Drawing New Boundaries: Can we legislate for administrative behaviour?

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Abstract

A central question of public administration is how public administrators make decisions within organisational frames and context. Public administrators cannot and do not make purely rational decisions based on means-ends models, and instead operate within bounded rationality. Motivational bounds are frequently implicit and culturally inculcated, but recent New Zealand legislation attempts to make these explicit. New Zealand intended that legislating for administrative behaviour would preserve longstanding conventions perceived as under threat. The legislated bounds are traditional in content but novel in form, contribute to ongoing debate on the limits of political responsiveness, and potentially reset existing public service bargains.

Key words

- Administrative behaviour
- Bounded rationality
- Inculcation
- Responsiveness
- Public service bargains

Implications for theory and practice

- Inculcation of administrative behaviour can be directed from outside administrative organisations.
- Legislation is a mechanism to create new bounds within which public servants exercise their rationality.
- Shifting from implicit to explicit cognitive architecture does not negate possible tensions between bounds and can signal them more explicitly.
- Legislating the limits of bounded rationality is a means of preserving the tenets of traditional public service behaviour.

Introduction

75 years after the publication of *Administrative Behaviour* (Simon 1947), the question of how public administrators make decisions within organisational frames and contexts remains at the forefront of academic and practitioner discourse. Simon contended that public administrators cannot and do not make completely rational decisions, as their decisions are influenced by limiting contextual factors (bounded rationality). These contextual factors are many, and frequently implicit. This article explores bounded rationality in the context of the New Zealand public service, particularly through the development of the new Public Service Act 2020, which aims to place explicit limits on public administrator behaviour.

In exploring the New Zealand case study, we consider three categories of bounds, referred to in the Public Service Act as responsibilities, values, and principles. We contrast these by examining them in terms of implicit or explicit nature, and their level of instrumentality or symbolism. The bounds are relatively traditional in their content but differ from New Zealand's historical position and that of comparable countries, in their explicitness and, in most cases, legal instrumentality. We therefore contend that the New Zealand legislation is evidence of an attempt not to radically reshape these bounds, but to intentionally codify them to prevent their accidental erosion over time. Such erosion of norms has characterised recent political and public administration discourse in other "Westminster-style" countries such as the UK, Canada, and Australia, with whose legislation this paper compares the New Zealand case study (Halligan 2020).

New Zealand is a jurisdiction that has been of high interest in public administration literature since being at the forefront of the New Public Management (NPM) reforms of the 1980s. There has been some debate over whether these reforms have been eclectic and pragmatic, or intellectually and ideologically coherent (Lodge and Gill 2011; Macaulay 2020). Regardless, one of the key outcomes of the reforms was an update of the foundational legislation for the public service, then called the State Sector Act 1988, that aimed to promote greater responsiveness of public administrators to ministers.

Since 2014, New Zealand has pursued two streams of reform in regard public administrative behaviour. First, there has been an increased formalisation of normative values and the use of normative ethical statements to shape behaviour. A set of "values"

is included in the Public Service Act 2020 that identifies how public servants should behave toward the public they serve. These are symbolic provisions that are not intended to override any element of responsiveness.

Second, running in parallel to the first approach, New Zealand has taken steps to formalise public administration conventions, after observing an erosion of similar conventions in countries with which it is often compared. Conventions like political neutrality, merit-based selection, free-and-frank advice to ministers, open government, and stewardship were perceived to be under threat. The New Zealand public service responded by issuing formal written guidance to bolster the craft behind application of these conventions. Then, in the Public Service Act 2020, these "principles" were given formal legislative backing, associated with legal duties on public administrators. Simultaneously, the responsiveness to ministers bolstered by NPM reforms is retained in the Public Service Act 2020 through the "responsibilities" owed to ministers. We contend that the principles are rightly considered as a balance or limit to political responsiveness.

Taking these streams together, this paper attempts to answer the research question: in what ways do the responsibilities, values and principles in Public Service Act 2020 entrench or challenge the boundaries of rationality in administrative behaviour? Despite being understood by its architects as a means to preserve a status quo considered under threat, the decision to shift to explicit bounds on behaviour will inevitably bring about changes that for now we can only speculate on. Similarly, it is not yet clear whether New Zealand's decision to clarify and codify the bounds on public administrators will become an historic outlier, or the beginning of a trend. This paper advances our understanding of administrative behaviour by exploring implicit and explicit bounds on rationality, while also considering the stated intentions of policymakers in choosing how to give these bounds effect.

Literature Review

Simon's theory of bounded rationality was developed in the first instance as a critique of the previously dominant neo-classical assumption of complete rationality in decision-making (S. Hong 2019, 2). As Simon's scholarship developed, bounded rationality was fledged as a positive theory of choice in its own right (Jones 2003, 396). The basis of the theory is that the evaluation of means-ends chains is not impartial and instead has to contend with a range of limiting contextual factors (Simon 1947). Such factors include material conditions like unsatisfactory problem definitions, incomplete information and limitation of time, skills and resources (Forester 1984, 24).

However, Simon also acknowledged the influence of "some system of values" that allows alternative means or ends to be preferred over another (Simon 1947, 75). This means that the social and organizational context that limits individuals' rationality also includes less material factors such as those of Jones' 'cognitive architecture': "attention, emotion, habit and memory" (Brown 2004, 1245); (Jones 2003, 398). Engel described this as motivationally bounded rationality, which is the sense of bounded rationality that we

mostly refer to in this article (Engel 1994, 154). Perhaps because of its strength in 'linking the procedures of human choice with the organizational and policy processes', bounded rationality still has great influence today in such fields as administrative behaviour, ethics, organizational identity, public service motivation and public service bargains (Jones 2003, 395).

The bounds of rationality can cause difficulties in the practical business of administrative decision-making. March and Olsen consider the traditional separation of political and administrative functions of government to be a method for addressing these difficulties (March and Olsen, The Logic of Appropriateness 2011, 491). The split can be traced back at least to Wilson's assertion that "the field of administration is a field of business. It is removed from the hurry and strife of politics" (1941, 493). Simon agreed that decision-making on either side – administrative or political – would require the application of "different criteria of 'correctness" (Simon 1947, 53). Many of the administrative principles that currently act as bounds on rationality have their roots in the separation paradigm (Hoggett 2005, 176).

However, the reductionism of the Wilsonian split is challenged in contemporary administrative practice, where public administrators are beginning to be recognised as "policy makers in their own right" (Selden, Brewer and Brudney 1999, 173) and official policy-makers can be "far from clear what they really want" (Hill 1983, 89). Since the division between policy and administration has become more permeable and complex, the tensions between democratic/political responsiveness and bureaucratic process have become more pronounced (Denhardt and Denhardt 2015, 127). The NPM reforms in New Zealand gave public servants greater discretion over process or 'means' (Scott 2019, 25), theoretically increasing the instrumentality of the cognitive architecture of professional ethics and values to play out as bounds on their rationality. At the same time, the New Zealand system retained accountability to political principals for outcomes or 'ends', thereby doing little in practice to resolve the tension. The upshot of this is that neutral competence is increasingly valued because it signals an ability to balance the demands of political responsiveness with the normative influences of bureaucratically inculcated ethics and values (Selden, Brewer and Brudney 1999, 175; Perry and Buckwalter 2010, S239).

The tensions inherent in the limits of political responsiveness are debated extensively between Friedrich and Finer (outlined in Denhardt and Denhardt 2015), with additions by White (Perry and Buckwalter 2010). In a published debate, Burke presents the same, while Cleary laments the absence of an answer to the question of how public administrators can reconcile bureaucracy and democracy. Burke suggests that the solution lies in defining the responsibilities of public administrators in political and institutional terms rather than moral ones, but Cleary still sees a role for morally defined responsibilities (Burke and Cleary 1989). Burke's position is echoed by Hong and Park, who point to the tendency of public servants to pay greater attention to symbolic gestures from political principals to compensate for the bounds on their rationality (2019, 423). On

the moral side, Selden, Brewer and Brudney argue that most administrators are more "influenced more by internalized values and norms than political responsiveness" (1999, 194). Whether the political/institutional or moral angle is preferred, both constitute bounds on public servant rationality.

As well as the dimension of political or democratic responsiveness in opposition to bureaucratic morals, it is important to consider the status of the various bounds on administrative decision-making in terms of their level of formality and explicitness. At the implicit and formal end of the spectrum, bounds are mostly normative, taking the form of constructs such as loyalty and identity, and which are therefore imposed by inculcation within the administrative organisation (Trondal 2011; Brown 2004; Simon 1947; Campbell and Faber 1961). These constructs are even now offered as "important motivation that induces employees to exert their efforts on behalf of the organisation" (Miao, et al. 2019, 77). Furthermore, organisations bind the rationality of individual decision-makers by providing 'situation definitions' (Forester 1984, 24). March suggests that the theory of bounded rationality is the mechanism that provides the reasoning for organisational inculcation, while Mumby and Putnam place their emphasis in the opposite direction, where organisational identity directly impacts on public servants rationality (March 2008; Mumby and Putnam 1992, 473). The downside to this is the possibility for organisations to "engage in poor decision making precisely because of their inability to transcend hierarchical, boundedly rational forms of behaviour" (Mumby and Putnam 1992, 476).

At the other end of the spectrum, legislation is the most formal and explicit method for imposing bounds. Furthermore, legislation can also be represented on a spectrum: from instrumental, where provisions have legal effect, or symbolic, where provisions are likely to have more of a normative effect (van Klink 2016). The value of symbolic legislation has been fiercely debated. Critics suggest 'symbolic' legislation can be read as synonymous with ineffective (Newig 2007), while others go so far as to suggest that symbolic legislation is dangerous (Johnson 1998) and pathological (Dwyer 1990). More positive views see symbolic or 'communicative' legislation as a legitimate technique for achieving behavioural change (van Klink 2016).

Various other threads of literature offer illustrations of how these tensions play out. For example, literature on public service bargains, which Hood characterises as "any explicit or implicit understanding between (senior) public servants and other actors in a political system over their duties and entitlements relating to responsibility, autonomy and political identity, and expressed in convention or formal law or a mixture of both" (Hood 2000, 8; see also Hood 2002; Lodge 2009). Hood's category of directed bargains that involve loyalty to political principals clearly illustrates democratic responsiveness, while tutelary bargains that involve guardianship through either technical or moral elite leadership illustrate the tenets of a more bureaucratic process perspective. Public service bargains can thus be used to describe various bounds on rationality such as role, identity, values and responsiveness that are likely to influence administrative decision-making.

In focusing on the motivational aspects of Simon's theory of bounded rationality, we are able to compare aspects of cognitive architecture that result from each side of the Wilsonian divide of public administration and politics. On the one hand: informal, normative and moral aspects inculcated by bureaucratic organisations and on the other: the demands of political responsiveness imposed by a democratic form of government. In identifying these within the Public Service Act 2020, we are then able to examine the tensions between them and explore the possible effects of setting explicit bounds rather than relying on the inculcation of identities and values that eventually then bind administrative decision-making.

Methodology

This study follows in the tradition of ethnographic research in public administration that has been recognised, and codified, for some time now (Wond and Macaulay 2011). Whereas a number of high-profile studies have been used to determine the importance of people sharing stories and narratives around both politics and the public service (e.g. (Bevir and Rhodes 2005; Rhodes and Tiernan 2014), this article focuses on both legislation and the authorial involvement in its development. One of its authors is a member of the (now) New Zealand Public Service Commission and was a key figure in the creation and development of both background papers and the text of the legislation itself. As such, he was able to track the genesis of these concepts in discussions between senior public administrators, their emergence in public documents, their introduction as policies and practices, and then their solidification in law. He represents a central point in the ethnographic "constellation" of interactions and relationships that surround the development of such ideas (Mordue and Dennis 2017). The second author was an advisor to the Public Service Commission on the legislation, essentially on the aspects pertaining to values, principles and the public service. The third author is a research communicator at the Public Service Commission, having joined after the legislation was drafted.

Not only do we acknowledge the potential this creates for researcher bias, we embrace it to the extent that it facilitates the development of a simultaneously emic and etic research perspective. In mitigation, the unit of analysis of essentially linguistic and textual – a reading of the language of the Public Service Act 2020 – and all experiential evidence is reinforced by primary documentary. Whilst the work is situated within the ethnographic tradition, it employs a classic mixed methods approach comprising documentary analysis, participant observer field notes, and meeting documentation, which enables a degree of historicity to be utilised in the study.

We focus primarily, therefore, on the Public Service Act 2020, and the discourse that led to and informed its creation. The legislation comprises 135 sections and 11 schedules. A schedule can be thought of as an appendix that is referred to in the body of the legislation; for example, "'department' means a statutory entity named in Schedule 2" (Public Service Act 2020, s5). For the purpose of this special issue we focus on five sections of the Act: the purpose (s11), principles (s12), spirit (s13), values (s16), and responsibilities (s52).

Of these, three sections (principles, values, responsibilities) define the bounds of public administrator decision-making, and the remaining two sections (purpose and spirit) provide context for interpreting these bounds.

Of course, the remaining 130 sections and 11 schedules bind public servants too, as do all manner of rules and restrictions across the statute book. We focus on the principles, values, and responsibilities because they attempt to do so in a general or overarching sense: the principles are described as necessary to "achieve the purpose [of the public service]" (Public Service Act 2020, s12); the values are described as those of "the public service" as a whole (Ibid., s16); and the responsibilities are described as the "general responsibilities of [heads of departments] responsible to the appropriate Minister" including the "functions and duties of their agencies" and "conduct of the employees for whom the [head of department] is responsible" (Ibid., s52).

Principles, values, and responsibilities have different legislative histories, serve different purposes, and arguably are owed to different parties, which we will discuss in our findings and analysis. Responsibilities were pre-existing components of New Zealand law, and so are discussed first. Public service values are new to the New Zealand statute book, but related examples can be found in similar jurisdictions. The principles, and their framing as duties not owed to a minister, represent a departure from similar jurisdictions, and are discussed last and in the greatest detail. In this section the terms principles, values, and responsibilities are used to refer to specific provisions in the Public Service Act 2020; all three would be considered 'values' in the sense used by Simon as bounds on rational means-ends decision-making.

In our findings we observe that the Public Service Act 2020 represents a shift to explicit bounds on administrative behaviour associated with instrumental duties on public administrators. To determine whether this represents a novel development, we explore how these bounds are addressed in other jurisdictions. Specifically, we selected the UK, New Zealand, Canada, and Australia as prominent examples of Westminster-style public administration (Craft and Halligan 2017) for comparison in a most-similar design (Lijphart 1975).

Findings

Our findings address three components of the Public Service Act 2020 that act as bounds on administrative behaviour:

1. responsibilities,
2. values, and
3. principles.

These bounds are positioned as necessary to achieve the purpose of the public service (Public Service Act 2020, s11):

> The public service supports constitutional and democratic government, enables both the current Government and successive governments to develop and implement their policies,

> delivers high-quality and efficient public services, supports the Government to pursue the long-term public interest, facilitates active citizenship, and acts in accordance with the law.

This purpose was intended as a traditionalist perspective, with the Minister for State Services responsible for the reforms, Hon Chris Hipkins (Minister Hipkins) explaining "the proposed purpose statement is largely consistent with the current description of the State Sector system" in the State Sector Act 1988 (Hipkins 2019a, para85). In this section we briefly explore how the responsibilities, values and principles are given effect in the legislation, before exploring the discourse surrounding the decision to place these bounds in law, and finally comparing these bounds to other Westminster-style jurisdictions.

Public Service Responsibilities

Heads of departments are responsible for: providing advice; being responsive to ministers' lawful instructions; the operation of the agency they lead; and executing the government's policies efficiently and effectively; while supporting ministers to act as good stewards of the regulations, assets, and institutions for which they are responsible. These responsibilities are nearly identical to those in the State Sector Act 1988 (s32). In addition, heads of departments have two new responsibilities: for improving ways of working across public service agencies; and for their agency's responsiveness on matters relating to the collective interests of government. As in the previous Act, these responsibilities are owed to the "appropriate minister" (Public Service Act 2020, s52).

Values

The Act legislates five values that define the behaviour of the New Zealand public service, which is intended to be: impartial; accountable; trustworthy; respectful; and responsive (Public Service Act 2020, s16). These values are very similar to the existing values in the New Zealand *Code of Conduct* (State Services Commission 2007), and to those found in codes of conduct in the UK, Canada, and Australia. Similar values appear in the Australian Public Service Act 1999, but the Public Service Act 2020 is the first time that values have been included in public service legislation in New Zealand. The values are symbolic, and not associated with any responsibilities through the Act itself. Further, they are aspirational, in that the "the public service values are *to seek to…"* (Public Service Act 2020, s16, emphasis added).

Principles

The public service principles are listed in s12 of the Act: politically neutral; free and frank advice; merit-based appointments; open government; and stewardship. They were intended by Minister Hipkins as "independent duties" to be performed by public servants outside of direct ministerial control (Hipkins 2019a, rec8-11), and heads of departments are "responsible *only* to the (Public Service) Commissioner for carrying out the responsibility to uphold the public service principles" (Public Service Act 2020, s12, emphasis added). In contrast to the values, the principles have clear instrumentality: heads of departments are responsible for upholding the principles both personally and

within their organisations. The Principles are described in the Act and in the Cabinet paper as being necessary to achieve the purpose of the public service. That is, they are limits to the convention of following all lawful instructions by Ministers that are considered necessary to fulfilling the "constitutional role" of the public service (Hipkins 2019a, para 6).

Stated rationale

Why did New Zealand choose to make these bounds explicit and statutory? Public administrators and Minister Hipkins provided different rationales for drafting choices relating to the responsibilities, values, and principles. In response to the release of the public consultation document, via workshops and written submissions, it was "clear that public servants are implicitly aware of the purpose, principles, and values of the public service" (Hipkins 2019a, para18). Minister Hipkins proposed that New Zealand "codify and make explicit attributes that have been established through convention, practices, or implicit assumptions" (Hipkins 2019a, para18). This includes non-legislative instruments like the *Cabinet Manual* and *Code of Conduct*. He continued:

> enshrining the purpose and principles of the public service in legislation will help ensure that successive Governments and generations of public servants do not forget about their key attributes, and any decision to fundamentally alter this aspect of New Zealand's system of government will require a deliberate decision to do so (Hipkins 2019a, para21).

The rationale for placing these conventions explicitly in legislation was not in response to losing these conventions in New Zealand, but rather a preventative response to the perception that they had been weakened and sometimes lost altogether in other jurisdictions. A phrase used repeatedly through the process, including in the Cabinet paper, was that these changes should be introduced to "prevent erosion over time" (Hipkins 2019a, paras4, 18, 44, 47). The conventions were seen as supporting public trust and confidence in public institutions, and New Zealand was concerned that "once lost, such trust is difficult to restore" (Hipkins 2019a, para20).

The responsibilities were largely carry-over provisions from the State Sector Act of 1988, and there was not substantial debate about their inclusion in the Public Service Act 2020, either in face-to-face discussions or in the relevant Cabinet papers. The inclusion of two new provisions – improving working across agencies, and working in the collective interest of government rather than solely to their specific minister – were consistent with broader themes throughout the Cabinet papers on shared and collective leadership responsibilities (Hipkins 2019b, paras18-24; Hipkins 2019c, paras14, 23, 26).

New Zealand considered two options for codifying the values: a statement of values set by the Public Service Commissioner, or a statement of values included in legislation (Hipkins 2019a, para46). In recommending the latter option, Minister Hipkins wrote "I believe the protection against erosion and political influence that would be afforded by primary legislation outweighs the emphasis on public service ownership which would be achieved through Commissioner-issued values" (Hipkins 2019a, para47). The decision to

make the values symbolic, rather than associating them with any duties on public administrators was because Minister Hipkins considered it "perverse" for public servants to be subject to legal action with respect to the values, "given that the values are intended as an expression of the internal motivations that public servants should hold and aspire to" (Hipkins 2019a, para48). The Minister therefore proposed that a "clause be included… to safeguard public servants and the public service from any possible unintended legal consequences relating to the values" (Hipkins 2019a, para48).

Minister Hipkins recommended that the principles be instrumental, with "independent duties" to be performed by public administrators outside of direct ministerial control (Hipkins 2019a, recs8-11). The relevant Cabinet paper pressed the point that these principles are not always in the direct interests of ministers, and instead may be in the interests of "successive governments" or in "preserving public trust and confidence" (Hipkins 2019a, Annex A).

International comparison

As described above, New Zealand's motivation to enshrine conventions in law was by means of international comparison. Each of the four nations to which New Zealand is most commonly compared have approached these issues differently. Table 1 shows how each nation addresses these bounds in their primary legislation, with a mix of omission entirely from law (addressing these bounds instead via convention), symbolic provisions not associated with legal duties, and instrumental provisions that are associated with legal duties. In general, these bounds are more likely to be absent in Canada and the UK, and included in legislation in Australia and New Zealand. The Australian Act, and the previous New Zealand Act, mostly included symbolic references to these bounds, but without creating any instrumental legal effect. The New Zealand Public Service Act 2020 therefore represents an outlier in that general bounds on administrative behaviour are frequently associated with legal duties on individuals, and mechanisms for ensuring compliance. For example, the Australian Public Service Act 1999 describes "advice that is frank, honest, timely, and based on the best available evidence" (s5) as a general value of the Australian Public Service without associated duties. New Zealand's Public Service Act 2020 also includes free and frank advice to Ministers as a principle. However, it adds associated duties on heads of departments for upholding the functions and ensuring that the agencies they lead also do so (s12[2]), as well as charging the Public Service Commissioner with ensuring that heads of departments fulfil these duties (s12[5]).

Table 1: Explicit bounds in primary legislation

	Australia Public Service Act 1999	Canada Public Service Employment Act 2003	UK Public Service Reform and Governance Act 2010	New Zealand State Sector Act 1988	New Zealand Public Service Act 2020
General responsibilities owed to a minister	Sym	X	X	Ins	Ins
Values for public servants	Sym	X	X	X	Sym
Principles					
– political neutrality	Sym	Sym	Sym	Sym	Ins
– free and frank advice to ministers	Sym	X	Sym	Sym	Ins
– merit-based appointments	Ins	Ins	Ins	Ins	Ins
– open government	X	X	X	X	Ins
– stewardship	Sym	X	X	Sym	Ins

Key:
X= absent
Sym= symbolic reference not associated with legal duties
Ins= instrumental reference associated with legal duties

Discussion

The changes that the Public Service Act 2020 has set in motion are complex and manifold. We will return to a number of specific features of the legislation here and explain what is of interest to a broader audience of public servants and public administration scholars. Before unpacking some of that detail, it is worth noting the broader changes that legislation establishes in regard to Simon's perspectives.

As a piece of legislation, the Public Service Act 2020 obviously does not use the language of Simon's *Administrative Behaviour*. Nonetheless we believe it speaks to that theory in many profound ways. New Zealand's Public Service Act 2020 represents a continuation in content, using existing conventions, and a deviation in form. Fundamentally it legally codifies and makes explicit aspects of cognitive architecture that form the bounds of rationality in public administrative behaviour. This includes traditional responsibilities owed to a minister, traditional public administration principles now owed to the Public Service Commissioner, and relatively conventional values given greater symbolic value through their elevation to legislation.

Conventions versus statute

New Zealand's Public Service Act of 2020 exemplifies an approach that is subject to a broader debate about the difference between implicit and explicit bounds of rationality. This debate is often legalistic, focused on the relative benefits of conventions that are not judiciable, as compared to legal statutes. However, the distinction between conventions and statutes is not always completely clear, as conventions are sometimes actionable and can sometimes inform judicial review (Jennings 1968; Ruru, Scott and Webb 2016). Furthermore, conventions can be extremely powerful on their own. For example, there is no legislative requirement in the UK pertaining to the necessity of having a Prime Minister or Cabinet (De Smith and Brazier 1977), and yet such institutions are critical to the entire system of government. Indeed, De Smith and Brazier assert that constitutional conventions should be observed as part of constitutional law (1977). This is part of a broader pattern in British common law and its derivatives, in which convention is often preferred. The other side of the debate argues that conventions cannot and should not be observed as part of law for the simple reason that no court will take notice if they are broken (Dicey 1959). This is an interesting consideration in the context of bounds for administrative behaviour, for which most jurisdictions seem content to have no legal enforceability.

Arguments around the merits of using convention or statute usually centre on the issue of providing certainty at the expense of flexibility (Cotterrell 1992). Under some circumstances, rules should be waived, and conventions are typically more easily waived than statutes, so long as there is broad support to do so. Writing conventions down (as law) can introduce unintended consequences by promoting literal interpretations that run contrary to the desired effect. Alternatively, the codification of some conventions and not others can have the intended or unintended effect of lessening the relative importance of those not codified, and increasing the chances that these may be waived in future (Barnett 2017).

Perhaps the most salient reason that conventions are retained is that there has not been a compelling reason for change. The fact they are conventions suggest that they already largely 'work' because they have historically resulted in compliance (Dicey 1959; De Smith and Brazier 1977). The discourse surrounding New Zealand's Public Service Act clearly rejects this argument. The rationale for placing these conventions in legislation was that, while New Zealand politicians and public administrators largely complied with these conventions already, the same could not be said of other jurisdictions. The law was changed pre-emptively to prevent the possibility that conventions could be eroded. This claim was largely rhetorical, and publicly available documents did not attempt to demonstrate that the conventions had indeed become eroded in other jurisdictions. This is understandable, as governments are likely to be reluctant to openly criticise the public administration practices of other jurisdictions. Despite this, it is possible to find many anecdotal claims of conventions being eroded around the world, notably in Australia (Boucher and Sharpe 2020), (Edwards, et al. 2017) the United Kingdom (Boin, et al. 2020) (Pyper 2020), and the United States (Goodsell 2019) (Siegel 2018).

Even statutes can be broken down into a scale of instrumentality. For example, it may be argued that the inclusion of the values within the Act is primarily symbolic. Indeed, perhaps some may see it, at best, as a Pyrrhic motif that speaks to grand aspirations that laws cannot, almost by definition, reinforce. One recent NZ commentator, for example, decried the Spirit of Service and the new values as: “essentially advertising slogans, formed from vaguely uplifting words being combined into sentences with no meaning” (Burton 2019).

As an act of symbolic legislation (setting aside the instrumentality of the principles and responsibilities), the Public Service Act 2020 still offers an interesting extension of Hong and Park’s (2019) assertion that public servants attribute meaning to symbolic gestures (1) of their political principals, and (2) in the context of bounded information. The identity of the New Zealand public service is not one that needs to be inferred or intuited from political gestures, symbolic or otherwise; it is given bounded shape and form in the words of the legislation. In this sense the Act extends Hong and Park’s argument and charts a different direction in which public servants can gain their identity. This is consistent with van Klink’s (2016) conception of communicative legislation, that provides symbolic clarification of the expected bounds of administrative rationality.

The New Zealand case illustrates a shift from implicit bounds on rationality to more explicit ones. It is not yet clear whether New Zealand will be an outlier or whether this will be the first indication of a trend toward explicit bounds on administrative behaviour.

Traditions and change

It is worth noting that the bounds discussed in relation to the Public Service Act 2020 exist within a traditionalist perspective. The purpose statement of the Act is entirely within the traditions of Wilsonian doctrine and would look at home in the Northcote-Trevelyan Report (1853), Hunt Commission (1912) or Haldane Report (1918). Indeed, it is a restatement of a list of functions in the New Zealand State Sector Act (1988, s1A), as well as bearing similarities to provisions in the State Services Act 1962 and Public Service Act 1912. Many of the principles, like political neutrality, merit-based appointment, and free and frank advice, similarly date to these earlier reports (Northcote and Trevelyan 1853, reprinted 1954; Hunt 1912; Haldane, et al. 1918). Yet the decision to codify these conventions in legislation marks a deviation from New Zealand legislative history as well as that of other Westminster-style countries.

The Public Service Act 2020 therefore creates an interesting, if counter-intuitive, dynamic. In order to preserve a very traditional view of the purpose of the public service, with all the bounds that such a view entails, there has been a conscious and deliberate attempt to establish new parameters around the rationality of public servants. The purpose of this change is to preserve the status quo and prevent erosion over time and in so doing, New Zealand intends to continue a traditional view of public administration, precisely by creating and codifying new forms of administrative behaviour.

Despite the above characterisation, there are some departures from tradition in the bounds, as noted in the findings section. In the area of public service responsibilities, the two newer responsibilities both relate to improving the collective operation of the public service as a whole – one through operational agency work and the other through improving awareness and responsiveness to other ministers across government (Public Service Act 2020, s52). Some of the specific mechanisms for giving this collectiveness practical effect include a new forum that brings heads of departments together as a "Public Service Leadership Team" (Ibid., s59) and new organisational forms for managing problems that span agency boundaries ("Interdepartmental Executive Boards", Ibid., s25-31; and "Interdepartmental Ventures", Ibid., s32-41).

In one sense the Public Service Leadership Team mirrors the collective responsibility of Westminster Cabinet government, creating a literal space in which decisions can be made. This forms an interesting parallel between the political and public administrative spheres. In another sense, these provisions in the Act signal a much broader mandate for collective decision-making. No longer are heads of departments to be islands within the sea of the public service; they form a continent of collective endeavour that is not predicated on the goodwill of individuals to engage in collaboration. This is echoed and expanded across other levels by parts of the Act that are intended to create a universal public service identity (Hipkins 2019a, paras1-2, 6-16, 73-86).

While administrative organisation literature traditionally suggests that the process of inculcation creates shared identities that then impose bounds on public administrators' rationality, the Act suggests an attempt to create a shared identity by first setting the bounds of rationality, one of which is to allow collective considerations to take precedent. These provisions break new ground in Simon's theory of bounded rationality with the involvement of multiple decision-making individuals. We are limited in the claims we can make regarding this new ground, because the legislation itself is extremely new and we have no way of knowing how this novel collective leadership will play out. Nonetheless, it is interesting to note that the law shifts both capacity and content for collective public service decision making.

Responsive and responsible

The Public Service Act 2020 is clear in its intent that the values, principles, and responsibilities should not be used as a prosecutorial tool – in each case, the relevant section is followed by a clarifying clause that limits legal liability. It is therefore extremely unlikely that a head of department could be the subject of litigation, for example, for having failed to protect or uphold the principle of stewardship. Yet the crucial element here is in the structuring of accountability for such obligations, placing the instrumental obligation for principles between the heads of departments and the Public Service Commissioner. We respectfully suggest that this distinction is not to be glossed over lightly in an age of increasing worry about the politicisation of public services around the world. In making the principles of the Public Service Act 2020 instrumental, the legislation extends the bounds of rationality by developing a new "criteria of correctness" through which decisions

can be made and, crucially, defended. The standard of correctness is now much less political, with a corollary that the bounds of rational decision making are expanded into a safer space. Again, it is impossible to judge how this will eventuate, but it is important to note that the new bounds lead into important waters.

However, there are still tensions within these new bounds. For example, the responsibility owed to the minister for providing advice (Public Service Act 2020, s52) could potentially rub up against the principle independently owed to the Public Service Commissioner that this advice must be free and frank (s12), even if this frankness is not always appreciated. There are also two similar, but distinct, definitions of stewardship put forward in the legislation: one for supporting ministers and another as a duty to be performed independently of ministers (ss52 and 12 respectively). The tension between the responsibilities and the principles will play out in different ways. It could be that public administrators feel that they are put in an impossible position, needing to be responsive to ministers in order to maintain their confidence, while at the same time risking sanction if this responsiveness comes at the expense of their responsibility to act in accordance with the principles. Alternately, these tensions may act as recourse for both ministers and heads of departments. Ministers may hypothetically point to the principles, and the independence of heads of departments, to avoid responsibility for the actions of the department. Heads of departments may point to these same principles in their conversations with ministers, as a means to resist soft pressure on conventions of independence. If nothing else, codification may make the tensions clearer and therefore easier to manage, even if some flexibility is lost.

These tensions illustrate the core paradox of the Act: changing things in order to stay the same and, in doing so, inevitably causing change. By giving the principles instrumentality in the new Act, New Zealand has created an unknown effect on the implicit public service bargain between Ministers and heads of departments, potentially shifting it further towards either the directed or tutelary end of the spectrum. New Zealand did not create the tension between political responsiveness and the bureaucratic ideal of a politically neutral public service, but it has made this tension explicit and potentially shifted the balance between these sometimes-opposing forces.

At the moment, arguments as to any effects would be purely speculative. All we can say with any confidence is that the tensions within the Public Service Act 2020 both reflect and highlight what has already been identified in the literature. The Act offers a potential reconciliation of the debate between Burke and Cleary (Burke and Cleary 1989), with limits to political responsiveness (responsibilities) described in terms both institutional (principles) and moral (values). Its provisions highlight choices between implicit convention and explicit statute (Cotterrell 1992), and a spectrum between symbolic/communicative and instrumental (van Klink 2016). Taken together, these various dimensions hint at a possible framework for considering and classifying intentional bounds on administrative behaviour. They indicate that public servants must balance the demands of both democracy and bureaucracy, and it is the ongoing

negotiation of these tensions that lends dynamism to the field and practice of public administration.

Conclusion

In closing it is perhaps worth noting that the most obvious way in which Public Service Act 2020 speaks to Simon's work, and that of so many commentators who have followed, is in the essence of inculcation itself. Whereas Simon himself argued that normative behaviours are inculcated at the level of the administrative organisation, the New Zealand approach is to significantly shift away from this toward the legislative level. Whether or not this succeeds is a conversation for the future years or decades; but inasmuch as it is happening now it is a major challenge to traditional thinking.

Herein lies the true importance, we suggest, of the Public Service Act 2020. It is an explicit attempt to create and entrench a new, universal, public service identity. Its authors and architects appreciate that legislation alone is not, and can never be, enough to do this. At best, the novel treatment of bounded rationality in the legislation will interact with the culture and leadership of the public service to provide a platform for building new forms of administrative behaviour. In creating new values, the Act aligns normative behaviour with aspiration. In giving new instrumentality to the principles, it develops less political and more explicitly administrative modes of decision making and provides a legal defence for those decisions. In establishing new responsibilities to act collectively, it provides a mirror to collective ministerial responsibility and opens a collective rationality as a further bound on administrative behaviour. These changes are in service of protecting the very deeply held tradition of the purpose of the public service, which remains essentially unchanged.

What Simon may have thought about this attempt to make such a radical shift is open to interpretation, but we are sure he would recognise the new cognitive architecture of the public service, both collective and individual, as well as the ways in which a new approach has been taken to defining the bounds of rationality. We suggest that just as New Zealand has often been seen to lead the way in public policy reforms, it is currently also at the forefront of new thinking around the intricacies of administrative behaviour.

References

Barnett, Hilaire. 2017. *Constitutional and Administrative Law.* Taylor and Francis.

Bevir, Mark, and Roderick A. W. Rhodes. 2005. *Governance Stories.* London: Routledge.

Boin, Arjen, Kathy Brock, Jonathan Craft, John Halligan, Paul t'Hart, Jeffrey Roy, Geneviève Tellier, and Lori Turnbull. 2020. "Beyond COVID-19: Five commentaries on expert knowledge, executive action, and accountability in governance and public administration." *Canadian Public Administration* 63 (3): 339-368.

Boucher, Geoff, and Matthew Sharpe. 2020. *The Times Will Suit Them: Postmodern Conservatism in Australia.* Routledge.

Brown, Reva. 2004. "Consideration of the origin of Herbert Simon's theory of "satisficing" (1933-1947)." *Management Decision* 42 (10): 1240-1256.

Burke, John P., and Robert E. Cleary. 1989. "Reconciling Public Administration and Democracy: The Role of the Responsible Administrator." *Public Administration Review* 49 (2): 180-186.

Burton, Tony. 2019. *How bosses' obsession with vapid slogans borked the public sector.* June 20. https://thespinoff.co.nz/business/20-06-2019/a-profound-collapse-in-treasury-advice-led-to-pre-budget-leak-saga/.

Campbell, Roald F., and Charles F. Faber. 1961. "Administrative Behavior: Theory and Research." *Review of Educational Research* 31 (4): 353-367.

Cotterrell, Roger. 1992. *The Sociology of Law: An Introduction.* Oxford: Oxford University Press.

Craft, Jonathan, and John Halligan. 2017. "Assessing 30 years of Westminster policy advisory system experience." *Policy Sciences* (Springer) 50: 47-62.

De Smith, Stanley A., and Rodney Brazier. 1977. *Constitutional and Administrative Law.* London: Penguin.

Denhardt, Janet V, and Robert B Denhardt. 2015. *The New Public Service: Serving, not Steering.* New York: Routledge.

Dicey, Albert Venn. 1959. *Introduction to the Law of the Constitution.* London: Macmillan.

Dwyer, John P. 1990. "The pathology of symbolic legislation." *Ecology Law Quarterly* 17 (1): 233-316.

Edwards, Meredith, John Halligan, Bryan Horrigan, and Geoffrey Nicoll. 2017. *Public Sector Governance in Australia.* Canberra: ANU Press.

Engel, Christoph. 1994. "Legal Responses to Bounded Rationality in German Administration." *Journal of Institutional and Theoretical Economics* 150 (1): 145-162.

Forester, John. 1984. "Bounded Rationality and the Politics of Muddling Through." *Public Administration Review* 23-31.

Goodsell, Charles T. 2019. "The Anti-Public Administration Presidency: The Damage Trump Has Wrought." *The American Review of Public Administration* 49 (8): 871-883.

Haldane, Richard, E. S. Montagu, Robert L. Morant, George H. Murray, Alan Sykes, J. H. Thomas, Sidney Webb, and Michael Heseltine. 1918. *Report of the Machinery of Government Committee.* London: His Majesty's Stationery Office.

Halligan, J. 2020. "Destabilising the relationship between democracy and bureaucracy: the consequences of system imbalance for an Anglophone country." *European Consortium for Public Research Virtual General Conference.* Innsbruck.

Hill, Michael. 1983. *Understanding Social Policy.* Oxford: Basil Blackwell.

Hipkins, Hon Chris. 2019a. *Public Service Legislation: Cabinet Paper 2 – A unified public service.* Wellington: Office of the Minister of State Services.

Hipkins, Hon Chris. 2019b. *Public Service Legislation: Cabinet Paper 5 – Leadership of the Public.* Wellington: Office of the Minister of State Services.

Hipkins, Hon Chris. 2019c. *Public Service Legislation: Cabinet Paper 6 – Organisations of the Public Service.* Wellington: Office of the Minister of State Services.

Hoggett, Paul. 2005. "A service to the public: The containment of ethical and moral conflicts by public bureaucracies." In *Values of Bureaucracy*, by Paul du Gay.

Hong, Sounman. 2019. "A Behavioral Model of Public Organizations: Bounded Rationality, Performance Feedback, and Negativity Bias." *Journal of Public Administration Research And Theory* 29 (1): 1-17.

Hong, Sounmand, and Nara Park. 2019. "Administrative reorganization as a signal: Bounded rationalitry, agency merger and salience of policy issues." *Governance* 32 (3): 421-439.

Hood, Christopher. 2002. "Control, bargains and cheating: The politics of public-service reform." *Journal of Public Administration Research and Theory* 12 (3): 309-332.

Hood, Christopher. 2000. "Paradoxes of public-sector managerialism, old public management and public service bargains." *International Public Management Journal* 3 (1): 1-22.

Hunt, William. 1912. "Report of the Public Service Commission." Wellington.

Jennings, William Ivor. 1968. *The British Constitution.* Cambridge: Cambridge University Press.

Johnson, Steve R. 1998. "The Dangers of Symbolic Legislation: Perceptions and Realities of the New Burden-of-Proof Rules." *Iowa Law Review* 84 (3): 413-495.

Jones, Bryan D. 2003. "Bounded Rationality and Political Science: Lessons from Public Administration and Public Policy." *Journal of Public Administration Research and Theory* 13 (4): 395-412.

Lijphart, Arend. 1975. "The Comparable-Cases Strategy in Comparative Research." *Comparative Political Studies* 8 (2): 158-177.

Lodge, Martin. 2009. "Strained or Broken? The Future(s) of the Public Service Bargain." *Policy Quarterly* 5 (1): 53-57.

Lodge, Martin, and Derek Gill. 2011. "Toward a New Era of Administrative Reform? The myth of Post-NPM in New Zealand." *Governance* 24 (1): 141-166.

Macaulay, Michael. 2020. "Towards a New Public Ethics." *Policy Quarterly* 16 (1): 37-42.

March, James G. 2008. *Explorations in Organizations.* Standford University Press.

March, James G., and Johan P. Olsen. 2011. "The Logic of Appropriateness." In *The Oxford Handbook of Political Science*.

Miao, Qing, Nathan Eva, Alexander Newman, and Gary Schwarz. 2019. "Public service motivation and performance: The role of organizational identification." *Public Money & Management* 39 (2): 77-85.

Mordue, Tim, and Noel Dennis. 2017. "Performing jazz and the jazz constellation: Movements, moments and connections." *Marketing Theory* 17 (2): 241-257.

Mumby, Dennis K., and Linda L. Putnam. 1992. "The Politics of Emotion: A Feminist Reading of Bounded Rationality." *Academy of Management Review* 17 (3): 465-496.

Newig, Jens. 2007. "Symbolic environmental legislation and societal self-deception." *Environmental Politics* 16 (2): 276-296.

Northcote, Stafford H., and Charles E. Trevelyan. 1853, reprinted 1954. "The Northcote-Trevelyan Report." *Public Administration* 32 (1): 1-16.

Perry, James L., and Neal D. Buckwalter. 2010. "The Public Service of the Future." *Public Administration Review* 70 (Special Issue): S238-S245.

Pyper, Robert. 2020. "Debate: The British civil service—contextualizing development challenges." *Public Money & Management* 40 (8): 555-557.

Rhodes, Roderick A. W., and Anne Tiernan. 2014. *The Gatekeepers: Lessons from prime ministers' chiefs of staff .* Melbourne: Melbourne University Press.

Ruru, J, P Scott, and D Webb. 2016. *The New Zealand Legal System: Structures and Processes, 6th edition .* Auckland: LexisNexis.

Scott, Rodney J. 2019. *Service, citizenship, and the public interest: New Public Service and our public reforms.* Wellington: New Zealand Government.

Selden, S. C., G. A. Brewer, and J. L. Brudney. 3000. "Reconciling Competing Values in Public Admnistration." *Administration & Society* 31 (2): 171-204.

Selden, Sally Coleman, Gene A. Brewer, and Jeffrey L. Brudney. 1999. "Reconciling Competing Values in Public Administration: Understanding the Administrative Role Concept." *Administration & Society* 31 (2): 171-204.

Siegel, Neil S. 2018. "Political Norms, Constitutional Conventions, and President Donald Trump." *Indiana Law Journal* 93 (1): 177-205.

Simon, Herbert A. 1947. *Administrative Behavior: a Study of Descision-Making Processes in Administrative Organization.* Macmillan.

State Services Commission. 2007. *Standards of Integrity and Conduct.* June. Accessed September 2020. https://www.publicservice.govt.nz/assets/Legacy/resources/Code-of-conduct-StateServices.pdf.

Trondal, Jarle. 2011. "Bureaucratic Structure and Administrative Behaviour: Lessons from International Bureaucracies." *West European Politics* 34 (4): 795-818.

van Klink, Bart. 2016. "Symbolic Legislation: An Essentially Political Concept." In *Symbolic Legislation Theory and Developments in Biolaw*, edited by Bart van Klink, Britta van Beers and Lonneke Poort, 19-35. Cham: Springer.

Wilson, Woodrow. 1941. "The Study of Administration." *Political Science Quarterly* 56 (4): 481-506.

Wond, Tracey, and Michael Macaulay. 2011. "Extending Time – Extended Benefits: Using Longitudinal Research in Public Management Evaluation." *Public Management Review* 309-320.