

Speech at IPANZ Seminar on ‘Free and Frank Advice in the Context of Open Government – Why It Matters’



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Kei aku hoa mahi kia nga pononga o te kawanatanga, nau mai haere mai

Kei te mihi ki te whenua nei, ko Te Upoko o te ika a Maui

Kei te mihi ki te tangata whenua – Ko Te Ati Awa, tēnā koutou

Kia kaha, kia manawanui, tatou katoa

Tēnā koutou katoa

I want to thank IPANZ for inviting me to contribute to this panel.

Let me start by saying some obvious things: that transparent and open government really matters – and so does free and frank advice. As public servants, we need to deliver on both these fronts.

Perhaps less obvious – or at least less well understood – let me note that New Zealand is a leader internationally on the transparency front. We have one of the freest Freedom of Information regimes in the world”.¹

Unlike many other countries the presumption that underpins our OIA is that all government information is open to the public, unless there is a good reason for protecting it. The absolute exemptions or exclusions are minimal – and even there a case has to be made. Cabinet papers are not excluded – as they are in a number of countries.

Importantly though, the OIA includes a balancing goal – to protect official information consistent with good government, the public interest and personal privacy.

So in this set of remarks that dwells a fair bit on problems and what we are doing to fix them, it is worth reiterating that the New Zealand benchmark of transparency is already at the very open end of the scale.

Having said that there has, over the years, been quite a lot of criticism of how well the state sector has met its obligations under the OIA. Frankly I agree that overall our

¹ Marie Shroff, ‘The Official Information Act and Privacy: New Zealand’s Story’, speech presented at the FOI Live 2005 Conference 16 June 2005, London, refer: <http://www.privacy.org.nz/assets/Files/67725421.pdf>.

performance has been variable. Too often too slow. Not always in keeping with the spirit of the Act.

Today I want to acknowledge the concerted efforts that SSC and the Office of the Ombudsman have made to call this out.

The requirements they have jointly imposed on the rest of us – to publicly document OIA performance – have sharpened our collective game. More information is being released, and in a more timely fashion. Non-performance is now more visible and less tolerated.

Earlier this month the government took a further step towards openness and transparency – opting to formalise the proactive release of Cabinet papers and to encourage the proactive release of “key advice” papers.² From January 2019 Cabinet papers and associated minutes must all be released proactively – within 30 business days of decisions being made by Cabinet – unless there is a good reason not to, or to delay the release beyond 30 business days.

Turning now to free and frank advice: like open government this also really matters. Having the opportunity to offer free and frank advice is one of the great privileges I enjoy as a policy advisor. It is the principal means by which I serve my fellow New Zealanders – helping Ministers make better decisions.

The public relies on public servants like many of us to give our best advice frankly, without withholding any key evidence or information about risks or pitfalls.

To state the obvious: our job is to tell ministers what they need to hear, rather than what they want to hear. This includes being honest about any significant limitations, assumptions and information gaps in our own analysis.

Of course we need to be frank without being foolish. We should combine our critiques with advice on solutions. If hard truths are stated constructively, our free and frank advice is more likely to be heard and acted on – not rejected.

It is our job to provide advice that is deep, expert and apolitical. Ministers continue to need this as they negotiate an increasingly messy and complex world.

So do we have a problem with the provision of free and frank advice in New Zealand? For many years now a number of commentators have argued we do.³

This narrative goes back a while. In 2007, a book by Nicola White published by the Institute of Policy Studies documented how concern about advice being released

² See <http://www.ssc.govt.nz/proactive-releases>.

³ Kibblewhite A and Boshier B (2018), Free and Frank Advice and the Official Information Act: Balancing Competing Principles of Good Government, , Policy Quarterly, Volume 14, Issue 2 May 2018, pp. 3-9.

under the Act was diluting officials' practice of free and frank advice.⁴ In 2013 Mathew Palmer referenced that and said "There is now, in my view, far too much second guessing by public servants of the political incentives on ministers – and too much pulling of punches in the provision of advice".⁵

Last year today's chairman, Chris Eichbaum, and his colleague Richard Shaw published research that gives us pause for thought. They surveyed 640 people, more than 80% of them public servants. 53% indicated some degree of agreement with the statement: 'Public servants in 2017 are less likely to provide a minister with comprehensive and free and frank advice'.⁶

So what is my view? We can clearly do better. Free and frank advice is a foundation stone of the New Zealand public service. And even the simple reality that we are debating about whether we get it or not suggests we have a problem. We need to take this seriously.

Having said that let us not indulge in too gloomy a council of despair. In my experience free and frank advice is still a regular feature of life in the New Zealand public service – the art is far from dead. Challenging advice is still regularly tendered, particularly orally, particularly by senior officials.

I do acknowledge however, that over time we have become less diligent at documenting our advice, and documentation matters. More on that shortly.

Over the last couple of years we have taken a number of practical steps to ensure that neither public servants nor Ministers should suffer under a lack of understanding about their obligations. The goal is to create a public service culture where free and frank advice is the accepted norm.

The Cabinet Manual was revised last year. It now makes specific reference to the duty that ministers have 'to give fair consideration and due weight to free and frank advice provided by the public service' (section 3.8).⁷

⁴ White, N. (2007) *Free and Frank: making the Official Information Act 1982 work better*, Wellington: Institute of Policy Studies.

⁵ Palmer, M. (2013) 'The importance of free and frank advice from the public service', address to Rethinking Public Service, PSA/Fabian Society seminar series, 25 November.

⁶ Eichbaum, C. (2017) 'Free and frank advice fast disappearing', Stuff, 8 August, <https://www.stuff.co.nz/national/politics/95499693/chris-eichbaum-free-and-frank-advice-fast-disappearing>.

⁷ The Cabinet Manual 2017, <https://www.dpmc.govt.nz/our-business-units/cabinet-office/supporting-work-cabinet/cabinet-manual>

In December 2017 the State Services Commissioner published guidance on free and frank advice and policy stewardship.^{8 9} I want to acknowledge the leadership of Diane Owenga and the Policy Project team who prepared that guidance and who are here today. We have given you copies to take home!

One of the important things the guidance addresses is inadequate documentation. It specifically says “Free and frank advice is expected to be in full and in written form.” It goes on to say “A record of key points and decisions should be made of advice given orally”.

There are two other things that I believe we need to fix, in order to do a better job of providing free and frank advice in the context of open government.

The first is our core stewardship capability. I’m concerned that we have not invested enough in the deep analytical capability needed to make us genuinely competent at providing future-focused advice - whether to the current or future governments.

The spirit is willing – my colleagues talk a lot more about our stewardship responsibilities than we did 5 years ago. But our ability to deliver deep and compelling advice – our stewardship muscle – is weaker than it needs to be.

The Policy Project’s Policy Capability Framework reminds us that stewardship is a key dimension of policy capability. Agencies need to invest more in analytical capability. We also need to help Ministers understand that advice on today’s issues – at the expense of longer term work - can’t completely dominate policy work programmes.

There is another significant issue that I believe must be addressed to support free and frank advice – having confidence in confidentiality. When the advice you are providing to a Minister is going to be challenging, confidentiality matters. We need to create safe spaces for Ministers and officials to speak frankly – so the key issues can be teased out in a reflective way.

This is not a new idea. Back in 1980 the architects of the OIA – Justice Danks and his colleagues – understood some balancing was necessary. I quote “To run the country effectively the Government of the day needs nevertheless to be able to take advice and deliberate on it, in private and without fear of premature disclosure”.¹⁰

⁸ State Services Commissioner (2017a) ‘Acting in the spirit of service: free and frank advice and policy stewardship’, 13 December, Wellington: State Services Commission. <https://www.ssc.govt.nz/sites/all/files/free-and-frank-advice-dec2017.pdf>

⁹ State Services Commissioner (2017b) ‘Acting in the spirit of service: frequently asked questions on free and frank advice and policy stewardship’, 13 December, Wellington: State Services Commission. <https://www.ssc.govt.nz/sites/all/files/free-and-frank-advice-dec2017-faqs.pdf>

¹⁰ Law Commission (2012) The Public’s Right to Know: review of the official information legislation, report 125, Wellington: Law Commission

Academic Richard Mulgan articulated this view to IPANZ in 2012 noting: “Free and frank advice [in such closed contexts] is at risk unless serious disagreement between ministers and public servants is kept confidential.”¹¹

In May this year Jonathon Boston addressed this issue in his editorial in the Policy Quarterly. He said: “...‘speaking truth to power’, while critically important, entails risks. Hence, a degree of confidentiality is essential if officials are to have the freedom and confidence to tender potentially contentious advice – and if ministers are to be willing to receive such advice and take it seriously.”

Jonathon asks the question: “Has New Zealand struck an optimal balance between openness and confidentiality?”¹² My answer is no – not yet.

In practice, the two ‘good government’ clauses in the OIA that provide grounds for withholding official information have been a problem. Neither officials nor ministers have been sure of what would provide adequate grounds for withholding information. As a consequence there has been something of a chilling effect on what gets written down.

When officials can’t have confidence in confidentiality, they get cautious about providing free and frank advice. This matters most in the case of exploratory advice – the kind of ‘blue skies’ thinking or advice generated in the early and formative stages of a policy development process that may challenge existing thinking. In those circumstances ensuring the free and uninhibited exchange of ideas is crucial to the development of robust policy advice.

This is a matter the Chief Ombudsman and I have discussed at length over the last couple of years, and happily we have found some agreement – on both the importance of protecting blue-skies advice and more generally to create as much certainty as possible on how the ‘good government’ provisions of the OIA are applied”.

Shortly I will turn the floor over to Peter Boshier, to explain the steps he and his office are taking to do just that. I thank Peter for his willingness to engage on these matters.

In closing, there is one more dimension of providing free and frank advice in the context of open government that I want to emphasise. My view is that we policy practitioners need to get much better at engaging the public in policy development. This means working in ways that actively empower citizens to help shape policies. This

¹¹Richard Mulgan’s 2012 speech to IPANZ, ‘What Future for Free and Frank Advice’ can be accessed at: https://ipanz.org.nz/Folder?Action=View%20File&Folder_id=84&File=IPANZ%20Distinguished%20Lecture%2030%20May%202012.pdf.

¹² Jonathon Boston, Editorial – Free and Frank Advice and the Official Information Act, Editorial, Policy Quarterly, Volume 14, Issue 2 May 2018, p.2.

will improve the advice we provide and make it more implementable. And in the process, it will develop greater trust in government.

To achieve this we need to bring the diverse perspectives of citizens and other interested parties into the policy process early on, and throughout the policy cycle. This means thinking of ourselves as much as facilitators who bring together expertise, as experts who have all the answers. Working together to identify and test options to arrive at mutually desirable and viable solutions.

So where does all this leave us. Transparency matters. It is a strength of our system and an essential prerequisite to building and sustaining trust in government.

The sibling of transparency is free and frank advice. Sometimes – and not necessarily forever – free and frank advice needs to be given in private. We shouldn't apologise for that. We will get more free and frank advice – and it will be better documented – if Ministers and officials have confidence in the circumstances it can be withheld.

I have flagged two other areas where we need to lift our game. The first is in our ability to offer deep, long term, expert advice. Across the public service some of these stewardship muscles have become too weak.

And finally, we need to lift our game in the way we engage with citizens and others in the policy process.

Thank you for listening. I look forward to the Panel discussion.

*Nō reira, e aku rangatira.
Tēnā koutou, tēnā koutou, tēnā tatou katoa.*