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PUBLIC SERVICE REFORM MUST NOT LET MINISTERS OFF HOOK

“I cannot accept your cannon that we are to judge Pope and King unlike other men, with a favourable presumption that they did no wrong. If there is any presumption it is the other way against holders of power, increasing as power increases. Historic responsibility has to make up for the want of legal responsibility. Power tends to corrupt and absolute power corrupts absolutely.”
Lord Acton.

I would like to concentrate my remarks on the notion of political accountability, accountability of Ministers to the Dáil.

That the Government and its members are “collectively responsible” is a rule of constitutional law. As to what collective responsibility signifies is entirely uncertain. It is as much a political as a legal doctrine and its outlines are vague and indeterminate.

At its most basic, collective responsibility to the Dáil means that after an election the Dáil elects a Taoiseach and approves his nominations for positions in government. After that, the government stands and falls as a single, united entity.

But, in relation to the doctrine of individual ministerial responsibility – in terms of day to day accountability far more important – the Constitution is, for reasons of historical accident, absolutely silent.

However, the rule exists as a political convention and, as such, it shapes the nature of the relationship of ministers to the Dáil.

Under the convention, everyone of the Ministers is sought to be held individually to account for his or her individual behaviour in office – although there is no specific constitutional provision to entitle this – and everyone of them is liable to become victim of a motion of no confidence.

But there have been few if any resignations for breach of the doctrine because of acts of maladministration within a minister’s department. There is no certainty at all – in fact there are no agreed ground rules – as to what is a minister’s personal responsibility in relation to performing the functions assigned to him or her in the job.

I will offer a few examples of cases where the issue has arisen. And I will try to draw a few conclusions from an analysis of cases like this.

>From the textbooks, Hogan and Gwynn Morgan offer as a stark example a situation that arose in 1961 in the context of the involuntary detention of mental patients. Under the legislation, the permission of the Minister for Health had to be renewed every six months during which a patient

was detained. Sadly, the junior civil servant who had the job of passing on the applications for renewal fell ill and failed to perform this task, with the result that almost 300 citizens were kept in involuntary and unlawful detention.

According to the Opposition spokesman Gerard Sweetman TD –

“[The Minister] is the person whose duty it is to see and to ensure that the Department is administered properly in accordance with the directions given to it by this House from time to time ... [I]t is the Minister who must stand over the actions of the civil servants of Parliament.”

However, Minister Sean McEntee replied –

“[I]n these matters there must be some realism. It is all very well to say that constitutional justice theory requires that the Minister should accept full responsibility for everything the Department does ... Am I to accept responsibility for the fact that an officer of my Department suffers a breakdown? ... Is there anything I could possibly have done to ensure that this would not have occurred? ”

To take some more examples. On the 26th March 1982, the Argentinean Junta decided to invade the Falklands/Malvinas Islands.

The British government was faced a major political crisis, which immediately involved the resignation of the Foreign Minister, Lord Carrington. He resigned because he believed that he was responsible for not protecting British interests and for failure to warn the government of imminent invasion.

Proponents of a “pure” principle of ministerial responsibility often cite this resignation as a model. Carrington quit Margaret Thatcher’s cabinet so as to take responsibility for his Department’s – as opposed to his own – failure to anticipate the crisis.

But, first, rather than being the norm in Westminster-style parliamentary convention, Carrington’s old-school decorum was a rare example. (In any event, given that he was not personally to blame, it transpired that there was no bar on his subsequent rehabilitation and appointment to high office.)

And, second, the problem is that Carrington’s resignation pre-empted any immediately effective and efficient answer to the questions that gave rise to it. Should the British Government have known that Galtieri was likely to invade? Was there information he and his officials had ignored? At what level within the Department would such information have circulated and what official would have had responsibility?

By invoking *noblesse oblige*, Lord Carrington not only accepted political responsibility for events in respect of which he had no personal knowledge: he also, by that action, lanced the boil. The Foreign Secretary had accepted responsibility and so, no need to inquire further.

This doctrine is praised in some circles. However, it seems to me that it is capable of obscuring more than it clarifies; it prematurely concluded the raising of questions; and it provided very few and entirely inadequate, pre-packaged answers.

Another example. In 1996 Judge Dominic Lynch let it be known to the Department of Justice that he no longer wished to serve as a member of the Special Criminal Court. Members of that court are from time to time appointed by the Government and can be removed by it. The Minister for Justice brought this request to a meeting of the Government, which agreed to remove Judge Lynch, with

immediate effect. However, no-one told either the judge or the President or any official of the Special Criminal Court. As a result, Judge Lynch continued to sit on that court for three months, until the mistake was realised.

The mistake was a serious one, since various court orders had been made, including the remand of defendants into custody, which were now null and void. The opposition smelled blood and demanded the minister's resignation. She insisted it was not her personal responsibility to draw up and transmit letters to the judge and the relevant officials informing them of government decisions. These were matters of administration that should properly be left to departmental officials. The opposition persisted in treating the matter as one involving direct ministerial responsibility.

The Government appointed two prominent individuals to examine all aspects of the affair and to consider what procedural changes should be made in the light of their inquiry. The two completed their report in little more than a week and made a number of significant recommendations regarding administrative and procedural improvements to ensure that such an error would not happen again.

However, they either could not or did not identify those officials in the Department of Justice responsible for the failure to pass on information regarding the delisting of Judge Lynch from the panel authorised to sit in the Special Criminal Court.

Another example. A Government Department advises health boards how to interpret rules on charging nursing home residents. Every lawyer who looks at the issue – including the Department's in-house lawyer – doubts that interpretation. Someone decides to ask the Attorney General but the request is not sent. Further delay, before it is finally conceded the interpretation was wrong. A liability of around €2 billion has built up. Who is to blame? The civil servants who maintained this practice or the Ministers who presided over the debacle?

In 2003 a crucial meeting of the Department's Management Advisory Committee (MAC) and the chief executives of the health boards dealt with the issue. You might think that events before, during and after that meeting should have ensured ministerial engagement and action but this did not occur.

Briefing material was e-mailed to participants on the day before the meeting. It included legal advice furnished by the South eastern Health Board. The information was received by the Minister, his two junior Ministers and his special advisers.

Of these five persons, only one – a junior Minister – read the brief he was given. He understood immediately that, if the legal advices were correct, "they would give rise to significant legal, operational, financial and political implications". However, he didn't take any further steps.

Another junior Minister did not read the brief but attended the MAC/CEO meeting. He understood the significance of the issue and volunteered to brief the Minister for Health but did not do so.

The two special advisers attended the meeting but did not read the legal advice either before or after the meeting but knew the issue was important enough to require referral to the Attorney General..

According to the former Secretary, he briefed the Minister on the margins of the MAC/CEO meeting, as the Minister had arrived late and had missed the discussion on the issue. He also states that he briefed the Minister at a subsequent meeting.

The Minister says he was not aware that the issue had been on the agenda for this meeting, that it had been discussed at the meeting in his absence or that the meeting had decided to take action in

order to resolve the issue.

The letter seeking the Attorney General's advice had been drafted but it lay unsent in his department for over a year.

The issue of unlawful charges may have been chronic but it was about to become a crisis. While its origins may be put down to systemic corporate default, the fact was that the issue had now directly engaged the most senior minds in the minister's department, none of whom could have failed to share Minister Tim O'Malley's analysis that it gave rise to significant legal, operational, financial and political implications.

But the senior Minister insisted that he had no responsibility for the complete failure on his part to engage with and tackle this unravelling crisis. He justified this denial of responsibility by stating that –

“Ministers can only bear responsibility for issues in respect of which they are properly and adequately briefed and where they have knowledge of something. If they do not take action, then they bear responsibility. However, they cannot be held responsible for something of which they were unaware.”

But the fact is that the Minister was briefed on this issue. The only reason he was unaware of it is that he did not read that brief. And that omission on his part was compounded by the failure of his junior ministers and his advisers to raise the issue with him at any later stage.

So, civil servants insisted they briefed the minister. The minister insisted he did not know of the problem. Politicians and journalists concentrate on the narrow question: what did the minister know?

But, although it is important, is it the central point? If he didn't know, why not? Why not hold the minister accountable for not knowing, for failing to read his briefs? Does our system of accountability place a premium on ministerial ignorance and indolence?

And what about a management system that finds it impossible to discover any accurate record of what the minister was briefed about, what he read, what he knew, what he decided – what he actually does for a living?

And another example. The power to deport illegal immigrants belongs to the Minister for Justice personally, not his civil servants. And the minister insists that he has never delegated this power. When a school student is deported, it turns out the minister was unaware the student was preparing for the Leaving Cert. The minister apologises and the student is readmitted. When the minister is accused of not reading the file, he replies that the Opposition is ignorant of the “*Carltona* doctrine”.

The *Carltona* doctrine permits a civil servant to exercise the powers of his or her minister. So, is this what happened in the case of Olukunle Eluhanla: that an overly assiduous civil servant made a judgment in the minister's name that the Minister would never himself have made?

If this was administrative practice, then it falls into the worst of both worlds. He allows his civil servants read all the papers and compile a file. He then gets a one page summary and recommendation which he affirms, without reference to the file of papers.

It is the worst of both worlds because the individual who made the decision is unknown and

unaccountable. The person who takes notional public responsibility is simply rubberstamping other people's decisions.

Given that the Minister has not enough time to devote himself exclusively to deportations why not give those powers to named, identified and accountable officials, whose functions, methodology and track records would be subject to public scrutiny? That is, after all, what public service reform – with the accompanying generous pay increases – was meant to be all about: the assignment of responsibility and accountability within the civil service.

Yet defenders of the status quo insist that it is vital that powers remain with and are exercised in the Minister's name because the Minister is accountable to the Dáil.

Defenders of the status quo, as you might imagine, are those with most to lose from proper, effective oversight and accountability.

In an attached Appendix I, I quote from a 2001 Special report of the Ombudsman where he pointed out that practice in recent decades suggests that the model of government in Ireland, whereby the Government acts as a collective authority and is “*responsible to Dáil Éireann*” – is “*more of a theoretical construct than a reality*.” And he concluded that “*the system of checks and balances envisaged in the Constitution appears not to be functioning*.”

The Ombudsman has already raised the issue of what appears to be a growing practice within Departments whereby Ministers tend not to put their views or instructions explicitly in writing. For example, the views of the Minister may be conveyed verbally, or conveyed via his or her private secretary, or conveyed through such phrases as ‘as directed’ or ‘as discussed’. While acknowledging the pressure of work facing all Ministers, there are a number of difficulties with this type of practice. In the immediate term, it may lead to a lack of clarity as to a Minister’s actual views and intentions. In the immediate and medium terms, failure properly to record a Minister’s views and intentions may well undermine that sense of absolute trust between a Minister and his or her senior officials which is vital to an effective working relationship. Such a practice also has implications for accountability; the absence of a clear, written record can lead to uncertainty when the actions, or inactions, of a Minister (and his or her Department) are being scrutinised by the Oireachtas.”

All of these issues were to the fore again in the Travers report. They were also raised by the Labour Party in our paper Putting our House in Order. They require more than the immediate response dictated by the political exigencies of the day.

Looking at the various cases I have listed, I should say I believe at the outset that accountability cannot be secured simply by improvements to parliamentary procedure, Oireachtas reform or the number of Oireachtas sitting days.

Instead, I think, one has to start with an analysis of the institution from which an account is demanded – how it goes about its business, how it presents itself to the public and the Oireachtas, how it is managed internally, and so on.

The present set of arrangements embodied in law and practice result in ministers individually personifying the large organisations that operate under their sometimes only ostensible supervision and control. It also results in accountability therefore being personalised: calls to “*Resign! Resign!*”. Accountability at that level is invariably antagonistic and rarely effective.

It is also predictable and seen by the public as largely ritualistic. Participants and seasoned commentators can find it engrossing. Others may find it all a bit of a big boys' game.

This is not to argue that personal ministerial responsibility is irrelevant: it is and must remain an essential lynchpin to any workable system of parliamentary oversight. But there is more to a system of true oversight and public accountability than playing the blame game.

An inevitable tension arises when two potentially quite conflicting expectations are held in respect of the same body. On the one hand, the Dáil is the forum in which the opposition demonstrates its superiority to the government and its entitlement to replace it. On the other hand, the Dáil is the body that claims oversight of government action and subjects those actions to detailed scrutiny.

The first exercise is invariably antagonistic while the second, if it is to have public credibility, must be seen to be reasonably thorough and without excessive pre-judgment. The holding of government to account, if it is to be a worthwhile exercise, must be fair as well as rigorous. Otherwise, it produces the inevitable response: "*They would say that, wouldn't they?*".

But that this is not an impossible task can I believe be seen from the workings of the public accounts committee, in particular its hearings on DIRT.

I want to set out some thoughts on the nature of government accountability and the procedures required to make it a living reality within the Houses of the Oireachtas.

In the Westminster system of government, which we operate in Ireland, the prime minister and most of his or her ministers are drawn from the lower, popularly elected house of parliament. The government must have and retain the support of the majority of members in that house and is "*responsible*" to it.

The Oireachtas – sometimes the Dáil alone – is expected to play at least the following roles:

- it identifies who should form the government of the day,
- it makes new laws,
- it provides a public platform for discussion of major issues,
- it approves the raising of taxes, and the way in which the money is spent,
- it provides a public forum in which opposition parties can show whether they could form a good alternative government,
- it watches, appraises and criticises the activities of government and the public service,
- it provides a forum for individuals to raise issues and grievances indirectly through its members.

So, in a Westminster system of government a parliament has at least three main constitutional functions. One is making laws, the legislative function, which is carried out by both Houses of the Oireachtas. A second function, exercised by the Dáil alone, is controlling national expenditure and taxation. A third class of function comprises criticism of national policy, scrutiny of public administration and, to some limited extent at least, procuring the redress of individual grievances.

And, far from carrying any derogatory connotations, as may have been intended, the description of public representatives as "*going around persecuting civil servants*" is one that refers to an entirely valid and proper aspect of their role.

My firm belief is that oversight of public administration is a distinct, legitimate and inherent area of parliamentary activity in a constitutional system like ours, where the government is both in

parliament and also accountable to parliament. It is an essential parliamentary task to hold the government and other public bodies to account to it, and through it to the public, for their actions.

Since it is still the formal and legal position that a minister is responsible to the Dáil for all activities going on in his or her department, the Dáil must attempt to shadow an enormous area of activity (often by way of parliamentary question, dealing with individual queries) to the detriment both of consideration by the Dáil of major issues of policy and the development of more effective mechanisms for individual review such as the Ombudsman and Citizens' Advice Bureau.

The traditional view is that ministers remain accountable for everything that happens in their department and that civil servants act and speak only on behalf of the minister. So, according to the civil service guidelines,; *“a civil servant who appears before, or provides information to, an Oireachtas Committee does so on behalf of his Minister who ... is legally responsible for the official acts of his civil servants ... The formulation of policy is the responsibility of Government. It is, accordingly, for the responsible Minister to decide how much information a committee should be given on policy matters. In general, civil servants can factually explain existing policies as outlined by Ministers/Government. However, they should not discuss the merits of particular policies or policy alternatives (including their administrative and financial feasibility) or allow themselves to be drawn into debating the merits of particular policy decisions, including expenditure decisions. If criticism is levelled at witnesses by members of committees in regard to policy decisions or related aspects which reflect on the competence, judgment or good name of the witness or other persons, the witness may point out that:*

- *he is precluded from disclosing policy advice given to a Minister;*
- *criticisms of policy decisions are appropriate to Ministers who are answerable to the Oireachtas. ”*

And it is still argued by some that, if you believe in a neutral, impartial civil service which does not have a political allegiance, it is important that the rules about appearances before committees reflect and respect that status.

In other words, it is argued that a necessary precondition for having a civil service that is neutral and impartial is that its members must never be pinned down to a personal opinion on a policy issue or be held to account for personal actions. The basis for this argument is that, if civil servants are reasonably secure from public censure, they will therefore find it easier to give unstinted loyalty to a succession of political masters.

But this has long since ceased to be the reality. In 1924 the Oireachtas established 11 departments of state *“amongst which the administration and business of the public services in Saorstát Éireann shall be distributed”*. The departments were given powers, duties and functions *“assigned to and administered by the Minister hereinafter named as head thereof.”*

In other words, the model was to create a department – an operational division of the civil service – to assign a particular function to it and to appoint a minister at its head. However, that model was very quickly abandoned. With one or two exceptions, all subsequent legislation ignores the concept of the powers, functions and duties of a department of state and instead vests such powers, etc., directly in the minister, to be exercised personally by the minister.

The trend was formally recognised in 1939 and the Oireachtas enacted that, whenever a particular power, duty, or function is conferred by statute on a minister having charge of a department of state, the administration and business in connection with the exercise of that power, duty, or function is

deemed to be allocated to that department .

You would have thought that this was reasonably straightforward and clear cut: the minister exercises ministerial powers but the department assists with all the accompanying “*administration and business*”.

In practice, in both Britain and Ireland, ministers relied heavily on their civil servants to do most of their work and much of their thinking for them. By the 1940s this had become well established, but no statute or doctrine of common law had ever sanctioned it, and executive powers were always (as they still are) vested by law in ministers alone. Delegation within a department of the statutory powers vested in the minister, theoretically underpinned by ministerial responsibility to parliament, became an accepted convention. When, in wartime Britain, its lawfulness was challenged in a case called *Carltona Ltd v Commissioners of Works* , the Court of Appeal found itself compelled to elevate departmental practice into a doctrine of law.

Previously it had been well understood that civil servants were the servants not of their ministers but of the Crown (in the UK) or the State (in Ireland), so that the minister was in law no more than first among equals. Notwithstanding this, an entirely heterodox concept of the civil servant as the minister’s alter ego was enunciated. According to a contemporary commentator: “*[the judgment] violated all the common law rules against unauthorised delegation, but it perfectly adequately described what went on and could not be stopped, and it has done service ever since as a principle of constitutional law.*”

However, as recently as 1999, this post-independence rule of British constitutional/administrative law was confirmed by the Supreme Court as also forming part of Irish law .

So, the statutory powers of a minister may be exercised by responsible officials of his or her department without the minister necessarily having any direct or personal knowledge, or having granted specific authority for their exercise.

There is still stated to be a vague and indeterminate category of powers which the courts consider cannot be exercised in this manner and where the minister is required to act personally.

But by and large it is the finely tuned political antennae of the civil service that are relied upon to decide what within the department requires ministerial intervention – and to what extent.

Meanwhile, at the same time as the courts were admitting the *Carltona* doctrine as a canon of Irish constitutional law, the civil service itself was embarking on a process of strategic management review and public service management reform. The essential purpose of this exercise was to “*[clarify] issues of responsibility and accountability and [bring] into greater focus the importance of accountability to citizens both as users of public services and as taxpayers who finance the expenditure required to ensure the delivery of these services*” .

As part of the process of civil service modernisation the Public Service Management Act 1997, was enacted to provide greater clarity in relation to the authority, responsibility and accountability of secretaries general. Specific duties are now assigned to the secretary general within the department, including managing the department, implementing government policies appropriate to the department, delivering “*outputs*” as determined with the minister, providing advice to the minister and using resources so as to meet the requirements of the Comptroller and Auditor General Acts in relation to regularity and propriety as well as to economy, efficiency and effectiveness.

In particular, one of the objectives of the strategic management initiative is to promote the

devolution of responsibility within departments. The 1997 Act provides a statutory framework for the assignment of specific functions for which the secretary general is responsible to officers or grades of officers within departments.

However, the most important aspect of the 1997 Public Service Management Act is that it did not repeal or amend any provision of the earlier Ministers and Secretaries Acts. Instead it was superimposed upon them and, in fact, it gives precedence to the earlier legislation. Section 3 of the 1997 Act states that: “*A Minister of the Government having charge of a Department shall, in accordance with the Ministers and Secretaries Acts, 1924 to 1995, be responsible for the performance of functions that are assigned to the Department pursuant to any of those Acts*”.

This produces the following curious result. When assigning responsibility to officers of a lower grade under the 1997 Act, a secretary general is entitled to delegate to them some of his or her own management functions and also to delegate to them some ministerial functions. By section 9 (1) (c), the assignment of the responsibility for the performance of functions includes a requirement, where appropriate, that the officer to whom the assignment is made shall “*assume responsibility for the statutory schemes or programmes specified in the assignment*”.

Therefore, within the four corners of one and the same Act, on the one hand a statutory scheme may be made the responsibility of a named civil servant, by direction of the secretary general and with accountability flowing to the secretary general while, on the other hand, the minister remains responsible to the Dáil for the performance of exactly the same functions.

We now have Departments of State that function under two parallel systems of management. Under one system, departments are assigned to ministers and administered by ministers, who remain responsible for the performance of departmental functions, but those same departments are managed by secretaries general and assigned functions are performed by departmental officers, who are accountable to the secretary general and not to the minister.

As a matter of law, to “*administer*” a department and to “*manage*” a department are synonymous terms.

Against the backdrop of previous law, all of which remains in place, the management function of secretaries general cannot be interpreted as one that in any way displaces the minister’s principal responsibility for supervising the administration and business of his or her department. How is responsibility to be divided between them? What is the difference between “*administering*” a department – a ministerial function – and “*managing*” a department – the function of the secretary general? It is no wonder, therefore, that the provisions of the 1997 Act seem to have been embraced more enthusiastically in some departments than others and to have been practically ignored in many.

There are, therefore, two competing strands of policy. On the one hand, a desire to maintain in place the *Carltona* doctrine, with all thereby entailed. All power is vested in the minister and the minister alone accounts to the Oireachtas. But any officer of the minister within the department can exercise any of the powers that have been vested by statute in the minister personally.

On the other hand, a desire to introduce concepts of delegated responsibility and accountability into the civil service, pursuant to a specific statutory regime that allows for certain powers to be delegated to named and identifiable officers of particular grades.

There is by the way always confusion about terminology. For example, a minister may be held accountable in the sense of “*giving an account*” or “*being held to account*”, or both. The former

British Cabinet Secretary Sir Robin Butler sought to draw a distinction between accountability and responsibility. While Ministers are accountable to Parliament in the sense of giving an account of the work of their departments, responsibility implies “*direct personal involvement in an action or decision, in a sense which implies personal credit or blame for that action or decision*”. However, while the distinction is useful in terms of clarifying thought, it cannot be argued that it was within the minds of the framers of the 1937 Constitution when they wrote that the Government was “*responsible*” to the Dáil.

It is meanwhile entirely understandable that the emerging model appeals to senior civil servants. The outside world is presented with the minister as personification of the department. All power is vested in the minister and the minister must account in public and in the Oireachtas for the performance of his or her functions. Civil servants, if they appear at all, do so merely to explain and amplify upon the minister’s position: there is no departmental point of view.

Internally, however, the powers of the minister are capable of being exercised by any responsible officer of the department and the department is managed not by the minister but by the secretary general, according to a system of line management, with authority delegated downwards by the secretary general and accountability travelling upwards, to the desk of the secretary general.

In the light of these developments, an old-fashioned, Opposition-led, demand for parliamentary accountability, concentrating simply on making life difficult for ministers, does not even begin to impact upon the reality according to which the country is governed.

The reality is that the ministerial/departmental pact – a Faustian pact – involves an abnegation of public personality on the part of civil servants and an excessive fascination with the role of the minister. In return for defending his department as if its actions were all his own, the minister is guaranteed that he will never walk alone and never be short of something to say in his own defence.

Of course the system has as one important characteristic: it can survive the imposition of even the most incompetent of ministers at its head. And there are examples of that.

But, whether this characteristic should ever have been seen as a plus factor is debateable. In any event, the time has long since passed when one should praise the civil service for their ability to carry political dead weight.

To a very large extent the programme of public service management reform has been owned and driven by the public service itself – or at least by its senior officials. Politicians have been content to encourage and to incentivise but have not sought to take control. They believed the process would not work unless it was embedded on a voluntary basis, rather than imposed from above.

But when it comes to the impact that public service management makes on the system of parliamentary oversight and public accountability, then politicians must have a point of view.

Nineteenth century notions of personal ministerial responsibility, coupled with legal ministerial responsibility for all official departmental acts and the legal competence of civil servants to perform such acts without any necessary recourse to the minister, all lead to a situation where accountability to the Oireachtas is demanded on an entirely fictitious basis. The problem is that both sides of the house know this to be so, yet that does not prevent us acting out the adversarial roles.

The problem is also that, during the last decade or so, the issues of civil service reform, strategic management initiatives, and so on, constitutional accountability, as delivered through the

convention of ministerial responsibility, has become confused with, and by, managerial accountability. While an increased emphasis on the accountability of officials through the management structure is to be welcomed, it is not immediately apparent that those driving this process have sought to fit it together with the constitutional accountability of ministers in a way that makes both theoretical and practical sense.

The issue is how to reconstruct constitutional accountability to accord with the changed structure and nature of government, of which managerial accountability is a product. The involvement of ministers in a system of parliamentary accountability is vital. It is particularly important when matters of public concern arise. However, the preoccupation with causal responsibility has resulted in ministers becoming overly defensive and seeking to distance themselves from anything which has happened in their departments, as in the Judge Dominic Lynch affair. Hence the employment of “*operations/policy*” and “*accountability/responsibility*” distinctions.

We still have a situation where, with some exceptions (deciding officers in the Department of Social Welfare, for example) Irish law does not vest functions, powers or duties in departments or in departmental officials but rather in the minister. Clearly, it would be a superhuman task to perform them all personally. So, civil servants are deemed by law to stand in the place of the minister and to be capable of performing any function vested in the minister.

Essentially I and the Labour Party take as our starting point a rejection of the insistence of Sir Humphrey Appleby that, “*when a minister actually starts to run his department, things are going pretty badly.*”

“It is not the minister’s job to run the department. It is my job, for which I have twenty-five years’ training and practice. If the minister were allowed to run the department, we should have:

- (i) *chaos*
- (ii) *innovations*
- (iii) *public debate*
- (iv) *outside scrutiny.*”

The same mandarin insisted that a government minister should confine himself or herself to just three functions.

1. He is an advocate. He makes the department’s actions seem plausible to Parliament and the public.
2. He is Our Man in Westminster, steering our legislation through Parliament.
3. He is our Breadwinner. His duty is to fight in Cabinet for the money we need to do our job.

A lot of politicians appointed to head government departments are very happy to slip into that job description: defending the department in the Dáil and to the public; steering the department’s business through the Houses; and fighting his corner in the battle for the Estimates. By and large, an ambassador-at-large, the Colonel Sanders for Kentucky Fried Chicken.

There is however a difference between being an ambassador plenipotentiary and being a minister who wields executive power.

Nowadays, in return for a salary and the publicity, the department cloaks the minister with corporate status. The minister gets credit for decisions never personally taken, policies and Bills inherited and

speeches never personally written.

And, if questions are asked as to who actually decided what, when and why, the corporate veil descends upon the entire department. Both the minister and his officials engage in collective self-defence, in order to obscure the actual decision-making process.

The Sir Humphrey analysis of what ministers should do and what they should not do seems to have become adopted as a basic primer in this State. What we now have as some if not most of our ministers are, generally speaking, nothing more than ambassadors-at-large for their departments, making the plausible argument, from a pre-supplied script, on the department's behalf in the Dáil, in government and to the public.

Decision-making in this State, at its highest level, is routinely and increasingly made along similar lines: citizens are presented with the public and acceptable, "*Colonel Sanders*", face of the State rather than having an opportunity to interrogate the true decision-makers – the chief executives of countless agencies, the secretary-generals of government departments, and so on.

But, while government ministers act as ambassadors-at-large for their departments, they can, when controversy arises, deny any executive accountability at all for what those departments – and the plethora of quangos they have created – actually do or fail to do.

What we need to do, it seems to me, is to re-define the relationship between ministers and their departments. We have three proposals to amend the law.

1. If the minister takes a decision personally, he or she should say so and account for it.
2. If the decision is taken by the department, under a delegated power, then the relevant, named official should say so and account for it.
3. The minister would then have to account for the degree of supervision he or she exercised over the department in relation to the exercise within it of delegated powers.

I believe senior civil servants are significant and important people and should get credit as such, rather than hiding behind the minister's skirts. They should get credit for their achievements and they should take the blame when their decisions turn out badly.

There may be a lot of argument that the operation of the Ministers and Secretaries Act is more important to the day-to-day administration of the State than the Constitution, that major and fundamental decisions cannot be taken without thorough analysis and review, that we have bitten off more than we can chew.

But civil service reform has up to now been a process largely owned and driven by the senior members of the service. Politicians have adopted a hands-off approach and simply passed laws to implement the reforms proposed by senior management. It is time for public representatives to regain ownership of the process, in the interests of the public which both sides are meant to serve.

My emphasis is therefore on giving information and satisfying the Oireachtas and the public that mistakes have been identified and rectified and that mechanisms have been established to prevent a reoccurrence on similar errors. And this requires greater openness from ministers than has often been the case and accords with the requirements of the ministerial code of conduct –

“It is of paramount importance that office holders give accurate and truthful information to the

Houses of the Oireachtas, correcting any inadvertent error at the earliest opportunity.”

Equally, the time has come when officials, giving evidence to select committees, should be allowed – even obliged – to speak on their own behalf for their delegated responsibilities and, where appropriate, defend themselves and their actions.

Civil service rules that were designed to give effect to the principle that ministerial responsibility protects officials from public accountability, are now outdated.

If the *Carltona* doctrine was by statute, to be replaced by a fixed and determined system of fixed powers, then in its place there should be a reformulated code, replacing both the Ministers and Secretaries Acts and the Public Service Management Act, that would establish the present departments of state, specifying their roles, their functions, powers and duties and the position of the minister in charge of each department.

The legislation would permit the delegation by the minister of specific ministerial powers to specific officers who would, to the extent of the authority delegated to them be accountable both within the department and also directly to the Oireachtas for the exercise of those powers.

Delegation orders would spell out the function of the minister in relation to supervision of the exercise of delegated power.

The statutory description of the departmental function, together with its strategy statement and the relevant delegation orders, would form a “*site map*”, by reference to which the appropriate Oireachtas joint committee would draw up a rolling 2 to 3 year work programme of scrutiny and oversight.

Departments would be examined division by division and spending programme by programme, so as to work out what was intended; what was done to achieve that intention; what, if any, delays were encountered; what, if any, money was wasted; when was the last time this subject matter was thoroughly reviewed, and so on.

The Department of Finance circular 1/84 should be scrapped and replaced with new guidelines for civil servants appearing before Oireachtas committees that reflect the reality of the authority delegated to them and their personal accountability for the way in which it is exercised.

Absent these reforms, we are let in a maze. We ask questions: What went wrong and why? Who knew what and when? What did the Minister know? Did he decide what happened, permit it, ignore it? Basic questions to do with accountability.

But the reality is that, absent statutory reform, the system of political accountability we pretend to operate in this country can never work because it is grounded on a lie. The Opposition is sucked into maintaining this charade.

The pretence is that, when we question a Minister in the Dáil, we are dealing with the person who actually made the decision we want to criticise. We want to hold him personally to blame for issues he or she may have known nothing about until reading that morning’s brief.

Our system makes no distinction between the cases where the minister did in fact make the decision, the case where the Minister announced a decision but failed to follow through on its implementation and the cases which in fact had nothing to do with the minister at all

Traditionally, the Minister is sent out to bat for a Department and to defend its anonymous civil servants. The usual temptation, when questions are asked as to what went wrong and why, is for ministers and civil servants to circle the wagons and engage in collective self-defence. The minister's impenetrable corporate shroud envelops them all and protects them from individual examination and accountability. Outdated or inadequate corporate practices and procedures are identified and individuals escape scrutiny.

In summary, ministers rely on civil servants to do most of their work and some of their thinking for them. Ministerial powers are exercised by officials without the minister necessarily having any direct, personal knowledge, or having granted specific authority for their exercise. And, by and large, it is the finely tuned political antennae of the civil service that decide what a minister needs to know.

The purpose of public service management reform was to clarify these issues of responsibility and accountability. The emerging model, which, for all the management-speak buzz words, retains very old-fashioned opacity, initially appealed to senior civil servants. The outside world is presented with the minister as personification of the department. All power is vested in the minister, who accounts in public and in the Dáil for the performance of all those functions.

But internally ministerial powers can be exercised by any official. And the department is managed not by the minister but by the secretary general, with authority delegated downwards by the secretary general and accountability travelling upwards, to the desk of the secretary general.

The drawback the civil service has now discovered is that this model permits a minister to sojourn for years in a Government Department without there being any record of what the minister did. So, ministers deal with the outside world, as ambassadors at large and they take responsibility for major policy initiatives, launches and ribbon-cutting, and so on.. But everything that goes wrong subsequently becomes an internal departmental issue and is solely the responsibility/fault of management.

Of course it is right to require an increased accountability from officials. But this must be addition to, rather than in substitution for, ministerial accountability. We need a more appropriate distinction between the functions of ministers and of their officials.

Public service management reform cannot be allowed to permit ministers escape their supervisory responsibilities. Their overseeing role includes ensuring that standards are maintained, both in terms of what is delivered and how it is delivered, and that the minister is provided with the necessary and correct information to enable him or her to respond to problems and to account to the Dáil and the public.

Not knowing that something has happened is not an appropriate excuse when a minister should have known; neither is failing to intervene, when the minister should have done so; or failing to ensure that they are kept informed of potential, as well as actual, problems.

Accountability does not work unless the system helps us identify the true protagonists and their roles and then, where necessary, to assign blame. When Ministers are to blame, the system should identify that, rather than shielding them. And, when civil servants get it wrong, we're entitled to know that too. And what the Minister did about it.

There is and must remain a difference between the accountability requirements imposed on ministers and on their officials. Ministers are accountable for what happened on their watch but not because of an arcane legal fiction that, whatever went wrong, they did it themselves. Or because of

their detailed involvement in departmental affairs.

They are responsible because they are, in the language of Article 6 of the Constitution, designated by the people as “*the rulers of the State*”. They are public representatives appointed to serve in the executive branch of government and are accountable as such.

This supervening reality lays on them certain duties, both personal and organisational, and the responsibility for ensuring that these are fulfilled. It includes exerting the appropriate level of supervisory authority.

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When it comes to accountability, the main issues are first, whether the minister has been negligent or incompetent in the overall supervision of the department. Second, whether the minister responds adequately when things go wrong. Ministers cannot escape their supervisory role. If they are called on to resign, such calls should be solidly grounded in the reality of that role, rather than fixing them with the knowledge or actions of others.

So, when civil servants insist they briefed a minister but the minister insists he was not aware of a problem, it is a distraction to concentrate solely on the narrow question: what did the minister know. If the minister didn't know, why not? Is the minister not accountable for not knowing, for failing to read his briefs?

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