a convention. It may result in the prime minister replacing an inconvenient minister, it may force the minister to resign, or it may be reflected in the results of the next election. It is a sanction without trial, and with no possibility of appeal.

For these reasons, the term 'unconstitutional' should be used very carefully.

'Ministerial responsibility' includes two separate but closely related concepts. There is the convention of 'individual responsibility', and the convention of 'collective responsibility'.

III Collective Ministerial Responsibility

De Smith labels the doctrine of collective ministerial responsibility as an "undoubted constitutional convention".[27] Whereas the convention originally protected ministers from the wrath of their King, should they disagree with his policies, it now ensures that the Cabinet presents a united face to the world: that a decision of Cabinet may not be questioned by any of its ministers in public. The convention even applies to ministers who join the Cabinet after a particular decision has been taken. An illustration of this occurred in 1959, when the then Home Secretary in the United Kingdom was questioned in Parliament about a decision taken by his predecessor, Viscount Tenby. He stated that although he could not defend the decision on its merits, he was nevertheless prepared to accept responsibility.[28] Although the example refers to decisions within a department, the principle involved must extend to decisions within Cabinet. If it does, Mr Friedlander arguably was in error in saying he need not take responsibility for decisions taken about the Maniototo scheme before he joined the Cabinet. The doctrine requires that since these were Cabinet decisions, and that he has subsequently joined the same Cabinet, he is therefore responsible for these policy decisions, as is every other minister. The situation might have been different had he denied these decisions before he joined the Cabinet; but this does not arise.

Earlier, I postulated three requirements of a constitutional convention. The first two of these are easily satisfied in relation to collective responsibility. Harold Wilson said that the British custom was that:[29]

> Every member of the Cabinet, every junior minister, on appointment received a document, hallowed over the years, and amended and updated regularly, which sets out the conduct required of ministers, from broad and clearly defined rules setting out the requirements of collective ministerial responsibility to mundane matters . . . it is one of the Prime Minister's responsibilities to ensure compliance with these rules.

26 Supra n 22 at 52: "In the Irish Home Rule crisis in 1913 both Anson and Dicey, active opponents of the Liberal Government, expressed manifestly unacceptable views on the conventional powers of the King to override his ministers."
27 Ibid at 182.
28 Marshall and Moodie, *Some Problems of the Constitution* (5th ed 1971) at 53.
29 Harold Wilson, *The Governance of Britain* (1976) at 74.

Wilson, himself a past British Prime Minister, obviously placed great importance on the doctrine of collective responsibility. He gave the text of two further statements he had made to ministers, reminding them of their responsibilities under the rule, and threatening a forced resignation if they were not complied with.[30] In New Zealand, the enforced resignation on this issue of Mr Derek Quigley must have enhanced the awareness of this doctrine.[31]

Problems arise in relation to the third requirement postulated: the requirement that the convention be of constitutional importance. If the function of the constitution is to aid in the good government of the country, then surely a constitutional convention should further this end. The principle did once have constitutional importance: the solidarity of Cabinet made it impossible for the King to play off one minister against another, and thus retain government policy under his control.[32] This need has long since passed. The principle is now important in party politics: "a cabinet split may become a party split, and a party split may lose the next election".[33] Cabinet solidarity protects both the Government, by making it difficult for opposition members to isolate individual ministers, and also the position of the Prime Minister within that Government, by making it more difficult for potential rivals to gain recognition and credibility.

However, if a particular decision is so difficult, or so controversial, that ministers cannot agree on the best course to follow, it is difficult to see how the constitution is protected by keeping the electorate, and the Parliamentary Opposition, in ignorance of the problem. The requirements of collective responsibility have been relaxed, in England, in special circumstances. In 1975 the Cabinet recommended that the electorate should vote in a referendum as to whether the United Kingdom should remain in the European Economic Community. Ministers who disagreed were expressly permitted to say so in public. De Smith comments that this experiment was successful.[34] The doctrine was waived by express permission of the Prime Minister, and no constitutional crisis resulted.

I think that the doctrine of collective responsibility would be better regarded as purely a political rule of a lesser status than that of a constitutional convention. It is a rule which will be maintained and enforced within the political party involved, and should have the same constitutional status as, for example, the rules governing candidate selection. It is necessary to understand the rule in order to understand the business of cabinet government; but the rule should not give rise to the moral obligation associated with a constitutional convention. Collective responsibility neither requires nor, perhaps, deserves, this moral enforcement.

30 Ibid at 191-193 (appendices).

31 Mr Quigley resigned in June 1982 following comments made about government policy to a Young Nationals conference.

32 Jennings, *The Queen's Government* (1954) 119.

33 Idem.

34 Supra n 22 at 189 (Note 77). See also Wilson, supra n 29 at 76, 194, and 197. Wilson comments that among the Members of Parliament who protested the measure was Mr Heath, then Leader of the Opposition, who (Wilson suggests) was perhaps afraid a precedent would be set.

IV INDIVIDUAL MINISTERIAL RESPONSIBILITY

The clarity of the rules relating to collective responsibility, and the uniformity of their acceptance, contrast with the confusion surrounding individual ministerial responsibility. A minister, who must be a member of Parliament,[35] is given by statute or convention a specific area of authority and responsibility. Mr Friedlander was so given the Ministry of Works and Development. At the lowest level, there is an acknowledged duty to transmit policy from Cabinet to the Ministry; and to provide information, accurate and up-to-date, upon the affairs of the Ministry when requested to do so by Parliament. If Mr Friedlander, or any other minister, had failed in this most basic duty, to provide information requested by Parliament, a breach of ministerial responsibility would thereby have occurred. There does not appear to be any duty, under normal circumstances, for a minister to take the initiative and inform Parliament, unrequested, of problems that have arisen in his department. There was criticism of Mr Nott, the British Secretary of State for Defence, for not advising Parliament of the Argentine invasion of the Falklands,[36] but that was a very serious matter.

Most commentators appear to consider that the convention of individual responsibility extends beyond the function of merely conveying information to and from the Ministry. There is no unanimity regarding how much further the concept extends – although, in general, older views are more rigorous. For example, Mr Herbert Morrison, a British minister, during the Second World War said:[37]

> There may be . . . an occasion on which so serious a mistake has been made that the Minister must explain the circumstances and processes which resulted in the mistake, particularly if it involves an issue of civil liberty or individual rights. Now and again the House demands to know the name of the officer responsible for the occurrence. The proper answer of the Minister is that if the House wants anybody's head, it must be his head as the responsible Minister, and that it must leave him to deal with the official concerned in the department.

At the other end of the spectrum is Mr Quigley, himself a former minister, in New Zealand. He appears to view the whole concept of ministerial responsibility as an outmoded fiction; actively impeding the business of the Ministry.[38]

The convention has been debated in Parliament on several occasions, most notably in the United Kingdom Parliament over the 'Crichel Down' affair in 1954. On that occasion land had been compulsorily acquired for military purposes during the war. After the war it was sold off. There was a scandal, and an inquiry found that several civil servants had been guilty of improper conduct in the handling of the sale. The Minister of Agriculture, Sir Thomas Dugdale, tendered his resignation to Parliament.[39] In his resignation speech the Minister accepted responsibility and announced

35 See s 9 of the Civil List Act 1979.
36 *The Times* (London), 3 April 1982.
37 Herbert Morrison, *Government and Parliament* (1954) 323.
38 Supra n 2, 27 February 1984. Mr Quigley lost his ministerial post, however, as a result of underestimating the force of the related doctrine of collective responsibility.
39 For a detailed account of the affair see Griffith (1955) 18 Mod L Rev 557.

measures ensuring that the same problem would not recur. De Smith, emphasising that the Minister had no personal knowledge of the circumstances of the affair and the mistakes of his officials, has commented that Dugdale's resignation was not required by convention.[40]

During the debate Sir David Fyfe, a government minister, listed four sets of circumstances involving departmental maladministration, with an appropriate ministerial response to each: this may perhaps be used to indicate what the generally accepted view was, at that time, of the convention of ministerial responsibility.[41] They were:

(1) where a minister explicitly orders a civil servant to take a particular action;

(2) where a civil servant acts properly, in accord with policy laid down by the minister.

In both these circumstances the minister must accept responsibility for any trouble. He must protect and defend the civil servant. Further:

(3) where an official makes a mistake or causes some delay, but not on an important issue of policy or where a claim to individual rights is seriously involved.

The appropriate response in these circumstances is for the minister to acknowledge the mistake and accept the responsibility. 'Accepting responsibility' appears limited to a formal *mea culpa* as it is understood the minister is not personally involved, and no real blame attaches to him. The mistake is corrected, and the official is not exposed to public criticism. The final circumstance:

(4) is where action has been taken by a civil servant of which the minister disapproves, and of which he has no prior knowledge, and where the conduct of the official is reprehensible.

Although the minister remains constitutionally responsible to Parliament to see that the problem is resolved, there is no obligation on his part to endorse what he believes to be wrong, or to defend what are clearly shown to be the errors of his officials.

The Maniototo controversy does not fit neatly into any one of these categories. There were important issues of policy involved, and, because much of the cost of the project was to be borne by a small group of farmers, claims to individual rights were seriously involved. It is possible to argue that because of the negligence of a group of public servants in assessing the costs, the Ministry, and through it the Government, became committed to a project which was not financially viable. Certainly the Minister was not aware of these errors, nor would he have accepted them if he had been. It is also possible to argue that the lapses were, to some degree, inherent in the structure of the Ministry, the Government's 'sinking lid' policy, and the pressures under which these particular public servants were working. The fact that Treasury estimates of costs conflicted with those of the Dunedin office of the Ministry was known to Cabinet. Mr Friedlander said that Treasury is only to advise on economics, not on

40 Supra n 22 at 186.
41 Supra n 39 at 566.

engineering, and that the likely response to the Treasury doubts would simply be to ask the Ministry staff if they were confident that their costings were correct.[42] This may explain the conduct of the (then) Minister – but it does not absolve him of responsibility.

It would seem, on balance, that according to the 1954 understanding of ministerial responsibility, the proper action for Mr Friedlander to take would have been to accept full public responsibility, both for the errors resulting from policy and the errors of his officials. He would not have been expected to tender his resignation. He would have been expected to remedy the faults in the organisation of his department which possibly led to the errors or prevented them from being detected.

Those public servants who were negligent could have expected to be disciplined. Mr Paget, an Opposition member, stated during the 'Crichel Down' debate that there were two controlling principles in ministerial responsibility, one of which was that the public must know that the Minister will be ruthless with his servants when they are at fault.[43] But it would also have been expected that any discipline would be exercised privately, that is within the Ministry. The officials concerned would not be held up to public disrepute.

In New Zealand in 1984 Mr Friedlander did not accept publicly the full responsibility, but on several occasions sought to evade it. The measures necessary to reorganise the Ministry were undertaken and publicly announced.[44] The public servants were publicly accused of negligence by the action of the Ministry in releasing an internal report on major works in the area. (The paragraph in the report naming individuals was, however, withheld.) Three senior officials were transferred in what became a blaze of publicity, although it must be admitted that the official themselves were responsible for much of that publicity. After Mr Cooper commented that Ministry "heads must roll",[45] and attention was drawn to that remark, it was inevitable that the transfers would appear to be a public reprimand.

It is, I think, certain that Mr Cooper's comment was seriously in breach of ministerial responsibility, however understandable it may have been in view of his position as Member of Parliament for Otago. It is possible that Mr Friedlander's most serious constitutional lapse lay in not challenging, immediately and publicly, this ill-considered and damaging statement by a senior government minister.[46]

42 Supra n 2, 22 February 1984.

43 Supra n 39 at 566. The other principle was that a civil servant must be able to trust his minister – that only his minister would punish him.

44 For example, supra n 2, 27 February 1984.

45 Supra n 2, 14 February 1984.

46 Ibid, 18 February 1984. Mr Palmer, the Deputy Leader of the Opposition, noted that the Commission clearly had had its independence severely damaged by critical comments from Mr Cooper and Mr Friedlander. Dr Probine, the Commission Chairman, regretted the implication. He said he found ministers to be "very good in this area. They understand the rules, and don't break them."

V Circumstances Altering the Nature of Ministerial Responsibility

It is apparent that there are some inconsistencies between the traditional view of ministerial responsibility, as expressed in the United Kingdom in 1954, and what actually happened in New Zealand in 1984. In part this is due to an alteration in the relationship between minister and civil servant which is presumed by the traditional understanding of ministerial responsibility.

The doctrine assumes that the minister is not only the representative of the department in Parliament, but also that he is its sole spokesman, both to Parliament and to the world. It assumes that he has total mastery over his civil servants, who can be promoted or dismissed at his pleasure. If this assumption is correct, then ministerial responsibility in its most rigorous form has an obvious constitutional function:[47]

> Individual responsibility in its political meaning ensures that for every act or neglect in his department, a minister must answer. Hence the rule of anonymity in the civil service is important. For what an unnamed official does or does not do, his minister alone must answer in Parliament and the official, who cannot be heard in his own defence, is therefore protected from attack.

Similarly:[48]

> It would be a new and dangerous constitutional doctrine if ministers . . . could excuse the failure of their policies by turning upon the experts whose advice they have taken, or upon the agents they have employed.

Ministerial responsibility protects both the anonymous official, who must strive to carry out the policies of successive governments, from unfair punishment or pressure; and also the citizen whose interests have been harmed by the actions of one of these unnamed, untraceable and unaccountable denizens of bureaucracy, by ensuring that one person, available for criticism, must account for the actions complained of.

In Britain, in 1967 and 1968, there was a complaint, culminating in Parliamentary debate, over what became known as the "Sachsenhousen Concentration Camp" case. The affair concerned the eligibility of ex-prisoners of war to compensation from a fund to compensate people imprisoned in concentration camps. The point initially at issue was whether the prisoners were in the concentration camp, or merely adjacent to it.[49]

During the debate there was considerable discussion of the doctrine of ministerial responsibility. Mr Brown, the Foreign Secretary, stated the doctrine in its classic form (while accepting responsibility for the actions of past Foreign Secretaries as well as his own) but while doing so he expressed

47 Wade and Phillips, *Constitutional Law* (8th ed 1970) 89. This passage has been omitted in the 9th edition of Wade and Phillips. It is included here for the rationale behind this view of ministerial responsibility; since a civil servant cannot reply to charges against him, it would be unfair to hold him responsible.

48 Ibid (9th ed 1977) 104, citing *The Times* leading article of 21 November 1949.

49 Fry, "The Sachsenhousen Concentration Camp Case and the Convention of Ministerial Responsibility" [1970] PL 336.

concern about the office of Parliamentary Commissioner (the Ombudsman):[50]

> The office of Parliamentary Commissioner was intended to strengthen our form of democratic government, but let me say, that if that office were to lead to changing the constitutional position so that officials got attacked and ministers escaped, then I think the whole practice of ministers being responsible to Parliament would be undermined.

The Attorney-General, Sir Elwyn Jones, was asked by the Select Committee on the Parliamentary Commissioner for Administration for a statement on the general question of ministerial responsibility in relation to the affairs of the Parliamentary Commissioner and replied that it was only in exceptional cases that blame should be attached to the individual civil servant:[51]

> The action of the department is an action for which the department is collectively responsible, and for which the minister in charge is alone responsible to Parliament . . . it follows from this principle that the minister alone has responsibility for the actions of his department, that the individual civil servant who has contributed to the collective decision of the department should remain anonymous.

Despite this rearguard action, the select committee which considered the Parliamentary Commissioner's report on Sachsenhousen recognised that:[52]

> In setting up the office of Ombudsman, Parliament had undermined the doctrine to some extent, in that the power of the Commissioner to carry out an independent investigation within the department, and publish what he finds, is an encroachment upon the Minister's responsibility.

New Zealand has a similar office, with similar powers.[53]

The doctrine is further undermined by the fact that in New Zealand the promotion and in particular the punishment of public servants is not within the jurisdiction of the minister. These matters are handled by an independent body, the State Services Commission, established by the State Services Act 1962. Section 10 of that Act specifically provides that:

> In matters relating to decisions on individual employees (whether matters relating to the appointment, promotion, demotion, transfer, disciplining, or the cessation of employment of any employee of the Public Service, or other matters) the Commission shall not be responsible to the Minister, but shall act independently.

This Act appears to remove much of the rationale behind the traditional statements of ministerial responsibility. As Mr Friedlander pointed out on several occasions, the minister's ability to discipline his servants, fairly or otherwise, is limited to calling on the Commission. Section 61 of the State Services Act 1962 provides an avenue for appeal in specified instances to

50 Ibid at 346.
51 Ibid at 352. The passage is a direct quotation from the Attorney-General's answer.
52 Ibid at 354.
53 See the Ombudsman Act 1975.

the Public Service Appeal Board. Further protection is provided in that, if it is suspected that the Commission has used its discretion unfairly, the High Court may review the decision.[54]

A further factor tending to weaken the concept of ministerial responsibility is the Official Information Act 1982. A major function of the convention of ministerial responsibility is to provide the ordinary citizen with some identifiable person who will take responsibility for a governmental action. The Official Information Act should tend to make the departments of government more amenable to outside inspection, thereby increasing the number of identifiable people, and enabling the complainant to locate who is actually to blame. There are, however, classes of documents still withheld from public scrutiny.[55] In the light of the present Labour Government's declared policy, it must be expected that these classes will be further diminished. The effect can only be to further weaken the traditional demands of ministerial responsibility.[56]

The doctrine of ministerial responsibility is predicated upon the assumption that civil servants cannot be heard in their own defence – that they must attempt to carry out policies, without protest, even when they think those policies are wrong. This is no longer true. Publicity provided by public servants not only weakens the conceptual basis of ministerial responsibility, but can also make it impossible for a minister to deal with a problem privately, within the department. Mr Quigley said:[57]

> Public servants today are generally hard-working and dedicated – but they are not anonymous political neuters accountable only to their ministers. They now speak out publicly more than they used to . . . sometimes they answer back when they feel aggrieved, as was the case in Dunedin recently.

He was perhaps referring to the comments by Mr Hicks, (President, Public Service Association) who said:[58]

> It is despicable that the Minister should attempt to use them [the Ministry of Works and Development staff in Dunedin] as scapegoats in order to avoid government respon-

54 As in *Poananga* v *State Services Commission,* unreported, High Court, Wellington, 20 March 1984, A 29/83, Davison CJ. The applicant suspected the Commission had used its powers of transfer under s 37 of the State Services Act 1962 as a disciplinary measure, avoiding the procedure of representation and possible appeal that would occur under s 56. The judgment of Davison CJ sites several other similar cases, including *Bullen* v *State Services Commission* (see supra n 14).

55 Sections 6, 7, 8 and 9 of the Act detail the circumstances in which various types of information may be withheld. They include the protection of State policies where these could be damaged by disclosure, the protection of information relating to competitive commercial activities of the Crown or its subsidiaries, and the protection of privacy, of confidential information supplied to a minister, and similar measures, including s 9(2)(f), the protection of constitutional conventions. Section 10 permits confirmation of the existence of information to be withheld in specific areas.

56 Public Sector Vol 6 Nos 3 and 4; 21, 26. Roberts, commenting on Dr Probine's article on ministerial responsibility in the same issue, makes this point. He states the intention of the Act runs counter to constitutional practice; while the 'saving' ss 9(f) and 9(g) run counter to the theme of the Act.

57 Supra n 2, 27 February 1984.

58 Ibid, 15 February 1984.

> sibility. It is even more despicable when the Minister knows that under the present system the accused officers can make no public statement in their own defence.

However, Mr Bullen, the District Commissioner of Works and one of the transferred officers, did in fact speak publicly in defence of the state servants when the first ministry report was released.[59] He justified his action in doing so by the fact that the report was made public.

Another way for public servants to complain about the wisdom or particularly the morality of policy exists through the State Services Commission. The chairman, Dr Probine, has said that any public servant who feels policy is wrong, on matters of law or conscience, should communicate with the Chairman of the State Services Commission.[60]

Finally, the doctrine of ministerial responsibility is seen increasingly as a fiction. Mr Quigley sees the effectiveness of a department being reduced as long as "control is based on a fictional link through Parliament, to a system of ministerial responsibility".[61] The comments of the British member of Parliament, Mr Fletcher Cook, during the Sachsenhausen debate were similar:[62]

> Ever since the days of Crichel Down and probably before, the doctrine of ministerial responsibility . . . was really becoming either a fiction or unworkable.

This view is not restricted to politicians. Constitutional writers have also frequently commented on the difference between the classic statements of ministerial responsibility and the performance of ministers in real cases.[63]

VI Current Status of the Convention of Ministerial Responsibility

The facts listed above, including lack of public confidence in the doctrine of ministerial responsibility, the ability of public servants to reply to criticism, the implications of the existence of the State Services Commission, the Official Information Act 1982 and the Ombudsman have made the traditional exposition of the convention untenable. The minister remains the representative of the department in Parliament, and he should answer questions in the House on behalf of that department. However, it must be recognised that public servants can now find means of expressing their discontents and reservations about policy in public. There is still a widespread public and political expectation that a minister will assume responsibility for departmental maladministration, but this has lost its constitutional significance. It would perhaps be more realistic to regard the assumption of responsibility by a minister as good manners, part of the dignity and tradition of Parliament.

It is interesting to consider recent events in England. At the beginning of April 1982 it became known that Argentina, after many years of diplo-

59 Ibid, 7 December 1983.
60 Supra n 56 at 22.
61 Supra n 2, 27 February 1984.
62 Supra n 49 at 353.
63 For example, supra n 28 at 60.

matic incidents, had invaded the Falkland Islands, a British territory close to the Argentine coast. The English public were united in bellicose, nationalistic fervour.

On Saturday, 3 April 1982, *The Times* commented that:

> There is a sense of humiliation among Conservative M.P.s that a Government which came to power with a commitment to strengthen the national defence policy could not prevent the invasion of one of its few remaining overseas territories.

On the same date, Mr Silkin, the Labour defence spokesman, stated that it was possible that a vote of censure would be introduced on the failure of the foreign and defence policies. While speaking on television, Mr Silkin said that the Government could not count on his party's support as long as Lord Carrington, the Minister of State for Foreign Affairs, and Mr Nott, the Minister of Defence, stayed in office. He said that there was a lack of trust in their competence. On April 6 Lord Carrington and two other Foreign Office ministers resigned. Mr Nott did not. *The Times* commented that:[64]

> The exchange of letters reveals that Lord Carrington first proposed to resign on Saturday . . . the fact that the announcement was made from the Foreign Office and not from Downing Street suggests that in the end he had to insist, taking his stand on the classic principle of ministerial responsibility.

If the convention of ministerial responsibility is now largely, in this respect, a polite fiction, why did Lord Carrington resign? A clue is given in the wording of his letter. Ministerial responsibility, in its most rigorous form, is supposed to ensure that the minister pays with his political head the price of mismanagement within his department, or of mistaken policy directions. Lord Carrington did not refer to any mistakes in policy or management, but rather alleged that much of the criticism was unfounded. Although he said he resigned because he was responsible for Foreign Office policy, it is apparent that his motive was to appease the Opposition and unite the country.

Lord Carrington's behaviour may be contrasted with that of Neville Chamberlain, in 1940, after the failure of the Norwegian campaign. Mr Chamberlain did not feel his resignation was demanded by convention. His resignation was forced by a Parliamentary loss of confidence in his ability, and he did not resign until that loss had become humiliatingly obvious.

VII Conclusion

The constitutional significance of ministerial responsibility is declining. When requested a minister must still report to Parliament, fully and accurately, on the departments under his control. The minister remains responsible to Parliament for departmental policy. Further, he has a responsibility to see that any departmental shortcomings which arise are remedied;

64 Supra n 36, 6 April 1982. The full text of the various letters of resignation is given.

but he does not need to accept unwarranted blame for these shortcomings in order to shield public servants.

Mr Friedlander's action in refusing to accept responsibility may well be an undignified breach of ministerial etiquette; but the breach may no longer be regarded as constitutionally improper. This conclusion assumes that the State Services Commission, required by the State Services Act 1962 to be an independent body, is in fact independent, and is known to be so. For this reason Mr Cooper should not have said publicly that Ministry heads must roll: such a statement can only damage the credibility of the Commission.[65] Because the existence and the integrity of the Commission is one of the main factors relieving Mr Friedlander of the necessity of accepting all blame, he should have, immediately, emphasised that integrity and independence. He did not do so.

The responsibility a minister cannot evade, whether he acknowledges it or not, is to ensure that the chain of events surrounding the Maniototo irrigation scheme project will not recur. This appears to have been done.

Perhaps the final comment lies with the people of New Zealand. It is a matter of record that a parliamentary general election was held on Saturday, 14 July 1984, which resulted in a change of government. The controversy surrounding the Central Otago irrigation projects did not appear to be a major factor in that election, although it might well have figured in a longer campaign. Several ministers lost their seats. Neither Mr Friedlander nor Mr Cooper were among them. The country-wide swing to Labour was reflected in the loss of support that both men experienced: but neither lost more support than the average National member. This evidence may suggest that the public of New Zealand no longer expects its ministers to submit to the obligations which used to be imposed by the convention of ministerial responsibility.

65 Supra n 2, 19 April 1984. PSA commentary illustrates the point that the Commission's reputation is fragile.