



Investigation into SSC conduct of MFAT leaks inquiry

Legislation	Ombudsmen Act 1975, ss 13,22 State Sector Act 1988, ss 4A, 6, 7, 8, 23
Agency	State Services Commission
Complaint about	Inquiry and report into unauthorised disclosure of Ministry of Foreign Affairs and Trade information
Ombudsman	Professor Ron Paterson
Case number	374155
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Summary

This investigation was triggered by a complaint about an inquiry by the State Services Commission (SSC), which culminated in the publication of the *Report to the State Services Commissioner on the Investigation into the Possible Unauthorised Disclosure of Information Relating to the Ministry of Foreign Affairs and Trade* (the Final Report). The State Services Commissioner, Iain Rennie, released the Final Report publicly on 12 December 2013.

The complainant, Derek Leask, was a former New Zealand High Commissioner to the United Kingdom. He retired in November 2012, after more than 40 years' service at the Ministry of Foreign Affairs and Trade (MFAT). Mr Leask was the subject of significant criticism in the Final Report. He complained to the Ombudsman that he had been treated unfairly.

The State Services Commissioner had an important role in ensuring the integrity and trustworthiness of the public sector in the face of serious concerns over leaks of official information. Mr Rennie clearly needed to commence an inquiry into the leaks and to publicly report on its findings, given his broad statutory mandate under the State Services Act 1988.

This review has identified numerous flaws in the inquiry, undertaken by Paula Rebstock on behalf of the Commissioner, in relation to Mr Leask. He was not responsible for the leaks that prompted the inquiry. Publication of a flawed report caused significant damage to Mr Leask's reputation and resulted in serious, unwarranted and adverse professional, personal and financial consequences for him.

In relation to Mr Leask, SSC acted unreasonably during the inquiry and in the findings and publication of the Final Report. In particular:

- the findings in relation to Mr Leask in the Final Report exceeded the Terms of Reference for the inquiry;
- Mr Leask was not given fair notice prior to his interviews that his conduct (apart from any possible culpability for the leaks in question) would be examined;
- insufficient material was provided to Mr Leask in advance of the Final Report about the applicable standards against which his behaviour was being measured;
- in several respects Mr Leask was not treated fairly, in accordance with the principles of natural justice;
- the evidence relied upon by the inquiry did not reasonably support some of the criticisms made about Mr Leask in the Final Report and some highly relevant evidence was not properly addressed;
- the manner in which the evidence was portrayed in the Final Report did not fairly represent Mr Leask's actions;
- the manner in which Mr Leask's actions were addressed in the Final Report was disproportionate when compared with the comments made about the actions of other MFAT staff, including a number of Tier 3 managers;

- the publication of the Final Report, in a manner that identified Mr Leask and contained unfair criticisms of him, was unjust; and
- the Commissioner's public statement about Mr Leask on 12 December 2013 was unreasonable.

The Ombudsman has issued formal recommendations that SSC offer a public apology to Mr Leask, reimburse him for actual and reasonable expenses, compensate him for harm to reputation and review its guidance for future inquiries under the State Services Act 1988, in light of this report.

Relevant background

Introduction

1. The facts that prompted the inquiry were:
 - a. On 2 May 2012, the Labour Party Spokesperson for Foreign Affairs and Trade, Hon Phil Goff MP, made references in Parliament that used content from papers before a Cabinet Committee about MFAT's change programme. Three papers on this topic had been finalised on 26 April 2012 and issued by the Cabinet Office on 30 April 2012, namely:
 - i. *Ministry of Foreign Affairs and Trade: Change Programme*;
 - ii. *MFAT: Global Footprint: European Posts*; and
 - iii. *Ministry of Foreign Affairs and Trade: Forecast Financial Position*.The papers were due to be considered by a Cabinet Committee on 2 May 2012.
 - b. The statements made in the House by Mr Goff on 2 May 2012 followed a succession of leaks over several months of information held by MFAT about the change programme. The leaks included but were not limited to:
 - i. information containing details of the Ministry Business Model (MBM) and the Ministry Remuneration Review was referred to in *The Dominion Post* article of 21 February 2012 quoted by Mr Goff. He also tabled a page of the MBM in Parliament on 6 March 2012;
 - ii. the content of the formal messages from three HOMs, dated 2, 3 and 5 March 2012 were disclosed by Mr Goff on 6 and 8 March 2012, and by the Labour Party to *The New Zealand Herald* on 9 March 2012;
 - iii. information from a MFAT spreadsheet prepared for the Change Programme Office showing remuneration and allowances for offshore posts was disclosed in *The Dominion Post* on 24 March 2012 and 27 March 2012;
 - iv. a letter signed by 49 HOMs to the Secretary, dated 15 March 2012, was tabled in Parliament by Mr Goff on 28 March 2012;

- v. the content of the Secretary's letter to all staff advising of the latest timeframe for announcing decisions on the change proposals, dated 20 April 2012, was reported in a Fairfax NZ News article on 26 April 2012; and
- vi. a copy of an email letter from the Trade Negotiations Division to MFAT's Senior Leadership Team (SLT), dated 27 April 2012, was reported in Hansard, on 2 May 2012, as being held by Mr Goff.

Consultation on proposed changes at MFAT

2. MFAT had been going through a change process for some time before the events of 2 May 2012.
3. In the last quarter of 2011, MFAT staff members were given the opportunity to provide feedback on the Future Business Model (FBM), the forerunner to the MBM issued in February 2012.
4. On 17 February 2012, the Chief Executive and Secretary of Foreign Affairs, John Allen, briefed Tier 3 managers about change proposals that he and SLT were about to make available for consultation with MFAT staff.
5. On 23 February 2012, Mr Allen announced to staff that the consultation period on significant changes to MFAT had begun. He explained that the MBM and the Ministry Remuneration Review documents, both classified as 'MFAT In Confidence', were available to staff through two secure websites. An online tool was made available to MFAT staff to ask questions and provide formal feedback. The consultation period closed on 21 March 2012.

Publicity and leaks about the proposed changes

6. Two days prior to Mr Allen's announcement to MFAT staff, *The Dominion Post* published an article about MFAT's change proposals. The article dated 21 February 2012 included details about the MBM and the Ministry Remuneration Review that were yet to be released to MFAT staff for consultation.
7. On the same day, Mr Allen emailed all HOMs and Division Directors:

Many of you will have seen the Dominion Post front page article this morning. While media interest around public sector change is inevitable, this is not the way in which we wanted our staff to hear information like this.
8. He emphasised that staff should read their respective consultation documents and engage in the 'wider formal consultation process over the coming weeks'. Mr Allen also advised the HOMs and Division Directors to remind their staff that questions about the proposals could be asked through the two secure websites.
9. On 23 February 2012, after releasing the consultation documents to MFAT staff, Mr Allen held a press conference. He outlined the main elements of the proposed changes and responded to questions.

Further leaks

10. Shortly after Mr Allen's release of the consultation documents, three HOMs sent formal messages or cables commenting on the change proposals to all MFAT divisions. The cables dated 2, 3 and 5 March 2012 were also sent to seconded MFAT staff in the offices of the Minister of Foreign Affairs, the Minister of Trade, and the Department of Prime Minister and Cabinet (DPMC) as well as to the Foreign Service Association (FSA).
11. The messages from two of the HOMs were referred to in Parliament by Mr Goff on 6 and 8 March 2012. He also referred to the content of the consultation document released to MFAT staff. The message from the other HOM was released to the media by the Labour Party on 9 March 2012.

Instructions regarding staff feedback and communications

12. Following the leak of the first cable, Mr Allen issued email instructions on 6 March 2012 to all Tier 3 Managers, including HOMs and Division Directors:

Dear colleagues,

You may or may not be aware that one of the recent formal messages sent by a post commenting on the MBM was referred to by Phil Goff during this afternoon's question time. Obviously, this does not reflect well on the Ministry or Ministry staff as it is clear someone has leaked the contents of the message outside the Ministry.

We have been careful to try to make our discussions with staff on the MBM and remuneration 'MFAT In Confidence'. This is out of respect for our staff, particularly those whose jobs are potentially affected by the proposals. This is increasingly becoming a hard position to maintain, but we continue to think that it is important that it is Ministry staff who get the first chance to debate the future of the organisation.

In future, we need you to please confine your feedback to the online tool. We appreciate this means you have to break the feedback up into sections, but the points that have been made in formal messages so far do relate to one or another aspect of the proposals rather than their totality. The tool also means all the feedback on particular aspects of the proposals can be carefully considered by SLT and the change team as they go through each issue covered by the MBM and the remuneration proposals. Common points made can also be picked up in FAQs, so that perspectives can be shared.

I realise this is a difficult time and staff are concerned about themselves and the future Ministry. I am too. But there is no justification for leaking material outside the Ministry. We want to hear what people think — but please use the online tool. It was set up for that purpose.

13. Later on 6 March 2012, Mr Allen sent a further email to all Tier 3 managers:

I gather some of you may have misinterpreted this message as an attempt on my part to stifle conversation about the change process. It wasn't. The points I

was trying to make were that leaks don't help us, and that formal feedback should be submitted via the online tool not formal message. If people want to email their thoughts or share their feedback with their colleagues who they want to be part of the dialogue they should.

14. Mr Allen provided the additional clarification on 8 March 2012:

Several of you have been in touch with me again to ask whether Formal Messages can be used as well as email. The answer to this is yes, but please do think about the appropriate classification.

Further publicity and leaks

15. On 12 March 2012, a group of spouses and partners of MFAT employees delivered an open letter to Mr Allen, expressing their concerns about the change proposals. This open letter was the subject of further publicity and reporting in the media.
16. On 15 March 2012, Mr Allen received by email a letter signed by 49 HOMs outlining their concerns with the change proposals. Some signatories circulated this letter to other MFAT staff and the offices of the Minister of Foreign Affairs, the Minister of Trade and DPMC. The HOMs' letter was leaked and Mr Goff tabled a copy in Parliament on 28 March 2012.
17. On 24 and 27 March 2012, articles published by *The Dominion Post* referred to salary and allowance data for offshore MFAT posts. This information had not been distributed widely within MFAT and is believed to have originated from a spreadsheet prepared for, and used by, MFAT's Change Programme Office. In addition, Fairfax NZ News featured an article on 26 April 2012 that referred to a letter dated 20 April 2012 from Mr Allen to all MFAT staff regarding the timeframe for decisions on the change proposals.
18. On 27 April 2012, the Trade Negotiations Division (TND) at MFAT sent a letter to Mr Allen and SLT, copied to all MFAT divisions and posts, asking for a further round of consultation on the change proposal. This letter was also leaked. During statements and questions in Parliament on 2 May 2012, Mr Goff referred to TND's letter as well as material in papers that were due to be considered by a Cabinet Committee later that day.

The inquiry

19. Following discussion with Mr Allen, the State Services Commissioner, Iain Rennie, decided to conduct an inquiry under section 8 of the State Sector Act 1988 into the possible unauthorised disclosure of information relating to the proposed changes within MFAT. The terms of reference for this inquiry were:¹
- *Investigate and report on the relevant facts around a possible unauthorised disclosure of three Cabinet papers, titled 'Ministry of Foreign Affairs and Trade: Change Programme', 'MFAT: Global Footprint: European Posts', and 'Ministry of Foreign Affairs and Trade:*

¹ The terms of reference were initially set on 4 May 2012 but were amended on 23 May 2012 to include the second term.

Forecast Financial Position', as well as information relating to those papers;

- *Investigate and report on the relevant background facts surrounding the development of the MFAT change programme culminating in the Cabinet papers referred to above and the environment within which MFAT was operating during this period. This includes, as appropriate, who may have been responsible for earlier unauthorised disclosures during the development of the MFAT change programme; and*
 - *Make recommendations as to measures, if any, that could strengthen information management systems within MFAT (or other agencies relevant to the investigation) to improve secure handling of government information and deter unauthorised disclosure.*
20. On 4 May 2012, Mr Rennie appointed Paula Rebstock² to conduct the inquiry. She was delegated certain functions under the State Sector Act 1988, including the power to summon witnesses and receive evidence.³
 21. In conducting the inquiry, Ms Rebstock was supported by an investigation team that comprised two legal advisors and one official from SSC.
 22. Interviews commenced on 11 May 2012. Over 200 interviews were conducted.
 23. Mr Leask was advised on 19 June 2012 that he would be required to come to an interview, and that he could arrange a support person or a legal advisor to attend with him. He was also provided with an information sheet. It explained, among other things, that all witnesses giving evidence had the same privileges and immunities as witnesses in a court of law, that all interviews would be taped and that adverse findings would not be made without first giving the affected person an opportunity to comment.
 24. On 27 June 2012, Mr Leask's barrister, Bruce Corkill QC, wrote to the investigation team asking for information about the intended topics for discussion at the interview. On 28 June 2012, the investigation team responded by setting out the terms of reference and stating that they are *'reasonably self explanatory and provide a general indication of the topics of interest'*.
 25. By letter of 3 July 2012, Mr Leask's QC stated that the second paragraph of the terms of reference was *'broad and somewhat vague'*. He again asked for an indication of the topics on which the inquiry wished to hear from Mr Leask. The investigation team responded on 4 July 2012 as follows:

I have discussed your request with Paula Rebstock.

² Ms Rebstock was appointed a Dame Companion of the New Zealand Order of Merit in the 2016 New Year Honours list, but is referred to in this report as Ms Rebstock, to reflect her status at the relevant time.

³ Ss 6(b), 6(ha), 7, 8, 9, 10, 25 and 57B of the State Sector Act 1988 (as in force at the relevant time).

She is satisfied that the second paragraph of the terms of reference is sufficiently clear to provide a general indication of the topics of interest. For example topics will include: the development of the change programme, the organisational context and culture, and the various leaks of information that preceded the possible unauthorised disclosure of the Cabinet papers.

26. Mr Leask was interviewed on 10, 13 and 29 August 2012. His QC was present at each interview.

First opportunity to comment — December 2012

27. On 21 December 2012, the investigation team wrote to Mr Leask's QC to provide an opportunity to comment (either orally or written) on concerns about Mr Leask's actions. This letter noted, having obtained emails between Mr Leask and others, that:⁴

...it is necessary for Ms Rebstock to investigate and report on actions within MFAT senior officials that made it acceptable, or encouraged others within the organisation to think it was acceptable, to disseminate information and documents about the MFAT change programme, including material that appears to have disclosed directly to the Labour Party. Whilst politicians and others were commenting publicly, this does not dilute the obligations of officials to act in a responsible manner in accordance with the Code of Conduct.

...

In particular it appears that Mr Leask and [Y] engaged in a strategy of ensuring that the change proposals did not become a reality and that this strategy included:

Encouraging the spouses to go public with their comments about the changes proposed.

Raising concerns with senior public servants outside MFAT, including Maarten Wevers and Ian Fletcher.

Discussing the proposals with, and encouraging, ex-MFAT employees to lobby the Government and John Allen.

Providing comment directly to Ministers on the change proposals.

28. The letter went on to outline examples of Mr Leask's actions that were of concern to the inquiry and attached the email evidence referred to.
29. On 29 January 2013, Mr Leask's QC replied asking for further details about what 'particular obligations provisions are relied on, as set out in the Code of Conduct'. In a response dated 8 February 2013, the investigation team explained that the draft extracts of the report would accommodate these concerns.

⁴ Paragraphs 4 and 6 of SSC letter to Mr Leask's QC dated 21 December 2012.

30. On 15 February 2013, Mr Leask and his QC provided written comments challenging the allegations set out in the letter of 21 December 2012 and the conduct of the inquiry. They also included two statements from expert witnesses: Sir Maarten Wevers, former Chief Executive of DPMC, and Neil Walter, former Secretary of MFAT.
31. On 7 March 2013, the QC wrote to Mr Rennie expressing '*acute concerns regarding a number of aspects relating to the setting up of the [inquiry], the way in which it has been run and the steps which are now being taken*'. SSC advised the QC that '*Mr Rennie has delegated responsibility for the investigation to Ms Rebstock and it is important that she continues to carry out that role independently*'.⁵

Second opportunity to comment — April 2013

32. On 4 April 2013, Mr Leask's QC was provided with extracts of the draft report that related to Mr Leask and other Tier 3 managers. On 10 April 2013, the QC advised the investigation team that he would be referring paragraph 118 of the draft report to the expert witnesses for comment. That paragraph stated:

Mr Leask supplied the investigation with statements from two former senior public servants who had been senior employees at MFAT. These statements commented on MFAT's practice and conventions on communications by its officers with Ministers, other government agencies and their families. These former MFAT employees were not shown the full communications and all evidence available to the investigation. Neither statement addressed the duty of allegiance of senior MFAT employees to their organisation and the responsibility of such employees not to use their professional access to Ministers, to other senior public servants or to their own staff to promote their personal interests and views over those of their organisation.

33. On 11 April 2013, Mr Leask's QC was advised by the investigation team that he was not to breach the conditions on which the extracts were provided by showing them to the expert witnesses.
34. On 18 April 2013, Mr Leask and his QC provided comments on the draft report. They raised a number of concerns about the conduct of the inquiry and the validity of the preliminary criticisms of Mr Leask. His QC asked for clarification of what was meant by the allegation that his client had breached a '*duty of allegiance*'. He also noted that the inquiry was not purporting to rely on the provisions of SSC's Code of Conduct.⁶

Third opportunity to comment — August/September 2013

35. On 30 August 2013, the investigation team sent revised extracts of the draft report to Mr Leask's QC. In this draft, Mr Leask was described as person 'Z'. On 12 September 2013, the QC requested that these extracts be shown to expert witness Neil Walter. Permission was granted by the investigation team.

⁵ SSC letter to the QC dated 22 March 2013.

⁶ *Standards of Integrity and Conduct* issued under section 57 of the State Sector Act 1988.

36. On 20 September 2013, Mr Leask and his QC provided additional comments criticising the draft report and the conduct of the inquiry. The QC submitted that reference was made to an undefined new standard (*'the standards required of public servants'*) and that the draft report failed to identify the source of this standard or provide an explanation why this standard outweighed other competing considerations, including relevant and important employment law obligations. A further and detailed statement from Mr Walter was provided.
37. Mr Leask's QC also wrote to Mr Rennie on 20 September 2013, submitting that the draft report was a *'seriously inadequate document'*. The QC requested that as soon as Mr Rennie received the final report, he provide a copy to Mr Leask and afford him with a further opportunity to make submissions before publication.
38. On 27 September 2013, the QC sent further comments to the inquiry on the draft report that had been provided to him on 30 August 2013.
39. On 14 October 2013, Mr Rennie advised Mr Leask's QC:

...I do not believe it would be appropriate for me to interfere in the inquiry being conducted by Ms Rebstock.

I understand that a thorough process has been undertaken by the inquiry to receive and take into account the various matters that have been put forward by your client and you on behalf of your client.

Naturally I will carefully consider the inquiry report before making any final decision as to publication. However my present intention, subject to that further consideration, is to publish the report as I believe that there are public interest considerations in doing so.

Of particular importance to me following publication of the report, will be what lessons can be learnt from this and the provision of appropriate guidance to the public servants about the conduct expected of them in situations such as that which gave rise to the inquiry.

I understand arrangements have been made for affected parties to receive the report shortly before its publication.

Report of 15 October 2013

40. On 15 October 2013, Mr Leask's QC was advised that, having taken account of his and Mr Leask's submissions, the investigation team was finalising the report. He was also advised that once this report was presented to Mr Rennie, he would make a decision about publication.
41. On 23 October 2013, Mr Leask's QC was advised by Mr Rennie that he had received the report and his preliminary view was that he wished to publish it as it stood. In order for submissions to be made on the issue of publication, he provided Mr Leask's QC with extracts of the report dated 15 October 2013.

42. On 1 November 2013, Mr Leask's QC made submissions about the deficiencies in the report and against its publication in its current form. He noted:⁷

The section of the Report sent to me contains multiple errors of fact, and omissions of important material. It relies on rules of behaviour created after the fact by the Investigator and having no foundation in law or in practice. It is misleading in that it makes charges and accusations backed by no evidence. It ignores almost all the evidence provided by my client.

43. Mr Leask's QC also pointed out that referring to his client as 'Z' would not prevent him from being identified. The QC also referred to examples of new accusations and the new reference to Standards of Integrity and Conduct. He submitted that this was the first reference to a formal standard but no indication was given as to which standard was applicable to Mr Leask. He criticised the dismissive approach to the statements from Sir Maarten and Mr Walter. Mr Leask's QC also provided the inquiry with a table of corrections that had been prepared by Mr Leask.
44. When Mr Leask's QC did not receive a substantive response to his letter of 1 November 2013, he wrote again to Mr Rennie.⁸ He requested, under Information Privacy Principle 7 of the Privacy Act 1993, that both the response of 20 September 2013 and the table of corrections supplied by his client on 1 November 2013 be used to amend the report or, alternatively, be annexed to the report.

45. Mr Rennie wrote to Mr Leask's QC on 5 December 2013 and explained:

Following your submissions to me, I have also asked Ms Rebstock to amend the report to expressly address the submissions made by your client to the investigation and the rationale as to whether or not she accepted the responses. I consider that these additions sufficiently address the submissions you have made, both to me and to the investigation, on those areas of disagreement as to the investigation's conclusions.

46. Mr Rennie also refused Mr Leask's request for a correction on the basis that the information at issue consisted of 'the opinions or conclusions of the investigation' and that pursuant to section 55 of the Privacy Act, Principle 7 did not apply to the investigation's reporting of submissions and evidence. While acknowledging that Mr Leask 'may be identified by reference to certain facts', Mr Rennie considered that the '[r]emoval of all identifying factors would reduce the value of the report' and may unreasonably 'tarnish' the remaining Tier 3 managers.
47. Mr Leask made a complaint to the Privacy Commissioner alleging a breach of the Privacy Act.⁹

⁷ Paragraph 4 of the letter dated 1 November 2013 from Mr Leask's QC.

⁸ Letters dated 4 and 12 November and 2 December 2013 from Mr Leask's QC.

⁹ In March 2015, the Privacy Commissioner issued Mr Leask with a certificate of investigation that confirmed there had been a breach of Information Privacy Principle 7, which relates to the correction of personal information.

Final Report of 27 November 2013

48. On 9 December 2013, Mr Rennie wrote to Mr Leask's QC. Mr Rennie advised that he intended to publish the Final Report (dated 27 November 2013) on 12 December 2013. Mr Leask and his QC were provided with an embargoed copy of the parts of the Final Report that related to Mr Leask and other Tier 3 managers.
49. Mr Rennie publicly released the Final Report on 12 December 2013. He also issued a statement on the same day, which noted:

Paula Rebstock reports a strong suspicion that the leak of the Cabinet papers came from the State Services Commission. I am extremely saddened and disappointed by this. I am proud of my team and the way they handle sensitive information with discretion and professionalism every day. If the leak came from within SSC then the individual who chose to behave like this has badly let down his colleagues.

Regarding MFAT itself, the report has identified conduct by a group of senior public servants at MFAT, during the change process, that fell below the standards expected of people in their position. Specifically Paula Rebstock finds that the behaviour of some Tier 3 managers in MFAT created a perception in the department that it was acceptable for opposition to the proposed changes to be aired outside the department and used for political purposes. Ms Rebstock finds that two Tier 3 managers developed strategies to oppose the change proposals, and to disrupt or stop the change process outside of the staff-in-confidence consultation process. Ms Rebstock further considered it probable that some MFAT staff leaked a variety of MFAT staff-in-confidence material to the Labour Party Spokesperson on Foreign Affairs and Trade, and to the media.

50. In terms of the earlier unauthorised disclosures, the Final Report contained a number of criticisms about Mr Leask and other Tier 3 managers at MFAT. It is impractical to set out an exhaustive list of these criticisms but the Final Report includes the following formal findings that are directly relevant to Mr Leask:¹⁰

B. From the evidence outlined in this Report, the investigation considers some Tier 3 managers at MFAT did not meet the Standards of Integrity and Conduct expected of public servants. The Secretary had issued lawful instructions on how to provide feedback on the change proposals. Some Tier 3 managers disregarded these instructions, choosing instead to send their feedback to all or most team in-boxes at MFAT. As a result, these Tier 3 managers created a perception that it was acceptable for their opposition to the change proposals to be leaked and to be used for political purposes. Some Tier 3 managers acted outside their own authority in providing personal advice direct to Ministers and DPMC on a staff in confidence consultation.

¹⁰ Page 59 of the Final Report.

- C. *Two Tier 3 managers, a Head of Mission and a Division Director, developed strategies to oppose the change proposals and to disrupt or stop the change process outside of the staff in confidence consultation process. Their strategies included:*
- *disregarding the Secretary's instructions for providing formal feedback on the change proposals via the secure websites;*
 - *providing personal advice to Ministers on the change proposals without notifying the Secretary of these discussions;*
 - *seeking to influence the Chief Executive of DPMC and the Prime Minister's Office to intervene in a MFAT staff in confidence consultation;*
 - *supplying government information that they were not authorised to disclose to the FSA and the partners group for use in public campaigns to embarrass or put pressure on the Government and the Secretary;*
 - *discussing the change proposals with former New Zealand diplomats and encouraging them to lobby the Government against the change proposal; and*
 - *discussing the change proposals with other senior public servants in the hope they might take action to influence the change process at MFAT.*

At the time, these two Tier 3 managers were planning to leave MFAT and have since done so.

Complaint to Ombudsman and investigation

51. On 20 February 2014, the Office of the Ombudsman received a complaint from Mr Leask alleging that the inquiry and the Final Report were unreasonable in a number of respects.
52. Mr Leask advised me that he *'wanted to ensure the sort of treatment that [he] received would not happen to any future public servant'*.
53. I wrote to SSC on 12 June 2014 to notify my intention to investigate Mr Leask's complaint. Appendix 1 summarises the grounds of complaint that I advised SSC would be the subject of my investigation.
54. SSC responded on 5 September 2014 with a detailed report and a large volume of information. After careful analysis of this material, I wrote to SSC again on 26 March 2015 with my preliminary thinking on some aspects of Mr Leask's complaint and to identify further information I required for the purposes of my investigation. I sent a similar letter to Ms Rebstock.
55. I received a further detailed response from SSC dated 4 June 2015.

56. I conducted interviews with Ms Rebstock on 19 June 2015, Mr Rennie on 30 July 2015, and Mr Leask on 5 August 2015.
57. On 3 March 2016, I issued a provisional opinion and provided SSC and Ms Rebstock with an opportunity to comment. I received these comments on 18 May 2016. SSC noted that *'there are some useful lessons to be learned from your opinion which should be addressed in future inquiries of this nature'*, but disagreed with aspects of my provisional opinion.
58. I also wrote to Mr Leask on 3 March 2016 to advise that I proposed to discontinue my investigation into certain aspects of his complaint. In his response of 3 May 2016, Mr Leask accepted my decision.
59. On 20 May 2016, I sought comments from SSC and Mr Leask on my proposed recommendations. I also provided SSC with a final opportunity to advise me of any further evidential material that it considered relevant to the scope of my investigation.
60. At the end of May 2016, I received comments from both parties on my proposed recommendations. SSC also provided a response to my queries about further evidential material.

Ombudsman's role

61. Under section 13(1) of the Ombudsmen Act, I have the authority to investigate the administrative acts, decisions, omissions and recommendations of SSC (including any officer, employee or member of the SSC). My role, pursuant to section 22 of the Ombudsmen Act, is to consider the administrative conduct of SSC and to form an independent opinion on whether that conduct:
 - a. appears to have been contrary to law; or
 - b. was unreasonable, unjust, oppressive or improperly discriminatory, or was in accordance with a rule of law or a provision of any Act, regulation, or bylaw or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory; or
 - c. was based wholly or partly on a mistake of law or fact; or
 - d. was wrong.
62. The relevant statutory provisions are set out in Appendix 2.
63. In its first response, SSC referred to *'[t]he traditional reluctance exercised by the Courts to interfere in the conclusions of a primary investigator'*.¹¹ SSC subsequently stated that it

¹¹ Paragraph 94 of SSC response dated 5 September 2014.

was not seeking to ‘dispute or challenge that the Ombudsman has broad powers’.¹² However, it also observed:¹³

To be able to make a finding that the decision was wrong or unreasonable, and one which a reasonable investigator would not have been able to make on the evidence, would require re-opening the investigation and reconsidering all of the evidence heard and gathered ... Whilst we have endeavoured to provide you with all relevant information and evidence we cannot recreate the whole investigation for you to enable you to reinvestigate the matter and make such a finding.

...

... the inquiry was one of considerable breadth and depth spanning many months, hundreds of interviews and considerable documentary evidence. For a conclusion to be reached that the findings were wrong and / or unreasonable would require the matter to be reinvestigated and for all the evidence, including emails and transcripts to be considered. A reinvestigation would still not have the benefit Ms Rebstock had of interviewing the people concerned and hearing the evidence directly from all the interviewees.

64. Examining the reasonableness of a decision, in Ombudsmen Act terms, does not involve a ‘reinvestigation’ of the original matter. I have not attempted to re-examine the unauthorised disclosure of MFAT information. That is clearly not within my purview. However, it is my role to investigate the actions of SSC insofar as they relate to Mr Leask, and form an opinion on whether that conduct was reasonable in the circumstances.
65. An Ombudsman is not restricted to forming an opinion on whether a particular decision was unreasonable in a *Wednesbury* sense.¹⁴ The term ‘unreasonable’ in the context of an Ombudsman’s jurisdiction has consistently been accepted as having a broader meaning than the Courts adopt for the purposes of judicial review.¹⁵
66. Even at common law, the Courts on judicial review are willing to carefully scrutinise the reasonableness of administrative conduct, particularly in cases involving human rights or where an individual’s reputation is affected.
67. The plain words of the Ombudsmen Act 1975 specifically authorise an Ombudsman to review the reasonableness of administrative action, including whether a decision, act or omission was ‘wrong’. The jurisdiction is not limited to issues of procedural fairness.

¹² Paragraph 63 of SSC response dated 4 June 2015.

¹³ Paragraphs 19 and 63 of SSC response dated 4 June 2015.

¹⁴ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

¹⁵ *Commissioner of Police v The Ombudsman* (unreported, 30044/94, Supreme Court of New South Wales, Administrative Division, 9 September 1994); and *BC Development Corp v Friedmann* [1984] 2 SCR 447, at 461.

Analysis and findings

68. I acknowledge the size and complexity of the inquiry, as demonstrated by the wealth of information provided to me. I also appreciate the critical role played by SSC in ensuring the integrity and trustworthiness of the public sector in the face of serious concerns over leaks of official information.
69. However, I am equally mindful of the significant personal and professional repercussions for Mr Leask from the inquiry and the publication of the Final Report. The report contained extremely serious findings about Mr Leask's conduct. Where an inquiry has the potential to result in significant adverse findings against an individual, particularly if those findings are disseminated publicly, fairness in the inquiry is essential.
70. I do not accept SSC's submission that as the inquiry was led by a non-lawyer who was *'not sitting in a quasi-judicial capacity'*, the standards against which I have measured the actions of the inquiry were *'not appropriate for inquiries of such a nature'*.¹⁶
71. It is no answer to a lack of fairness that an inquiry body *sought* to treat an affected individual fairly and believed it had done so. An Ombudsman, while giving appropriate latitude to an inquiry body, must objectively assess the reasonableness of the process and findings of the inquiry under review.
72. SSC submits that *'the implication of the provisional opinion is to suggest that the Commissioner move away from the high-level principles-based approach to the activities of public servants'*.¹⁷
73. I am not suggesting that the Commissioner should move away from a high-level, principles-based, approach to the conduct of public servants, but I do not accept the submission that such an approach can or should restrict the rights of persons subject to such an inquiry to procedural fairness and natural justice. Nor do I accept SSC's submission that my provisional opinion *'suggests that findings on these matters are dealt with in a way that is not transparent and not fully able to be used for the purpose for which such inquiries are undertaken'*.¹⁸ My findings highlight the importance of transparency and fairness in the conduct of inquiries.

Revised scope of my investigation

74. During the course of my investigation, I decided to consolidate and refine the grounds of complaint as originally notified (a summary of which is set out in Appendix 1). In forming my opinion, I have focussed on the following questions:
- a. Was the inquiry conducted in a reasonable and fair manner:
 - i. whether the findings against Mr Leask exceeded the terms of reference;

¹⁶ Paragraphs 4 and 5 of SSC response dated 18 May 2016.

¹⁷ Paragraph 25 of SSC response dated 18 May 2016.

¹⁸ Paragraph 25 of SSC response dated 18 May 2016.

- ii. whether Mr Leask was provided with sufficient information about the standards of behaviour or conduct that he was being assessed against; and
 - iii. whether the principles of natural justice were complied with.
 - b. Were the findings of the Final Report in relation to Mr Leask wrong and/or unreasonable:
 - i. whether there was a sufficient evidential basis for the criticisms against Mr Leask;
 - ii. whether the Final Report fairly portrayed the evidence about Mr Leask's actions and how he engaged with MFAT's change proposals; and
 - iii. whether Mr Leask was unfairly singled out in the Final Report.
 - c. Whether the decision to publish the Final Report with the findings against Mr Leask was unreasonable and/or unjust.
- 75. In revising the scope of my investigation, I also identified a number of grounds of complaint (as originally notified) where further investigation was unnecessary. In particular, whether:
 - a. Mr Leask was informed that should his behaviour be found to have breached appropriate standards, it was likely that he would be in effect identified in the Final Report as committing such breaches (A2);
 - b. Mr Leask was provided with sufficient and timely information in respect of the specific topics to be address in interview phase of the inquiry (A4(a));
 - c. Mr Leask ought to have been provided with an opportunity to cross examine certain witnesses who were being questioned about the role he played in the change process (A4(b));
 - d. Mr Leask was provided with an opportunity to consider and respond to the 'Focus' and 'Media and Political Commentary' sections of the Final Report (A5(a));
 - e. Mr Leask was provided with an opportunity to consider and respond to the allegation that his actions had 'fuelled the political debate' (A5(d));
 - f. there was a lack of an 'open-mind' regarding Mr Leask's conduct (A6); and
 - g. Mr Rennie's acceptance of the Final Report was unreasonable, unjust and/or oppressive (C1).
- 76. In reaching the decision pursuant to section 17(1)(f)(ii) of the Ombudsmen Act to discontinue these aspects of the investigation, I took into account that:
 - a. it was not possible to know who would be central or peripheral to the inquiry prior to or during the interview phase — the appropriate time to provide notice about the potential for identification was when seeking submissions on the draft report;
 - b. given that 200 interviews were conducted, the inquiry's awareness of the situation and matters to be pursued developed iteratively, and it was not reasonably

- practicable for the inquiry to provide Mr Leask with forewarning of the specific questions to be addressed in the interview;
- c. the principles of natural justice did not require the inquiry to provide Mr Leask with a separate opportunity to cross-examine any witnesses who may have made adverse comment about his actions;
 - d. it is not clear that the *'Focus'* and *'Media and Political Commentary'* sections of the Final Report are directly relevant to the allegation about Mr Leask's conduct;
 - e. in the various extracts of the draft report provided to Mr Leask, the inquiry had conveyed to him the essence of its concern that his actions had *'fuelled the political debate'*;
 - f. since the threshold for predetermination and/or bias is high, there were insufficient grounds to conclude that the inquiry was conducted without *'an open mind'*; and
 - g. it is not necessary to examine Mr Rennie's acceptance of the Final Report as a separate and distinct step from his decision to publish it.

Terms of reference

77. Did the findings in the Final Report, relating to Mr Leask, exceed the terms of reference for the inquiry? Counsel for Mr Leask alleged:

Even if Ms Rebstock had jurisdiction to investigate and report on the conduct of individuals, the accusations and findings made against [Mr Leask] appear to be outside the scope of the Terms of Reference. There is no evidence to suggest that [his] actions were in any way connected with the leak of Cabinet documents, which was the central issue for the investigation, or with the earlier leaks of documents.

78. I consider that the amended terms of reference allowed the inquiry to:
- a. identify the possible source(s) of the various leaks;
 - b. ascertain how the leaks of the Cabinet papers may have occurred; and
 - c. report these events in their full and proper context.
79. It did not empower the inquiry to investigate conduct that was not reasonably connected to the leaks. In my opinion, the findings against Mr Leask exceeded the terms of reference.

Discussion

80. The amended terms of reference for the inquiry were to:
- *Investigate and report on the relevant facts around a possible unauthorised disclosure of three Cabinet papers, titled 'Ministry of Foreign Affairs and Trade: Change Programme', 'MFAT: Global Footprint: European Posts', and 'Ministry of Foreign Affairs and Trade:*

Forecast Financial Position', as well as information relating to those papers;

- *Investigate and report on the relevant background facts surrounding the development of the MFAT change programme culminating in the Cabinet papers referred to above and the environment within which MFAT was operating during this period. This includes, as appropriate, who may have been responsible for earlier unauthorised disclosures during the development of the MFAT change programme; and*
- *Make recommendations as to measures, if any, that could strengthen information management systems within MFAT (or other agencies relevant to the investigation) to improve secure handling of government information and deter unauthorised disclosure.*

81. In his letter of 23 May 2012 to Ms Rebstock (with the terms of reference amended), Mr Rennie explained:

I intended the scope of the terms of reference to encompass a broad investigation into the background facts surrounding the development of the MFAT change programme and the environment within which MFAT was operating during this period, including who may have been responsible for earlier unauthorised disclosures leading up to the unauthorised disclosures of the three Cabinet papers referred to above.

These aspects go to the heart of understanding what occurred and sets the context against which the standards of conduct required of State servants are to be considered.

82. SSC subsequently maintained that:¹⁹

...inquiries undertaken by Ms Rebstock were within the scope of the Terms of Reference and she was able to follow those lines of inquiry and ultimately make findings about Mr Leask's behaviour that she found concerning.

83. In response to my provisional opinion, Mr Rennie submitted:²⁰

...the second term of reference deliberately gave wide scope to inquire into the background facts and the environment of the Ministry of Foreign Affairs and Trade (MFAT) change programme.

84. I do not find SSC's explanations convincing.

¹⁹ Paragraph 12 of SSC response dated 4 June 2015.

²⁰ Paragraph 9 of SSC response dated 18 May 2016.

85. The amendment to the terms of reference was discussed in the Final Report as relating to leaks of information (emphasis added):²¹

*The Commissioner amended the terms of reference on 23 May 2012 to include a new second paragraph. The Commissioner had always intended that the investigation encompass more than just the Cabinet paper **leaks** and extend to the earlier **leaks** of information. The additional paragraph was included principally for the avoidance of doubt about the scope of the matters to be investigated.*

86. During my meeting with Mr Rennie on 30 July 2015, he confirmed that the leak of the Cabinet papers was the ‘proximate spur’ for the inquiry and that it was necessary to establish whether there was a link between the leaking of these papers and any of the earlier leaks of MFAT information to the media and Mr Goff.
87. It is important to bear in mind that the inquiry did **not** find Mr Leask responsible for the leaks of the Cabinet papers. The inquiry in fact formed a ‘strong suspicion’ that a contractor employed by SSC may have been responsible for these leaks. There is also no suggestion that Mr Leask leaked any of the other material relating to the MFAT change programme to the Labour Party or the media.
88. In these circumstances, it is difficult to see how any other issues relating to Mr Leask’s conduct were relevant to the factual context of the leak of the Cabinet papers, or how findings such as that he ‘developed strategies to oppose the change proposal and to disrupt or stop the change process outside of the staff in confidence consultation process’ could fall within the terms of reference.
89. Mr Rennie has also submitted:²²

The State Services Commissioner’s (Commissioner) power to conduct investigations, and make and receive reports is very broad. The State Sector Act does not provide for any particular process for such investigations or provide any guidance as to how they ought be carried out.

...

...It is my mandate to set the terms of reference and there is no suggestion, nor could there be, that I was not permitted to inquire into the matters investigated. The position you take in the provisional opinion is a narrow interpretation of the terms of reference that is not warranted, was not intended by me nor understood to be the position by [Ms Rebstock].

I agree that as a general proposition terms of reference should fully address matters as explicitly as possible. But your provisional finding ignores the reality that the second term of reference deliberately gave a wide scope to

²¹ Paragraph 78 of the Final Report.

²² Paragraph 3, 8, 9 and 10 of SSC response dated 18 May 2016.

inquire into the background facts and the environment of the Ministry of Foreign Affairs (MFAT) change programme.

Further Mr Leask was plainly aware of the matters that [Ms Rebstock] was viewing as within the terms of reference; indeed in objecting to her Inquiry, counsel acknowledged those matters were being inquired into.

90. The State Sector Act 1988 confers extensive powers on the Commissioner, whose role is 'to provide leadership and oversight of the State services', including by 'working with State service leaders to ensure that the State services maintain high standards of integrity and conduct...';²³ and who has a specific function to 'promote and reinforce standards of integrity and conduct in the State services'.²⁴ The Commissioner has broad powers to carry out his functions, including a specific power to conduct investigations that he considers necessary.²⁵ The power to investigate may be delegated,²⁶ as occurred with the appointment of Ms Rebstock to undertake the inquiry in this case.
91. I can appreciate why the Commissioner felt it necessary for the inquiry to consider the contextual background to the leaks of the Cabinet papers, and for the second term of reference to be added on 23 May 2012.
92. Given the breadth of the Commissioner's powers, and the potential impact on an affected State sector employee, it is important that the ambit of an inquiry is clearly spelt out (so that the State sector and the public are properly informed as to the matters under inquiry) and that the inquirer stays within the terms of reference.
93. I reject the submission by the Commissioner that my analysis of how natural justice applies to State Sector Act inquiries is 'highly legalistic and imposes standards not appropriate for inquiries of such a nature'.²⁷ The Commissioner and his delegate in undertaking such an inquiry have a duty to act fairly. It is no answer to say that Ms Rebstock 'was not sitting in a quasi-judicial capacity'.²⁸
94. The terms of reference of such an inquiry are crucial for any affected State sector employee. First, those terms enable individuals to judge the extent to which they should seek to engage with an inquiry. Secondly, if called to an interview, individuals need to have an unambiguous understanding of the scope of the inquiry. Interviewees are entitled to expect that any questions at interview will be confined to the matters specified by the terms of reference. An interviewee should not be taken by surprise.
95. Natural justice gives affected individuals the right to make submissions on proposed adverse comment by an inquiry body, before it makes final findings. However that

²³ State Sector Act 1988, s 4A(d).

²⁴ State Sector Act 1988, s 6(h).

²⁵ State Sector Act 1988, ss 7, 8(2).

²⁶ State Sector Act 1988, s 23(1).

²⁷ Paragraph 5 of SSC response dated 18 May 2016.

²⁸ Paragraph 4 of SSC response dated 18 May 2016.

protection does not remedy any failure to stay within the terms of reference of an inquiry. It is no answer to the unfairness of criticism of an individual, in a final inquiry report, to say that the individual had the opportunity to respond to the criticism at a draft or provisional report stage, if the criticism relates to a matter beyond the terms of reference. Nor is it an answer to say that the inquiry *could* have been given the power to traverse broader issues, if the actual terms of reference do not go so far.

96. The fact that Mr Rennie intended, and Ms Rebstock understood, the amended terms of reference to empower the inquiry to investigate and comment upon any conduct by State sector employees in relation to the MFAT change programme, even conduct not reasonably connected to the leaks at the heart of the inquiry, cannot alter the plain words and meaning of the terms of reference. Furthermore, they were on notice, from Mr Leask's QC, about concerns that the terms of reference had been exceeded.
97. In sum, the terms of reference did not empower the inquiry to make adverse conduct findings with respect to individuals unless these were 'reasonably connected' to a leak. The findings as they related to Mr Leask were therefore outside the terms of reference.

Fair notice prior to interviews

98. A secondary issue is whether it was sufficiently apparent from the material provided to Mr Leask prior to the interview phase of the inquiry that his conduct (apart from any possible culpability for the leaks in question) would be examined.
99. In addition to disputing that the inquiry strayed from the terms of reference, SSC submitted:²⁹

Mr Leask could reasonably have expected to be asked what was his role in the change programme, what MFAT information in relation to the change programme he had access to (including but not limited to information in the Cabinet papers), when he had access, how he handled MFAT information, what he was authorised to do in terms of passing on MFAT information and what he knew about unauthorised disclosures of information about MFAT. He could also reasonably have expected to be asked about the organisational context and culture at the time.

...

Mr Leask was sufficiently informed that his general actions, as they related to background facts in relation to the change programme and the environment within which MFAT was operating at that time, would be questioned by Ms Rebstock. Any adverse findings as a result of these discussions with Mr Leask on those topics and of evidence in emails identified after those discussions were provided to Mr Leask for comment.

100. I accept SSC's argument that the process of the inquiry was 'iterative', and agree that it would not be reasonable to expect that Mr Leask be provided with an exact list of

²⁹ Paragraphs 4 and 6 of SSC response dated 4 June 2015.

questions ahead of the interviews.³⁰ However, Ms Rebstock indicated at interview that it was understood from the outset that she would be looking at issues relating to the adherence to MFAT and SSC's codes of conduct.

101. That being the case, fairness required that it be made very clear to Mr Leask prior to the interviews that:
- a. the inquiry considered that the terms of reference allowed it to '*examine the actions of the various public servants involved and **identify any problematic behaviours or conduct***' beyond any possible culpability for the leak of Cabinet papers and other information relating to the MFAT change programme;³¹ and
 - b. it would be assessing whether Mr Leask had adhered to the relevant codes of conduct.
102. This was not made clear in the information sent to Mr Leask prior to the interviews. That information suggested that the inquiry was concerned solely with:
- a. the relevant facts surrounding the possible leaking of the Cabinet papers; and
 - b. the relevant background facts surrounding the development of the MFAT change programme and the environment at MFAT during this period, including who may have been responsible for leaking information.
103. In response to my provisional opinion, Mr Rennie '*acknowledge[d] that before his first interview Mr Leask may not have been on notice that his conduct ... would be examined*'.³² However, he went on to say:³³
- Nevertheless ... Mr Leask was later given an opportunity to comment on [Ms Rebstock's] concerns about his conduct. Mr Leask was able to address those matters, including being given numerous opportunities to comment on relevant draft extracts of the report as part of the natural justice process as extensively as he wished.*
104. I accept that the inquiry later wrote to Mr Leask to provide him with an opportunity to comment on its concerns about his conduct. However, since Mr Leask's conduct was being considered at the interviews, and an assessment as to credibility of his responses was reached by the inquiry,³⁴ he needed to be given fair notice that he was personally a subject of the inquiry. In my opinion, Mr Leask was not properly alerted to the scope of the inquiry before his interviews and this deficiency was not adequately addressed by the later opportunity to comment.

³⁰ Paragraph 21 of SSC response dated 5 September 2014.

³¹ Paragraph 17 of SSC response dated 5 September 2014; emphasis added.

³² Paragraph 12 of SSC response dated 18 May 2016.

³³ Paragraph 13 of SSC response dated 18 May 2016.

³⁴ Paragraphs 19 and 66 of SSC response dated 4 June 2015.

Disclosure of information regarding the applicable standards

105. Another issue is whether the inquiry adequately advised Mr Leask of the standards that his behaviour was being measured against. He alleges that despite repeated requests for this information during the course of the inquiry, the specific standards were not made apparent to him until the Final Report, by which stage he was deprived of any opportunity to respond meaningfully.
106. I consider that insufficient material was provided to Mr Leask in advance of the Final Report about the applicable standards against which his behaviour was being measured.

Discussion

107. In response to my notification of this element of the complaint, SSC advised:³⁵

...While she did not drill into the provisions of the Code as was requested during the process, Ms Rebstock focussed on providing [Mr Leask] and others with the detail of their actions that she was concerned about, and the reasons that they concerned her.

108. SSC further advised:³⁶

The Code promulgated by the Commissioner is deliberately principles-based, and therefore operates at a relatively high level. Importantly, the Code does not operate like a penal code, and it is not appropriate to approach it in that way. Due to its high level nature, the behaviours identified by Ms Rebstock as concerning cut across a number of the Code provisions, leading her to ultimate conclusions that his behaviour was not justified. Ms Rebstock was seeking from [Mr Leask] and considering his explanation for his behaviour, not trying to prove the elements of an offence.

109. SSC initially argued that Mr Leask was provided with sufficient advice and information relating to the concern that his behaviour had not met the standards expected of a public servant. In addition, SSC stated:³⁷

...Given Mr Leask's seniority within the State Service and his length of time working within MFAT and his employment obligations to abide by the MFAT Code of Conduct, including the Standards of Integrity and Conduct issued by the State Services Commissioner, it is reasonable to assume that he would have been aware of the standards expected of public servants and the requirements for handling official information...

110. Mr Rennie accepted, following my provisional opinion, that the inquiry 'might have been more explicit about the applicable standards against which Mr Leask's behaviour was assessed'.³⁸ However, he also submitted that:³⁹

³⁵ Paragraph 38 of SSC response dated 5 September 2015

³⁶ Paragraph 39 of SSC response dated 5 September 2015.

³⁷ Paragraph 20 of SSC response dated 4 June 2015.

- a. by its letter of 21 December 2012, the inquiry *'identified in detail ... [Mr Leask's] actions that ... did not meet the standards required by the code'* and provided him with an opportunity to respond;
 - b. Mr Leask was also given an opportunity to comment on extracts of the draft report; and
 - c. in forming my provisional opinion, I had overlooked these points and the fact that the SSC's code of conduct is *'deliberately principles-based'* and *'operates at a relatively high level'*.
111. I do not accept that any *'principles-based'* flavour to the MFAT and SSC's codes of conduct obviated the need to fully disclose to Mr Leask in advance of the Final Report the principles that were seen as potentially relevant, and the way in which those principles were engaged. Regardless of Mr Leask's length of service, or general knowledge of the codes of conduct, there was an obligation on the inquiry to ensure, as far as reasonably practicable, that the specific standards and principles being relied upon were identified for Mr Leask in advance of the Final Report.⁴⁰ Similarly, he should have been given the opportunity to comment on how these specific standards were being interpreted and analysed in the context of the inquiry as it related to his actions.
112. In particular, the inquiry should have:
- a. advised Mr Leask of the exact standards, rules or principles that his behaviour or conduct was being measured or assessed against, and how these standards were being interpreted in his case;
 - b. advised Mr Leask how his conduct was measured against those specific standards; and
 - c. provided Mr Leask with a reasonable opportunity to respond to the above matters before any adverse findings were made.
113. During the course of the inquiry, Mr Leask's QC repeatedly wrote to the investigation team seeking clarification about the particular standards or provisions of the Code of Conduct that were at issue. On 29 January 2013, the QC asked for further details about what *'particular obligations provisions are relied, on as set out in the Code of Conduct'*. In its reply of 8 February 2013, the investigation team maintained that the draft extracts of the report would accommodate these concerns.
114. Mr Leask's QC sought further clarification on 15 February, 7 March, 18 April, 20 September, and 1 November 2013. It was therefore clearly drawn to the inquiry's attention that Mr Leask remained unclear about the standards against which his behaviour was being measured.

³⁸ Paragraph 14 of SSC response dated 18 May 2016.

³⁹ Paragraphs 14 to 16 of SSC response dated 18 May 2016.

⁴⁰ *Sigglekow v Waikato District Health Board* [2011] NZERA Auckland 384, at [129]–[134].

Summary of material sent to Mr Leask and his QC

115. The investigation team's letter of 21 December 2012 included a general reference to an *'obligation of officials to act in a responsible manner in accordance with the Code of Conduct'*. Apart from this, there was no other reference to any of the specific provisions of the Code of Conduct that were being relied upon.
116. Similarly, the draft extracts of the report sent to Mr Leask's QC on 4 April 2013 did not include any explicit reference to the Code of Conduct. Those draft extracts merely referred to a *'duty of allegiance owed by managers to their organisation'* and *'the appropriate handling of government information and a clear separation between their personal interests and their duty to their employer'*.⁴¹
117. The extracts of the draft report sent to Mr Leask's QC on 30 August 2013 provided a level of additional information about the applicable standards, albeit of a general nature. For example, the August draft referred to *'the standards expected of public servants'* and the *'responsibility of staff to maintain the political neutrality of the Public Service'*, including:⁴²
- ...working within their organisation's processes as directed by the Secretary; enabling the organisation to develop robust and unbiased advice; avoiding unauthorised discussions with Members of Parliament; ensuring the appropriate handling of government information; and keeping a clear separation between their personal interests and views and their role as public servants.*
118. Many of these standards were repeated in the extracts of the draft report sent to Mr Leask's QC on 23 October 2013. The October draft also referred to:⁴³
- ...a core responsibility of public servants to handle official information properly and securely, regardless of the classification of government documents or of the process used to create, store and distribute them. Secure and proper handling of official information is dependent on public servants behaving with integrity.*
119. In my opinion, the information provided to Mr Leask about the standards against which he was being measured was overly general, given the criticisms that were ultimately made in the Final Report. Prior to the Final Report, he had not been referred to the applicable parts of the MFAT and SSC's codes of conduct against which his behaviour was being measured.
120. I refer in particular to paragraphs 79 to 94 of the Final Report which contained a number of detailed statements about the disclosure of official information; the meaning of

⁴¹ Page 22 of the April 2013 draft report.

⁴² Paragraphs 11.2, 11.4, 14, 16 and 139 of the August 2013 draft report.

⁴³ Paragraph 18 of the October 2013 draft report.

'unauthorised disclosure'; and the relevant parts of SSC's code of conduct not previously provided to Mr Leask. For example:

89 *...Aspects of the code of conduct that are particularly pertinent to this investigation with respect to the handling of official information are:*

89.1 *The requirement to be fair, including being professional.*

89.2 *The requirement to be impartial:*

- *maintaining the political neutrality required to enable employees to work with current and future governments;*
- *carrying out the organisation's functions, unaffected by personal beliefs;*
- *supporting the organisation to provide robust and unbiased advice; and*
- *respecting the authority of the Government of the day.*

89.3 *The requirement to be responsible, including treating information with care and using it only for proper purposes.*

89.4 *The requirement to be trustworthy:*

- *ensuring actions are not affected by personal interests; and*
- *avoiding any activities, work or non-work, that may harm the reputation of the organisation or of the State Services.*

121. None of these references were contained in any of the material provided to Mr Leask for comment prior to the Final Report.

122. This was a significant omission. An earlier iteration of these paragraphs, substantially similar to paragraphs 79 to 94 of the Final Report, formed a part of the draft report.⁴⁴ For reasons that are unclear, these important paragraphs, setting out the standards against which his conduct were being measured, were omitted from the materials provided to Mr Leask for comment in April, August and October 2013. This was notwithstanding the repeated requests from his QC for this information.

123. SSC suggested that these earlier paragraphs were *'included to give the reader the necessary background to understand the legal and other context for the investigation'*.⁴⁵ However, paragraphs 79 to 94 of the Final Report (and the earlier versions of these paragraphs) were highly relevant to the criticisms of Mr Leask. It is these paragraphs that describe, in detail, the standards and principles against which the inquiry was measuring Mr Leask's conduct, and how those standards and principles were being interpreted.

⁴⁴ Email between the investigation team members on 7 March 2013 attaching a draft report.

⁴⁵ Paragraph 19 of SSC response dated 4 June 2015.

124. SSC has failed to explain why it elected not to provide this information to Mr Leask in response to his repeated requests for information about applicable standards.
125. The fact that Mr Leask would have had a general knowledge of the standards expected of public servants did not obviate the need for the inquiry to explicitly advise him of the specific standards that his behaviour was being measured against in the inquiry, once it had become clear that he was effectively a subject of the inquiry.
126. In conclusion, I consider that it was unreasonable for the inquiry to fail to disclose to Mr Leask, in advance of the Final Report, sufficient material specifying the standards that his conduct were being measured against, and how those standards related to his actions.

Natural justice

127. The issues of excess of jurisdiction, insufficient notice about the scope of the interviews and the lack of information about relevant standards, point to a lack of fairness by the inquiry and lead me to conclude that Mr Leask was not treated fairly, in accordance with the principles of natural justice.⁴⁶

Discussion

128. In making adverse findings in the Final Report about Mr Leask's conduct during his employment at MFAT, the inquiry, as it related to him, had the flavour of an employment-related investigation. This begs the question why — if Mr Leask's conduct in relation to the MFAT change programme was seen as inappropriate — he was not subject to a separate disciplinary process. Indeed, Ms Rebstock advised at interview that she had considered whether in addition to the inquiry, a separate disciplinary process should be held for Mr Leask, but by then he had left MFAT.
129. Ms Rebstock stated at interview that she and the entire investigation team were 'very worried' about the implications of the findings in the Final Report for Mr Leask's professional reputation, and that this was not a matter that they took lightly. However, she advised that the findings were made to enable Mr Rennie to carry out his function of educating the wider public service as to the expected standards of behaviour.
130. The courts have held that natural justice requirements vary depending on the power being exercised and the particular circumstances.⁴⁷ Relevant factors include the nature of the interest at stake, whether an adverse decision would amount to a finding of misconduct, and the severity of the sanction that the body is empowered to impose.⁴⁸

⁴⁶ See *Quinn v New Zealand Harness Racing Conference* CA385/91, 6 July 1992 at 23, where the Court of Appeal noted that there may be unfairness in matters separately or in their totality.

⁴⁷ *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA) at 141.

⁴⁸ *Peters v Collinge* [1993] 2 NZLR 554 at 567.

131. In general, a person should be afforded a fair opportunity of correcting or contradicting any statements that are relevant and prejudicial to his or her position.⁴⁹ The High Court in *Ali v Deportation Review Tribunal* stated:⁵⁰

...The more significant the decision, the higher the standards of disclosure and fair treatment.

132. In an employment situation, the minimum natural justice requirements are set out by the former Labour Court in *NZ (with exceptions) Food Processing etc IUOW v Unilever New Zealand Ltd*:⁵¹

1. *notice to the worker of the specific allegation of misconduct to which the worker must answer and of the likely consequences if the allegation is established;*
2. *an opportunity, which must be real as opposed to a nominal one, for the worker to attempt to refute the allegation or to explain or mitigate his or her conduct; and*
3. *an unbiased consideration of the worker's explanation in the sense that consideration must be free from predetermination and uninfluenced by irrelevant considerations.*

133. Several features of this case called for particular attention to the principles of natural justice:

- a. The adverse findings against Mr Leask were in effect findings of misconduct against him. The inquiry, as it related to Mr Leask, therefore had a flavour of an employment misconduct hearing.
- b. The allegations had a clear impact on Mr Leask's professional reputation, as acknowledged by Ms Rebstock and Mr Rennie in their interviews with me.

134. A clear adverse finding was made against Mr Leask in paragraph 312 of the Final Report, as follows:

...The investigation considers these long-serving managers saw the change proposals as a personal attack on their legacy in the department and therefore put their personal interest in protecting that legacy before their professional obligations as a leader of change and supporting the Secretary to provide robust and unbiased advice to the Government.

135. At no time prior to the Final Report was Mr Leask warned that an adverse finding of this nature would be made about him.

⁴⁹ *Daganayasi v Minister of Immigration*, above n 46, at 143.

⁵⁰ *Ali v Deportation Review Tribunal* [1997] NZAR 208 at 220.

⁵¹ *New Zealand (except Northern in the case of Chemical) Food Processing, Chemical and related products Allied Workers Factory Employees Union v Unilever New Zealand Ltd* NZEC WLC 4/90, 9 February 1990 at 16.

136. In responding to this part of the complaint, SSC relied on the fact that the following statement by an unnamed HOM, cited at paragraph 200 of the Final Report, had been put to Mr Leask for comment:

...I think that some of [the Tier 3 Managers] felt that their legacy was being impugned you know. They were being told that the culture changes were required because MFAT was no longer a good organisation and hadn't been for some time. I think some of those people felt their legacy of 35 years contribution was being brought into question. That is what I took when I sat in on the two day HOM meeting.

137. SSC also relied on the fact that 'the substance of the finding' had been put to Mr Leask.⁵²

138. After being provided with a draft of the report that contained that reference, Mr Leask commented as follows:⁵³

Personal interests

There is a leap of logic in the findings in the final draft report. It is suggested that I and others did not separate our personal interests from our professional duties. This is wrong and insulting and quite unsupported by evidence...

...

Para 33. This unidentified HOM gave some thoughtful arguments. But as a judgement call I would say he or she was wrong on one point. I had no feeling that those arguing most strongly against the MBM were concerned with legacy. They were making genuine calculations about what was best for New Zealand.

139. SSC submitted as follows in relation to paragraph 312:⁵⁴

...[This] was not an additional finding against Mr Leask but rather Ms Rebstock's explanation for why she did not accept his submission. While the finalised wording of paragraph 312 was not included in the drafts provided to Mr Leask, the substance of the finding that a number of individuals within MFAT acted in such a way so as to promote their personal interests over their professional duties was provided to Mr Leask for comment. The view, as expressed by the unidentified HOM, that the personal interests of some were protection of their legacy was also put to Mr Leask to which he responded. As is evidenced by Mr Leask's submissions above, he acknowledged that it was a finding, albeit one that he disagrees with.

140. I do not accept SSC's argument that paragraph 312 was not an additional finding against Mr Leask. The statement by an unidentified HOM that some people had felt their legacy

⁵² Paragraph 25 of SSC response dated 4 June 2015.

⁵³ Page 12 of Mr Leask's submission dated 18 April 2013.

⁵⁴ Paragraph 25 of SSC response dated 4 June 2015.

was *'being impugned'*, and a general comment that a number of individuals had acted to promote personal interests over professional duties, did not put Mr Leask on notice that he was at risk of a specific, damaging finding that he put his personal interests before his professional obligations. Moreover, the Final Report goes considerably further than the unidentified HOM's quote in referring to Mr Leask as viewing the MFAT change programme as a *'personal attack'*.

141. In addition, Ms Rebstock maintained at interview that there were dozens of people both inside and outside MFAT who had concerns about Mr Leask's behaviour, and that the sentiment in paragraph 200 of the Final Report was often repeated to her by other people she spoke with. However, Mr Leask was not advised of any of these comments that are said to have informed the finding in paragraph 312, nor was I provided with the referenced comments.

142. In *Fraser v State Services Commission*, the Court of Appeal held that:⁵⁵

Natural justice requires that the Commission must exercise its powers ... in such a way as to ensure that an officer has an adequate opportunity to answer any prejudicial material furnished to the Commission...

143. It would be unrealistic to expect the inquiry to put to Mr Leask every statement in which adverse comment had been made about him by an interviewee or other person. However, **no** such statements were provided to him, nor was he provided with any information as to the existence of these additional statements. Mr Leask was thus unable to counter the prejudicial material relied upon by the inquiry in forming the views expressed in paragraph 312.

144. In the following respects, Mr Leask was not treated fairly, in accordance with the principles of natural justice:

- a. failure to provide him with the opportunity to respond to the finding in paragraph 312;
- b. failure to provide him with any information regarding adverse comments purportedly made against him by other interviewees;
- c. failure to provide him with fair notice prior to interview that his conduct (apart from any possible culpability for the leaks in question) would be examined; and
- d. failure to specify the standards against which his conduct was being measured.

145. Mr Leask was denied the opportunity to respond to matters key to the adverse findings made against him in the Final Report.

⁵⁵ *Fraser v State Services Commission* [1984] 1 NZLR 116 (CA) at 127.

Evidential basis for the inquiry's findings

146. In reviewing whether the findings in the Final Report that related to Mr Leask were wrong and/or unreasonable, I have examined whether there was a reasonable basis for, or causative link to, the criticisms made about Mr Leask.
147. I have formed the opinion that:
- a. the evidence provided to me, which was relied upon by the inquiry, did not reasonably support some of the criticisms against Mr Leask.
 - b. the inquiry failed to have proper regard to relevant evidence in making its findings against Mr Leask.

Discussion

148. I have carefully considered the evidential basis for the following criticisms of Mr Leask:
- a. *'created a perception that it was acceptable for [his] opposition to the change proposals to be leaked and to be used for political purposes';*⁵⁶
 - b. *'deliberately disregarded the Secretary's instructions about the process to provide formal feedback';*⁵⁷
 - c. *'provid[ed] personal advice to Ministers on the change proposals without notifying the Secretary of these discussions' and 'acted outside [his] own authority in providing personal advice direct to Ministers';*⁵⁸
 - d. *'saw the change proposals as a personal attack on [his] legacy in the department and therefore put [his] personal interest in protecting that legacy before [his] professional obligations as a leader of change and supporting the Secretary to provide robust and unbiased advice to the Government';*⁵⁹ and
 - e. *'suppl[ied] government information that [he was] not authorised to disclose to the FSA and the partners group for use in public campaigns to embarrass or put pressure on the Government and the Secretary'.*⁶⁰
149. In its various responses SSC rejected criticism of the evidential basis for the inquiry's conclusions. In its first response, SSC observed that the inquiry had *'the benefit of all evidence, including interviews, and was entitled to reach conclusions based on all of that evidence'*.⁶¹ In its second response, SSC submitted that the inquiry was entitled to come to its own conclusions having had the benefit of hearing first hand from those

⁵⁶ Paragraph 69.3, 182 and Finding B of the Final Report.

⁵⁷ Paragraphs 27, 69.3, 69.4 and Finding B of the Final Report.

⁵⁸ Paragraphs 27.3, 69.3, 69.4 and Findings B & C of the Final Report.

⁵⁹ Paragraph 312 of the Final Report.

⁶⁰ Paragraphs 27.10, 69.4, and Finding C of the Final Report.

⁶¹ Paragraph 94 of SSC response dated 5 September 2014.

interviewed.⁶² These comments were repeated in Mr Rennie's response to my provisional opinion, where he observed:⁶³

...[T]here are also aspects of your provisional opinion where you reach conclusions on the evidence which differ from those reached by [Ms Rebstock]. I am greatly troubled by this. I question the soundness of this approach given that, unlike [Ms Rebstock], you did not have the advantage of having seen or heard the witnesses who gave evidence or have had the advantage of being able to draw inferences and conclusions from all of the evidence provided to the Inquiry.

...

While I acknowledge that you have a broad jurisdiction where, as here, an inquiry involves matters of complexity and judgement there is a real issue as to the extent to which you are able to come to different conclusions than the inquirer did, without having the advantages she had in conducting the Inquiry.

...

...In the course of her Inquiry she met with witnesses and reached findings based on the evidence she heard. Matters of credibility and the weight to be given to evidence we matters entirely for her as the Inquirer.

...nor do I believe there is any proper basis for you to call into question or second guess the findings [Ms Rebstock] has made. I urge you not to do so.

150. I acknowledge that I have not seen all the evidence before the inquiry. However, during the course of my investigation, SSC has been given numerous opportunities to provide me with all material relevant to the specific issues within the scope my investigation. Following its response of 18 May 2016, I gave SSC a final opportunity to advise me of any further relevant evidence that it wished to draw to my attention.

151. While no further evidence was provided to me, SSC maintained that:⁶⁴

...although it is appropriate for the Ombudsman to examine the process followed in undertaking the investigation, it is not appropriate to review the substantive findings of the specialist investigator.

152. Ultimately every decision must stand or fall on the evidence relied upon and referred as the basis of the conclusions reached. As Ombudsman, I am authorised, and indeed required, to examine whether the evidence relied upon by the decision maker reasonably supported the conclusions reached. In doing so, I do not seek to stand 'in the

⁶² Paragraphs 19 and 63 of SSC response dated 4 June 2015.

⁶³ Paragraphs 7, 19, 20 and 21 of SSC response dated 18 May 2016.

⁶⁴ Page 2 of SSC response dated 31 May 2016.

shoes of the specialist investigator,⁶⁵ but simply to review the reasonableness of the Final Report on its own terms.

153. I note that SSC has stated:⁶⁶

In the end, the principal evidence on which [Mr Leask] was being asked to comment during the investigation came from his own emails ... provided to him at the start of the natural justice process and eventually included in detail in the report.

154. Similarly, the main documentary material that SSC provided me as evidence for criticising Mr Leask's conduct was his emails.⁶⁷

155. I have therefore focussed on whether the emails reasonably supported the conclusions drawn in the Final Report about Mr Leask's behaviour.

Created a perception acceptable to leak

156. Finding B on page 59 of the Final Report stated (emphasis added):

*...The Secretary had issued lawful instructions on how to provide feedback on the change proposals. Some Tier 3 managers disregarded these instructions, choosing instead to send their feedback to all or most team in-boxes at MFAT. **As a result, these Tier 3 managers created a perception that it was acceptable for their opposition to the change proposals to be leaked and to be used for political purposes...***

157. As worded, Finding B should not have applied to Mr Leask as he did not send his feedback to all or most team in-boxes at MFAT.

158. However, the overall impression one gains from the Final Report, and the material SSC provided to me, is that Mr Leask is one of the Tier 3 managers against whom this criticism is directed. This was confirmed by SSC's first response to me when it noted:⁶⁸

Ms Rebstock's conclusion that the actions of [Mr Leask] and others had created a perception in the MFAT environment is ultimately a matter of opinion, a conclusion she has drawn from the evidence she has gathered.

159. Further, paragraph 182 of the Final Report states:

It appeared to the investigation that some Tier 3 managers had taken steps to deliberately undermine the formal staff consultation process inside MFAT. The opposition to the change proposals appeared so substantial, and so much at odds with what would be expected of a senior manager, it seemed to the

⁶⁵ Page 2 of SSC response dated 31 May 2016.

⁶⁶ Paragraph 52 of SSC response dated 5 September 2014.

⁶⁷ The only other relevant documentary evidence provided to me as the basis for these criticisms are the transcripts of Mr Leask's interviews with the inquiry.

⁶⁸ Paragraph 121 of SSC response dated 5 September 2014.

investigation that the actions of these officials may have encouraged others to believe it was acceptable to contribute to the public and political debate concerning the proposed changes at MFAT and/or leak information and documents about the change programme.

160. However, I am not persuaded that this conclusion can be supported in respect of Mr Leask's actions. Specifically:

- a. there is no evidence in the Final Report that Mr Leask leaked any documents or encouraged or supported any other person at MFAT to leak documents;
- b. Mr Leask did not distribute his feedback on the change proposal to a wide audience; his email was sent to the MFAT Senior Leadership Team and four other individuals (three of whom were MFAT seconded staff);
- c. with the exception of one Division Director and possibly two other HOMs, there is no evidence that Mr Leask shared his views on the change proposal with a wider audience at MFAT;
- d. there is no evidence in the Final Report that Mr Leask's views on the change proposal were known to the wider MFAT environment prior to the HOMs' meeting on 2 and 3 April 2012;
- e. Mr Leask's emails referred to in the Final Report were, for the most part, an exchange between him and a Division Director identified as 'Y' in the Final Report;
- f. there is no evidence in the Final Report that Mr Leask's actions played any part in the alleged action of the SSC contractor who apparently leaked the Cabinet papers;
- g. given that the inquiry was unable to identify who else leaked information about the MFAT change programme, it is unclear how the inquiry established that Mr Leask's actions motivated those individuals to leak information; and
- h. it is not apparent how Mr Leask created a perception in the wider MFAT organisation that it was acceptable to leak information by forwarding the HOMs' letter to an MFAT staff member seconded to DPMC.

161. In terms of the HOMs' letter of 15 March 2012, the Final Report stated:⁶⁹

...Also, one HOM forwarded an unofficial copy to the offices of the Minister of Foreign Affairs, the Minister of Trade, and DPMC...

162. While it is not clear to me whether the inquiry was specifically referring to Mr Leask at this point, it is clear that his actions were the focus of paragraph 274 of the Final Report:

On 15 March 2012, one HOM sent the HOMs' letter to the Secretary, and forwarded the Secretary's response of 22 March 2012, by email marked IN CONFIDENCE, to all the signatories of the HOMs' letter. [Mr Leask] forwarded

⁶⁹ Paragraph 228 of the Final Report.

this correspondence to the MFAT advisor seconded to DPMC who told the investigation he understood he was to provide a copy to the Chief Executive of DPMC and the Prime Minister's Office.

163. However, Mr Leask only forwarded the HOMs' letter on to DPMC **after** Mr Allen had provided a copy to the relevant Ministers. On 22 March 2012, Mr Allen wrote to the spokesperson for the 49 HOMs and confirmed that he had, as requested, forwarded the HOMs' letter to Mr McCully and Mr Groser. It appears that Mr Leask forwarded this information to DPMC on 23 March 2013, after he received confirmation that the information had been presented to the Ministers.⁷⁰ There is no reference to this in the Final Report.

164. This is an unfortunate and potentially misleading omission, since it could be reasonably assumed, based on the other findings made about Mr Leask, that he is one of the HOMs referred to in paragraph 355:

...A number of HOMs did not accurately disclose whether and to whom they had forwarded the final version of the HOMs' letter.

165. In addition, it appears that Mr Leask's views on the change proposals had become more widely known within MFAT after the HOMs' meeting on 2 and 3 April 2012. By this stage, information about the MBM, the spreadsheet of remuneration and allowances for offshore posts, the formal messages from three HOMs, and the 49 HOMs' letter dated 15 March 2012 had already been leaked to the media and Mr Goff. The only further disclosure of information that occurred relating to the inquiry was the leak of the Cabinet papers, which has not been linked to any action by Mr Leask.

166. I do not consider that there is a logical evidential basis for the inquiry's view that Mr Leask '*created a perception that it was acceptable to leak information*'.

Breach of instructions for feedback and providing advice to Ministers

167. At paragraph 69.4 of the Final Report, Mr Leask is criticised for:

- *disregarding the Secretary's instructions for providing formal feedback on the change proposals via the secure websites*
- *providing personal advice to Ministers on the change proposals without notifying the Secretary of these discussions*
- *seeking to influence the Chief Executive of DPMC and the Prime Minister's Office to intervene in a MFAT staff in confidence consultation*

168. In analysing whether it was reasonable for the inquiry to have reached these adverse conclusions about Mr Leask's actions, I have considered:

- a. the interpretation of Mr Allen's instructions adopted by the Final Report; and

⁷⁰ Email from a Foreign Policy Advisor at DPMC to a member of the investigation team on 29 June 2012.

- b. the statements from Sir Maarten Wevers and Neil Walter that Mr Leask provided to the inquiry.

Interpretation of Mr Allen's instructions

169. At paragraphs 211 to 213, the Final Report referred to emails from Mr Allen in March 2012 which contained his instructions about providing feedback on the MFAT change proposals. The interpretation of these instructions by the inquiry was as follows (emphasis added):⁷¹

*This sequence of emails from the Secretary was interpreted by some HOMs and Tier 3 managers as 'a complete backdown' by the Secretary on the requirement to provide formal feedback via the secure on-line tool. **Clearly, that was not the case; if staff wanted to share their thoughts or feedback with colleagues as part of a dialogue they could do so with appropriate classification for such discussion, but formal feedback was required by the online tool.** The Investigation also accepts that MFAT staff could share their thoughts or feedback with staff seconded into Ministers' offices or other departments. However, staff should have ensured that the appropriate classifications were maintained and that the information was only used for that purpose and not distributed further.*

170. In its response to the query in my letter of 26 March 2015 regarding this interpretation of Mr Allen's instruction, SSC advised (emphasis added):⁷²

*Ms Rebstock clearly stated at paragraph 214 what her interpretations of Mr Allen's instructions were. Namely that if staff wanted to share their thoughts or feedback with colleagues as part of a dialogue they could do so with the appropriate classification for such discussion, **but formal feedback was required by the online tool.***

171. This, however, does not accord with Mr Allen's subsequent email on 8 March 2012, which said:

Several of you have been in touch with me again to ask whether Formal Messages can be used as well as email. The answer to this is yes, but please do think about the appropriate classification.

172. Mr Allen's emails made it clear that MFAT staff were permitted to share, via email or 'Formal Message', their feedback with their colleagues if they so wished. I consider that this is what Mr Leask was seeking to do when he emailed his paper to SLT on 7 March 2012 with the classification of 'In Confidence'. I am not persuaded that the inquiry's interpretation of Mr Allen's instructions is supported by a fair reading of the emails he sent MFAT staff about the methods of providing feedback on the change proposals.

⁷¹ Paragraph 214 of the Final Report.

⁷² Paragraph 72 of SSC response dated 4 June 2015.

Statements from Sir Maarten Wevers and Neil Walter

173. SSC did not accept in its responses to me that Mr Leask was acting in a manner that was consistent with Mr Allen's instructions or the usual conventions regarding discussions with Ministers:⁷³

...The evidence provided to Ms Rebstock and the conclusion she was entitled to draw was that Mr Leask did not share his thoughts or feedback as part of a dialogue with his colleagues but rather did so strategically to undermine the instructions of the Secretary and the change process. In particular, it is evident that he was not just sharing his feedback with seconded staff in other offices but was expecting that those staff would pass on the feedback to Ministers and the Chief Executive of DPMC, who were not MFAT employees.

There was evidence before Ms Rebstock in the emails between Mr Leask and [Y] that indicated that they engaged in a deliberate strategy to undermine the change programme. There is an important distinction between any authority to provide advice or distribute material to Ministers in relation to portfolio responsibilities, as part of 'business as usual' discussions, and seeking to provide advice on sensitive matters outside of this ambit on such matters as personal opinions on organisational change.

174. I have set out below the evidence of the expert witnesses that is relevant to the findings that Mr Leask:

- a. disregarded the Secretary's instructions for providing formal feedback on the change proposals via the secure websites;
- b. provided personal advice to Ministers on the change proposals without notifying the Secretary of these discussions; and
- c. sought to influence the Chief Executive of DPMC and the Prime Minister's Office to intervene in a MFAT staff in confidence consultation.

175. Sir Maarten commented:⁷⁴

I was unsurprised at the communications that had been copied to DPMC from Heads of Mission, including Mr Leask ... It is common practice for posts to copy to the Foreign Policy Advisor messages that the post judges may be of interest to the Prime Minister or his department. Indeed, that has long been embedded in the MFAT cables and email systems, and practice, with a specific electronic address available for such messages. Accordingly, I did not consider such communications to be inappropriate in the circumstance. Certainly, I was and remain unaware that there had been any instruction from the CE of MFAT that staff should not communicate, as appropriate, with senior public servants or Ministers with an interest in the issues being considered.

⁷³ Paragraph 72 and 73 of SSC response dated 4 June 2015.

⁷⁴ Paragraphs 13 and 18 of Sir Maarten Wevers' statement of 12 February 2013.

...

In my view, the relatively small number of messages that had been copied to DPMC by Mr Leask, and some other HOMs, in relation to the MFAT change proposals, fell well within the bounds of practice and convention at MFAT as I had understood it.

176. Mr Walter commented in his first statement:⁷⁵

MFAT officers, by the nature of their work, spend a considerable amount of 'face' time with Ministers. Ministers often want to be briefed in person about the foreign policy and trade issues confronting New Zealand and to discuss in detail the recommendations and options put before them. In my experience they expect officials to engage with them in an open and robust manner...

...by general public service standards there are unusually high levels of formal and informal contact between MFAT officers and their primary Ministers.

...

Conversations between Ministry staff and Ministers during my time in the Ministry were not restricted to foreign and trade policy issues of the day. Often they took in such matters as the state of the bilateral or multilateral relationship, the situation and capacity of the overseas post, the conditions of service and morale of officers and their families ... and how things were going generally in the Ministry. In other words, Ministers wanted to be kept up to speed not just on the foreign policy and trade issues of the day but on the welfare of staff and the ability of the overseas service and the Ministry to deliver on the government's objectives.

...

The relationship between the Minister and Heads of Mission is unique in New Zealand's public service. All Ambassador, High Commissioner and Consul-General appointments are made by the Minister of Foreign Affairs under the Foreign Affairs Act. All Heads of Mission are furnished with a letter of appointment from the Minister of Foreign Affairs spelling out his or her — and the Minister of Overseas Trade's — expectations of the appointee. Heads of Mission were seen in my time as the Minister's eyes and ears in their area of accreditation. Among the expectations placed on them was that the Ministers of Foreign Affairs and Overseas Trade would be kept informed of any significant issues affecting the relationships or issues for which the Head of Mission was responsible. (This was generally referred to as the 'no surprises' policy.) Traditionally MFAT officers have understood this rule of thumb to cover not just foreign and trade policy issues themselves but also

⁷⁵ Paragraphs 1, 3, 5, 8 and 12 of Mr Walter's statement dated 14 February 2013.

any factors that might adversely affect the ability of the overseas post or the Ministry to implement the government's policies.

...

The tradition I referred to earlier of open and challenging debate and strong communication applies around the interagency circuit as well as within the Ministry. Debate and exchanges with other agencies were never in my time restricted to the issues themselves. Inevitably they took in the roles and responsibilities of all the players and the capacity of each agency to play the role expected of it. It would be unusual for an officer facing a significant erosion of his or her unit's or agency's capacity to implement the government's external policies not to alert other agencies to the problem. In a team situation, open and honest communication is important. I would expect any senior officer worried about his or her unit's ability to play its part in interagency exercises to ensure that other affected agencies were aware of the situation.

177. Mr Walter's second statement noted:⁷⁶

The classification of 'MFAT in Confidence' was widely used when I was an employee and Chief Executive of the Ministry of Foreign Affairs and Trade. It was used to keep exchanges and information 'in house' — ie to prevent the content of messages getting out into the public domain.

This did not mean that they were not on occasion shown or sent to other agencies or people who could be relied on not to misuse the information they contained.

The classification of 'Staff in confidence' was used in the same way to restrict circulation of messages.

178. In addition, having seen the extract of the draft report provided to Mr Leask on 30 August (which included excerpts from the relevant emails), Mr Walter stated:⁷⁷

...The draft Report notes (at paragraph 138) that I was not shown the full communications and all evidence available to the Investigation, and implies that the views that were expressed might have suffered from that limitation.

Having considered carefully the information set out in the sections of the draft Report shown to me, I believe that the comments I made in my original statement stand and are applicable in the present circumstances.

...

Based on the selected quotes in this section of the Report, the criticisms of Person Z's^[78] actions do not seem to me an accurate and fair reflection of the

⁷⁶ Paragraphs 6, 7, 8 of Mr Walter's statement dated 20 September 2013.

⁷⁷ Paragraphs 13, 14, 29, 30 and 33 Mr Walter's statement dated 20 September 2013.

nature of his overall response to the MBM. It is apparent that he was openly (but not publicly) critical of many aspects of the MBM, that he shared his views with colleagues and that he also made those views known to two Ministers and agencies.

It seems clear to me that person Z felt strongly that the proposals contained in the MBM would cause serious damage to the Ministry's ability to meet its responsibilities to the country and deliver on the Government's foreign and trade policy objectives...

...

I consider many informed senior public servants would argue that Person Z was right to contest and speak out against (but not publicly) a package of organisational changes that he considered was ill conceived and likely to be damaging to New Zealand's national interests.

179. It may be helpful to set out in full SSC's response to my enquiries regarding the consideration given to the statements provided by Sir Maarten and Mr Walter (emphasis added):⁷⁹

In respect to the submissions received from Sir Maarten we note the following. Sir Maarten had initially encouraged Mr Leask and [Y] to keep in touch as noted in Mr Leask's email to [Y] dated 10 March 2012 ... In that email Mr Leask notes that:

I sent a message to Maarten about John Allen's given up any pretence of transparent (and therefore merit) based appointment practices vis-a-vis HOMs. Got positive feedback from him on the general question of keeping him informed.

Subsequent to this, Sir Maarten discouraged the sending of information to him...

Sir Maarten distanced himself from Mr Leask and [Y] while in his role at DPMC declaring a conflict of interest, this conflict of interest was managed by Sir Maarten putting up 'Chinese Walls' between himself and Mr Leask and the issue of the change process.

*It is also important to note that **Sir Maarten left MFAT in the early 2000's so is not in a position to comment on what the current practice was at MFAT during the relevant time in question of the investigation.** When Sir Maarten provided his initial submission he did so without being privy to the relevant emails between Mr Leask and [Y]. **Following Sir Maarten's submissions he was provided a copy of the emails of concern** involving Mr Leask and [Y's] behaviour. **It was of significance that following being provided with these***

⁷⁸ Person Z is Mr Leask.

⁷⁹ Paragraphs 67 to 71 of SSC response dated 4 June 2015.

emails he provided no further comment or submissions to the investigation.
In assessing the weight to be placed on Sir Maarten's evidence Ms Rebstock was entitled to take those matters into account.

In relation to the statement provided by Mr Walter, Ms Rebstock carefully considered the submission and the information it contained. It was Ms Rebstock's opinion, following her careful consideration, that Mr Walter's submission did not address the issues at hand or provide any new evidence that altered her view. As the investigator this was a position she was entitled to take.

180. Ms Rebstock reiterated on two occasions in her interview with me that she found it 'material' that Sir Maarten had not made a second submission after being provided with the relevant emails. However, upon further enquiry, SSC advised as follows:

Following a review of the correspondence held on file, we acknowledge Ms Rebstock's recollection during her interview is inconsistent with the documentation. Based on the correspondence reviewed, we are unable to determine whether Sir Maarten received the emails of concern.

181. It is plain from the above excerpts that the evidence of Sir Maarten and Mr Walter was highly relevant to the extent of a HOM's authority to provide advice to, and have private conversations with, Ministers and to distribute material (in this case, advice or feedback on change proposals) to Ministers and DPMC, and the propriety of Mr Leask's actions.
182. Despite this, the Final Report in effect dismisses the relevance of key aspects of Sir Maarten and Mr Walter's evidence. I refer in particular to paragraph 317 of the Final Report, which reads:

None of the statements addressed the fact that even senior managers must follow the instructions of the Secretary, may not exceed their authority to provide advice to Ministers, may not have private conversations with Ministers on MFAT matters without first clearing this with the Secretary and without reporting back to the Secretary, and may not distribute government information such as feedback from MFAT staff to the Secretary on MFAT in confidence matters to Ministers, DPMC or others without authority.

183. This characterisation of the expert witnesses' evidence is not persuasive. The evidence of these highly regarded former public service leaders and HOMs was directly relevant to the matters referenced at paragraph 317 and the findings against Mr Leask. They *did* address the appropriateness of HOMs communicating directly with Ministers and DPMC. Nor do I find it credible to discount their views as out of date in the absence of evidence that the conventions of appropriate communications by HOMs had changed in the interim. I do not find the inquiry's reasons for rejecting their evidence convincing.
184. By way of comparison, the Final Report contained a section entitled 'Advice to Ministers', which included the views of an anonymous HOM and an anonymous Division Director about their understanding of when it was appropriate to consult with a Minister. Even though two former public service leaders provided submissions in support of an

alternative view of MFAT practices, the Final Report does not cite or quote any of their statements.

185. I consider that the Final Report failed to provide a balanced view of MFAT's practices, and failed to properly address evidence from two expert witnesses that was highly relevant to adverse findings made about Mr Leask.
186. For the reasons outlined above, I am of the opinion that the adverse conclusions reached by the inquiry about Mr Leask's actions at paragraph 69.4 of the Final Report were unreasonable because the inquiry:
- a. relied upon an interpretation of Mr Allen's instructions that is not supported by the emails he had sent MFAT staff; and
 - b. failed to properly address highly relevant evidence from expert witnesses.

Protecting personal legacy

187. It is alleged at paragraph 312 of the Final Report that Mr Leask:

...saw the change proposals as a personal attack on [his] legacy in the department and therefore put [his] personal interest in protecting that legacy before [his] professional obligations as a leader of change and supporting the Secretary to provide robust and unbiased advice to the Government.

188. The only other reference in the Final Report to certain Tier 3 managers feeling their legacy was being questioned by the change programme appears to be at paragraph 200, which reads:

In reflecting on how Tier 3 managers had responded to the consultation documents and the change process, a HOM said:

...I think that some of those people felt that their legacy was being impugned you know. They were being told that the culture changes were required because MFAT was no longer a good organisation and hadn't been for some time. I think some of those people felt their legacy of 35 years' contribution was being brought into question. That's what I took when I sat in on the two day HOM meeting.

189. In its letter of 5 September 2014, SSC indicated that the inquiry was not necessarily relying on the views of the unidentified HOM for the criticism that Mr Leask was seeking to protect his personal legacy.⁸⁰ It further stated that:⁸¹

...Ms Rebstock had the benefit of interviews, emails from the time in question setting out in his own words and in some detail the reasoning for steps that [Mr Leask] was taking to oppose the process...

⁸⁰ Paragraph 116 of SSC response dated 5 September 2014.

⁸¹ Paragraph 117 of SSC response dated 5 September 2014.

190. In my letter of 26 March 2015 to SSC, I noted that it was unclear what evidence was relied upon to reach the conclusion that Mr Leask was motivated by his personal interest in protecting his legacy at MFAT:⁸²

I have been unable to identify any particular pieces of evidence which support Ms Rebstock's conclusion on this point.

191. In its response by letter dated 4 June 2015, SSC did not direct me to any interviews or emails that supported the finding in question. Instead, SSC made the general statement that:⁸³

Ms Rebstock was entitled to draw inferences from the evidence provided to her that Mr Leask was motivated by his personal interest in protecting his legacy at MFAT.

192. Ms Rebstock subsequently said at interview that the finding that the actions Mr Leask took were motivated by his personal interest, came across 'strongly' in her interviews with him. I have since carefully reviewed the transcripts of the interviews to find the source of that evidence. However, I have been unable to locate any material in the interview transcripts that supports such an interpretation of Mr Leask's motivations.

193. SSC made the general comment that 'body language and other cues' are 'highly relevant' in assessing the evidence of interviewees.⁸⁴ However, the interview with Mr Leask was via telephone, so it is unlikely that his body language or non-verbal cues could have contributed to any assessment of his responses.

194. To the extent that the inquiry did rely on the statement made by the unidentified HOM at paragraph 200 of the Final Report for its criticism of Mr Leask, I question the reasonableness of such reliance, given that Mr Leask was not identified in the statement.

195. I also question whether the inquiry has applied its own standard of proof with regard to this finding, having stated at paragraph 69.33 of the Final Report that:

...the investigation [must] apply a level of proof commensurate with the seriousness of the primary issue into which the investigation has to inquire and report.

196. The finding at paragraph 312 is also at odds with the prudent approach to determining the question of intention with respect to other MFAT employees, evident at paragraph 27.9 of the Final Report.

197. In sum, I consider that the finding that Mr Leask was motivated to protect his personal legacy did not have sufficient evidential foundation. Moreover, it was at odds with the

⁸² Paragraph 161 of my letter dated 26 March 2015.

⁸³ Paragraph 83 of SSC response dated 4 June 2015.

⁸⁴ Paragraph 19 of SSC response dated 4 June 2015.

wealth of other direct evidence to suggest that Mr Leask was motivated by a concern about the future of MFAT and New Zealand's national interest.⁸⁵

Supplied information to FSA and partners group

198. The Final Report in Finding C criticises Mr Leask for '*supplying government information that [he was] not authorised to disclose to the FSA and the partners group for use in public campaigns to embarrass or put pressure on the Government and the Secretary*'.⁸⁶

199. In my opinion that criticism is unjust.

200. SSC argued that Mr Leask has misinterpreted this criticism of his actions and in fact Finding C was that (emphasis added):⁸⁷

...[Mr Leask] and [Y] developed strategies to oppose the change proposals and disrupt and stop the change process, including a strategy to supply information to the FSA and Partners' Group for their use in embarrassing the Government and the Secretary.

...

The Report does not identify [Mr Leask] as ever having personally supplied the information to the FSA or Partners' Group. It does notably include detailed conversations between [Mr Leask] and [Y] on the best way to ensure that various groups, including the FSA and Partners' Group, are able to impact on the MFAT change programme.

201. While I appreciate the subtleties of SSC's explanation, I doubt that the distinction would be readily apparent to the average reader. The overall impression conveyed is that Mr Leask improperly disclosed official information to the FSA and the partners' group for use in public campaigns to embarrass or put pressure on the Government and MFAT. Yet there is no evidence that Mr Leask provided such material to either of these groups.

202. The fact that all the other matters identified in the bullet points of Finding C are actions that SSC maintains Mr Leask took, supports this impression.

203. Prior to finalising and publishing the Final Report, the inquiry was aware that both Mr Leask and his QC had interpreted the relevant part of this finding as a conclusion that Mr Leask made unauthorised disclosures of government information to the FSA and the partners' group.⁸⁸ However, I have seen no evidence that the inquiry gave any consideration to Mr Leask's concerns about the accuracy of the wording of Finding C and the way in which they had interpreted its meaning.

⁸⁵ See, for example, paragraphs 29 to 33 of Neil Walter's statement dated 20 September 2013.

⁸⁶ Paragraphs 69.4, 252, 269 and Finding C of the Final Report.

⁸⁷ Paragraph 133 and 135 of SSC response dated 5 September 2014.

⁸⁸ Letter of 27 September 2013 from Mr Leask's QC and the Table of Corrections dated 1 November 2013.

204. Overall, I consider that the inquiry unreasonably included in the Final Report a finding that gave the incorrect impression that Mr Leask had made disclosures of official information to the FSA and the partners' group, despite it being drawn to the inquiry's attention that this impression was unwarranted. This action by the inquiry was unjust to Mr Leask.

Portrayal of email evidence

205. In considering whether the findings against Mr Leask were fair and reasonable, I have also examined how the inquiry depicted various emails that he sent and received, in the Final Report. In my opinion, the manner in which this material was portrayed did not fairly represent Mr Leask's actions.

Discussion

206. The Final Report refers at various points to Mr Leask's email on 7 March 2012 where he sent his paper on MFAT change proposals to SLT, and copied to MFAT seconded staff in Ministers' offices and DPMC.⁸⁹ However, the content of this email does not appear to be cited anywhere in the Final Report. It is significant that Mr Leask expressly sought to preserve the confidentiality of the email and to limit its distribution. The email ends with the following comments (emphasis added):

*The designated website does not however lend itself to my own broad comments on the MBM and, in any event such comments demand in the consultation period to be considered by more than the MBM team that has access to that site. Hence this informal message. This message is intended for the wider management group — ie the full list of post and divisional addresses of your various messages on the change process. But **I wanted a more limited distribution** — SLT and selected Wellington addresses — to have the opportunity to see it before others started commenting. **It is also of course marked 'In Confidence'**.*

207. Notwithstanding the wording of the email, it seems that Mr Leask did not intend to distribute his paper to 'the wider management group'. In his interview with the investigation team on 29 August 2012, he clarified:

...I did not want my message to be broadcast ... I wanted the substance of my reply into the system to be what counted ... not a public fact that I'm High Commissioner in London speaking out against those proposals.

208. During an earlier interview on 13 August 2012, Mr Leask said:

*...it is not appropriate for us — not appropriate for someone to put out there that these are the views of the High Commissioner in Singapore. That is political news ... for me the significant impact of that and what I would be most anxious to avoid when I said something was that **I did not want ... it to***

⁸⁹ Paragraphs 215 to 216, and 262, of the Final Report.

be known that I was sending messages into the system and that I strongly disagreed with elements of the MBM...

209. Mr Leask's views about the appropriateness of widely distributing feedback on the change proposals are not reflected in the Final Report. Similarly the respectful and constructive tone of Mr Leask's email and paper is not reflected in the Final Report. A one-sided view of his actions is presented — in particular, that by choosing not to use the formal feedback process, Mr Leask was motivated to 'undermine the ... change process'⁹⁰ and that his actions led to a 'perception that it was acceptable to leak material'.⁹¹

Private conversations between colleagues

210. Mr Leask is concerned that the emails relied upon by the inquiry and cited in the Final Report were essentially private conversations between two colleagues and that it was not appropriate for them to be paraded in a public document.

211. The emails in question were certainly unguarded and arguably unwise. However, they were frank exchanges between two colleagues with a longstanding professional and personal relationship. I have significant disquiet about the inquiry's decision to include so many private emails in the Final Report. In my opinion, the inquiry's actions were unfair and contributed to imbalance in the Final Report.

Proportionality

212. Another aspect of the complaint before me is whether Mr Leask was unfairly singled out in the Final Report, given that he says his actions were not materially different from other Tier 3 managers who were not identified in the same manner.

213. In my opinion, the manner in which Mr Leask's actions were singled out in the Final Report was disproportionate and unfair.

Discussion

214. In addressing the issue of proportionality, I have considered whether:

- a. Mr Leask was singled out in the Final Report;
- b. the actions of other Tier 3 managers were similar to those of Mr Leask; and
- c. there was any inconsistency in the treatment in the Final Report of the three HOMs and Mr Leask.

Singling out

215. SSC rejected that Mr Leask was singled out in the Final Report:⁹²

...It is important to remember that the report did not solely make findings on behaviours attributable to Mr Leask but rather identified concerning

⁹⁰ Paragraph 316 of the Final Report.

⁹¹ Paragraph 118 of SSC response dated 5 September 2014.

⁹² Paragraph 20 of SSC response dated 4 June 2015.

behaviours throughout MFAT, and sought to identify this behaviour and conduct to be clear on the type of behaviour that is not appropriate for public servants to engage in. Mr Leask ... [was] not in any way singled out by the inquiry during the investigation process or in the final report...

216. I acknowledge that the Final Report comments on a range of activities in MFAT. However, only three individuals are identified — as ‘X’, ‘Y’ and ‘Z’ — in the Final Report.
217. The first is the SSC contractor who was strongly suspected of leaking the Cabinet papers. As a result of a High Court order, the publication of any details that might lead to the identification of ‘X’ is prohibited. Mr Leask was ‘Z’, one of the other two individuals identified for particular criticism in the Final Report.
218. The general and specific criticisms directed against Mr Leask are set out in Part 2 of the Final Report, entitled ‘*Relevant background facts about the MFAT change programme*’. The general criticisms of Tier 3 Managers (which include but do not specifically identify Mr Leask) are set out at paragraphs 191 to 243 of the Final Report (ie, a total of 53 paragraphs over approximately nine pages). The specific criticisms directed against Mr Leask are addressed at paragraphs 244 to 323 (ie, a total of 80 paragraphs over approximately 12 pages). By way of further comparison, the issue of who disclosed the Cabinet papers is set out at paragraphs 437 to 481 (ie, a total of 45 paragraphs over approximately eight pages). That the behaviour of Mr Leask, who was not found to have leaked any information, featured so prominently in the Final Report evidences a lack of balance.
219. For these reasons, I consider that Mr Leask was unfairly singled out in the Final Report.

Similar actions to other Tier 3 managers

220. On the question whether Mr Leask’s actions were similar to those of other Tier 3 managers in the Final Report, SSC submitted (emphasis added):⁹³

*The conclusion Ms Rebstock reached on the evidence before her was that whilst other Tier 3 managers engaged in individual acts that were of concern, as referenced in the final report the additional actions of Mr Leask were such that within the context of what was being discussed in the report needed to be separately addressed. The report makes findings on the behaviours of other Tier 3 managers as supported by the evidence. The difference with Mr Leask was that there was evidence that showed **other relevant conduct** outside of that identified in relation to other employees, which for completeness needed to be separately mentioned. We ... reiterate that Ms Rebstock did not identify similar scale of such activity elsewhere. This activity being: **providing personal advice to Ministers on the change proposals; seeking to influence Ministers, the Chief Executive of DPMC and the Prime Minister’s Office to intervene in a MFAT staff in confidence***

⁹³ Paragraphs 39 to 41 of SSC response dated 4 June 2015.

consultation and the development of a strategy to undermine the change process.

In addition, Mr Leask carried on this opposition after the consultation period, including having sent further feedback to John Allen, Mr Leask forwarded a copy directly to Sir Maarten Wevers ... It was for this reason that the final report carefully provides a summary of the activities of the Tier 3 managers and other staff members generally, and specific actions of some other managers such as the three HOMS, and separately a section reporting on the activities of Mr Leask ... (Finding C).

Therefore, we do not agree that there was inconsistent treatment between Mr Leask's actions to the actions of other Tier 3 managers.

221. I consider below the reasons for different treatment as between Mr Leask and other Tier 3 managers.

Personal advice to Ministers, seeking to influence DPMC and Prime Minister's Office

222. The first 'other relevant conduct' that SSC outlined in support of the Final Report's focus on Mr Leask as compared to the other Tier 3 managers, was that Mr Leask 'provid[ed] personal advice to Ministers on the change proposals [and sought] to influence Ministers, the Chief Executive of DPMC and the Prime Minister's Office to intervene in a MFAT staff in confidence consultation'.⁹⁴

223. However, it is clear from the Final Report that a number of other Tier 3 managers also engaged in such activities. I refer in particular to the following:

- a. three HOMS sent formal messages, dated 2, 3 and 5 March 2012, to all MFAT divisions and copied their feedback to the offices of the Minister of Foreign Affairs, the Minister of Trade and DPMC and the FSA email in-box;⁹⁵
- b. another HOM sent his or her feedback, by email, to SLT and copied the feedback to the offices of the Minister of Foreign Affairs and the Minister of Trade and DPMC;⁹⁶
- c. on 15 March 2012, 49 HOMS (including Mr Leask) sent an email to Mr Allen with joint feedback on the change proposals rather than using the online consultation tool;⁹⁷
- d. 12 signatories of the HOMS' letter sent a copy of that letter to people who were not signatories to, or recipients of, the letter. In most cases, the letter was sent to

⁹⁴ Paragraph 39 of SSC response dated 4 June 2015.

⁹⁵ Paragraph 150 of the Final Report.

⁹⁶ Paragraph 216 of the Final Report.

⁹⁷ Paragraph 157 of the Final Report.

seconded MFAT staff in offshore posts. One copy was sent to a Divisional Director and forwarded twice to reach 10 MFAT staff within the Wellington office;⁹⁸ and

- e. paragraphs 222 and 223 of the Final Report suggest that there may have been other HOMs, apart from Mr Leask, who had conversations with the Minister that were not reported to SLT.

Opposition after consultation period

224. The second matter that SSC specified as *'relevant conduct'* on the part of Mr Leask, which it believes justified the Final Report's focus on him as compared to the other Tier 3 managers, was that he *'carried on this opposition after the consultation period, including having sent further feedback to John Allen, Mr Leask forwarded a copy directly to Sir Maarten Wevers'*.⁹⁹
225. It is not clear to me why the inquiry considered it inappropriate for Mr Leask to provide further feedback to Mr Allen after the consultation period. In any event, Sir Maarten Wevers, as Chief Executive of DPMC, was present at the HOMs' meeting when Mr Leask provided his verbal feedback. In my view, by forwarding his email with feedback on the HOMs' meeting to Sir Maarten, Mr Leask was doing little more than confirming what he had already said in the meeting.¹⁰⁰

Strategy to undermine the change process

226. The third matter that SSC specified as *'relevant conduct'* on the part of Mr Leask, which it considered justified his different treatment in the Final Report, was that he *'develop[ed] ... a strategy to undermine the change process'*.¹⁰¹
227. However, Mr Leask was not alone in developing such a strategy. The Final Report found that actions of the three HOMs were *'part of a deliberate strategy to undermine the change process and the Secretary's authority and instructions'*.¹⁰² Moreover, Ms Rebstock indicated at interview that such a strategy was in fact widespread, and told me that she was briefed early in the inquiry that there had been a *'rebellion'* among certain senior officials in MFAT regarding the change process.
228. Based on the information before me, it appears that other Tier 3 managers may have failed to follow Mr Allen's *'instructions'* regarding the use of the online feedback tool; sent their feedback on the change proposals to all MFAT staff as well as Ministers and DPMC; overlooked reporting to SLT about discussions with Ministers on the change proposals; and disclosed information to the FSA.

⁹⁸ Paragraph 228 of the Final Report.

⁹⁹ Paragraph 40 of SSC response dated 4 June 2015.

¹⁰⁰ Pages 7-8 of Mr Leask's submission dated 18 April 2013.

¹⁰¹ Paragraph 39 of SSC response dated 4 June 2015.

¹⁰² Paragraphs 206 and 215 of the Final Report.

229. In these circumstances, I do not believe there was a reasonable basis to distinguish their actions from those of Mr Leask.

Treatment of actions by three other HOMs

230. Unlike Mr Leask, the three HOMs who sent their feedback to all MFAT staff and the offices of the Minister of Foreign Affairs, the Minister of Trade, DPMC and the FSA, were only identifiable by inference, at paragraph 155 of the Final Report.

231. In addition, the actions of these three HOMs were discussed at paragraphs 206 to 215 of the Final Report. In particular, I note that paragraph 215 stated (emphasis added):

*The investigation does not accept that the submissions made by some Tier 3 managers that the feedback they sent to **all staff**, DPMC and Ministers offices was not 'formal' feedback and therefore not required to be submitted via the online tool. The investigation believes that the wide distribution of the feedback, which included the Secretary and the SLT, was intended to be formal feedback on the change proposal rather than part of a legitimate discussion process that the Secretary had authorised in his 8 March email. **The investigation considers that the choice to distribute the material broadly was part of a deliberate strategy to undermine the change process and the Secretary's authority and instructions.***

232. The conclusion emphasised above appears to have related to the actions of the three HOMs, rather than Mr Leask. This is because:

- a. at this point, the Final Report had not begun discussing the actions taken specifically by Mr Leask;
- b. the first sentence of paragraph 215 referred to the feedback being sent to '*all staff*' and it appears that only the three HOMs distributed their feedback that widely; and
- c. it is not clear that Mr Leask distributed his feedback '*broadly*'. His email of 7 March 2012 with his feedback was sent to SLT and four other individuals. The three HOMs distributed their feedback to a much wider audience.

233. Even though paragraph 215 was (implicitly) directed at the three HOMs, the findings against '*some Tier 3 managers*' in paragraph 69.3 and Finding B of the Final Report, were crafted in a manner that did not render those HOMs identifiable. This contrasts with the criticism of this nature directed specifically against Mr Leask at paragraph 69.4 and Finding C of the Final Report.

234. In my opinion, the passages of the Final Report referred to above show a dilution or diminution of the findings against some Tier 3 managers, particularly the three HOMs, when compared to the findings made against Mr Leask directly.

235. Overall, I consider that the report lacked balance with respect to the findings against Mr Leask.

Decision to publish and identify

236. Finally, I have considered whether the decision of Mr Rennie to publish the Final Report was fair and reasonable in the circumstances. My conclusions about the deficiencies in the conduct of the inquiry and the findings of the Final Report, lead me to the view that the publication of the Final Report, in a manner that identified Mr Leask and contained unfair criticisms of him, was unjust.

Discussion

237. Given my conclusions that the inquiry was in fact procedurally flawed in multiple respects, it follows that the decision to publish the Final Report in a manner that identified Mr Leask was unjust.

238. In relation to publication, SSC submitted:¹⁰³

The Commissioner's statutory mandate is to (amongst other things):

promote and reinforce standards of integrity and conduct, and

promote transparent accountability in the State services...

A major tool of ensuring transparency and accountability over major problems that occur in public administration is to be open about lessons to be learnt ... It also would have been unusual not to publish the report, as the usual practice of Commissioners has been to release such material.

239. SSC also stated that Mr Rennie was 'careful to meet his requirements to ensure that [Mr Leask's] views on publication were taken into account', as demonstrated by the amendments made to the report following receipt of Mr Leask's submissions in November 2013.¹⁰⁴ SSC submitted that Mr Rennie:¹⁰⁵

...carefully weighed the prospect of [Mr Leask] being identified from the material against the public interest that he saw in identifying the lessons to be learnt for future change programmes, and the need to reinforce the behaviour expected of public servants. Ultimately, he was not persuaded that either refusing to publish the report, or redacting completely the part relating to the complainant, was in the public interest.

240. In response to my provisional opinion, Mr Rennie submitted:¹⁰⁶

...As to publication, it was, and remains, my view that it was essential and part of my role that the findings were made public including so that the lessons learned able to be promulgated throughout the public service. This is

¹⁰³ Paragraphs 154 and 155 of SSC response dated 5 September 2014.

¹⁰⁴ Paragraph 156 of SSC response dated 5 September 2014.

¹⁰⁵ Paragraph 157 of SSC response dated 5 September 2014.

¹⁰⁶ Paragraphs 22 and 25 of SSC response dated 18 May 2016.

consistent with my statutory mandate and with the way in which the public service operates. I stand by that decision.

...

It is a matter of deep concern to me that the implication of the provisional opinion is to suggest that the Commissioner move away from the high-level principle-based approach to the activities of public services and that it also suggests that findings on these matters are dealt with in a way that is not transparent and not fully able to be used for the purpose for which such inquiries are undertaken.

241. I acknowledge the importance of Mr Rennie's role as Commissioner in ensuring the integrity and trustworthiness of the public sector in the face of serious concerns over leaks of official information. I do not question the need for him to commence an inquiry into the leaks and to publicly report on its findings, given his broad statutory mandate.¹⁰⁷
242. As Commissioner, Mr Rennie was required to exercise his functions in a principles-based and transparent manner. My review has identified numerous flaws in the inquiry as it related to Mr Leask. It was critical that the published findings about Mr Leask were accurate, proportionate and not procedurally flawed. Recourse to general principles and a commitment to transparency cannot overcome basic flaws in an inquiry, no matter how legitimate its purpose.
243. Both Ms Rebstock and Mr Rennie advised me, in their respective interviews, that they were acutely aware of the ramifications for Mr Leask. They nevertheless maintained that a public report devoid of all identifying factors would be of less value and would risk 'tarnishing' the remaining Tier 3 managers.
244. Mr Leask was not responsible for the leaks that prompted the inquiry. The Final Report unfairly elevated the actions of Mr Leask and rendered him identifiable. Publication of a flawed report caused significant damage to Mr Leask's reputation and resulted in serious, unwarranted and adverse professional, personal and financial consequences for him.
245. The impact on Mr Leask was further compounded by an error made by Mr Rennie in an interview he gave on Radio New Zealand on 12 December 2013. Part of the transcript reads:

MW [Mary Wilson]: Two tier three managers in MFAT — probable that they also leaked material but not Cabinet papers.

IR [Iain Rennie]: That is correct.

MW: Did they resign? Were they sacked? Or did they just find another job?

IR: Those individuals at the time of the restructuring were already thinking about leaving the Ministry and made personal decisions to do so at around that time.

¹⁰⁷ In particular, pursuant to the State Sector Act 1988, ss 6(h), 6(i).

246. Nothing in the Final Report suggests that Mr Leask was ‘*probably*’ responsible for the leaks of MFAT material. Subsequent to my interview with him, Mr Rennie confirmed that his comment was incorrect and offered an apology to Mr Leask. He advised me:¹⁰⁸

...That statement was made in the context of a radio interview with Radio New Zealand. It was a misstatement on my part, and I retracted it and apologised for it as soon as it was drawn to my attention.

247. It would be regrettable if senior public officials, including those who commission or author public reports on matters of significant public interest, become unwilling to comment publicly on such reports, or choose to comment only in anodyne terms, because of fear of a ‘*slip of the tongue*’ in summarising inquiry findings.

248. I accept that the mistake made by Mr Rennie occurred in the course of the cut and thrust of a live media interview. However, singling out Mr Leask as ‘*probably*’ responsible for the leaks of MFAT material was a damaging and unreasonable action.

249. On the overall issue of the fairness of singling out Mr Leask for criticism in the Final Report, SSC submitted:¹⁰⁹

The heart of this matter is a refusal by the complainant to accept that Ms Rebstock weighed the evidence that she identified about his behaviour, and reached (and reported on) a conclusion that was logically available to her. It can be expected that counsel for [Mr Leask] would robustly defend his position throughout the natural justice process. However, the fact that the complainant conveyed strong disagreement with Ms Rebstock’s conclusion is not in itself sufficient reason for the Commissioner to doubt her findings, or to persuade the Commissioner that he should reject her findings as the primary investigator.

250. It is plain from my above analysis that I disagree with this assessment of Mr Leask’s complaint. I have identified a number of deficiencies regarding the conduct of the inquiry and the findings reached about Mr Leask.

251. Mr Rennie has also submitted:¹¹⁰

It is critical in inquiries such as this one that it is conducted independently and not subject to interference from the Commissioner. That is particularly so here where the actions of SSC itself may be involved as it turned out to be case in this instance.

252. Mr Rennie submits that I have failed to properly recognise the arms length nature of the inquiry and the importance of ‘*distinguish[ing] the role of the Commissioner and the independent investigator*’.¹¹¹ Clearly, it was sensible and appropriate for Mr Rennie to

¹⁰⁸ Paragraph 23 of SSC response dated 18 May 2016.

¹⁰⁹ Paragraph 158 of SSC response dated 5 September 2014.

¹¹⁰ Paragraph 18 of SSC response dated 18 May 2016.

¹¹¹ Paragraph 18 of SSC response dated 18 May 2016.

appoint an independent investigator. However, it is the Commissioner's statutory function to conduct inspections and investigations.¹¹²

253. The inquiry by Ms Rebstock was conducted under delegated authority from Mr Rennie as Commissioner. In relation to such a delegation, section 23(8) of the State Sector Act 1988 provides:

No such delegation shall affect or prevent the exercise of any function or power by the Commissioner nor shall any such delegation affect the responsibility of the Commissioner for the actions of any person acting under the delegation.

254. It is clear that Parliament intended the final responsibility for the actions of a delegate to remain with the Commissioner. Accordingly, the Commissioner was accountable for any deficiencies in the inquiry. In any case, most (if not all) of the deficiencies I have identified were raised by Mr Leask and his QC with Mr Rennie directly on several occasions. The Commissioner was on notice of the possible problems in the inquiry.

255. In conclusion, I consider that the inquiry, and its findings as they related to Mr Leask, was unreasonable, and that the decision to publish the Final Report, in a manner that identified Mr Leask and contained unfair criticisms of him, was unjust.

256. I also consider that Mr Rennie's inaccurate statement that Mr Leask was 'probably' responsible for the leaks of MFAT material (for which Mr Rennie later apologised), was unreasonable.

Ombudsman's opinion

257. My opinion is that, in relation to Mr Leask, SSC acted unreasonably during the inquiry and its findings and publication of the Final Report. In particular:

- a. the findings in relation to Mr Leask in the Final Report exceeded the terms of reference for the inquiry;
- b. Mr Leask was not given fair notice prior to the interview phase of the inquiry that his conduct (apart from any possible culpability for the leaks in question) would be examined;
- c. insufficient material was provided to Mr Leask in advance of the Final Report about the applicable standards against which his behaviour was being measured;
- d. in several respects Mr Leask was not treated fairly, in accordance with the principles of natural justice;
- e. the evidence relied upon by the inquiry did not reasonably support some of the criticisms made about Mr Leask in the Final Report and some highly relevant evidence was not properly addressed;

¹¹² State Sector Act 1988, s 7.

- f. the manner in which the evidence was portrayed in the Final Report did not fairly represent Mr Leask's actions;
- g. the manner in which Mr Leask's actions were addressed in the Final Report was disproportionate when compared with the comments made about the actions of other MFAT staff, including a number of Tier 3 managers;
- h. the publication of the Final Report, in a manner that identified Mr Leask and contained unfair criticisms of him, was unjust; and
- i. the Commissioner's public statement about Mr Leask on 12 December 2013 was unreasonable.

Recommendations

258. Pursuant to section 22(3) of the Ombudsmen Act, I recommend that SSC:

- a. offer Mr Leask a public apology for the deficiencies identified in the inquiry and the publication of the Final Report, insofar as it relates to him;
- b. take reasonable steps to ensure that any person accessing information held by SSC about the inquiry and the Final Report is alerted to the outcome of my investigation. This should include a prominent and visible statement on any SSC web-pages referring to the inquiry and its findings, as well as on the front page of its hard and electronic copies of the Final Report, that:
 - i. notes *'to the extent the inquiry and Final Report relates to Z, it has been the subject of an Ombudsman's investigation which found that SSC acted unreasonably in a number of respects'*; and
 - ii. provides the webpage address to my published opinion;
- c. within 20 working days of provision by Mr Leask to SSC of information confirming the actual and reasonable expenses incurred by him (in responding to the inquiry, and challenging the findings of the inquiry and the publication of the Final Report), reimburse those expenses to Mr Leask;
- d. undertake a consultation process with Mr Leask to determine, in good faith, a level of appropriate compensation that recognises the harm to his reputation caused by the deficiencies identified in the inquiry and the publication of the Final Report. I suggest that this process be facilitated by an independent mediator; and
- e. review its guidance for future inquiries under the State Sector Act 1988 in light of this report.

Professor Ron Paterson
Ombudsman

Appendix 1. Summary of grounds of complaint

A Was the inquiry conducted in a reasonable and fair manner, including whether:

1. Mr Leask was given notice, prior to the interview phase, that his actions (apart from any possible culpability for the leaks under investigation) were being investigated and assessed as to whether they breached appropriate standards of behaviour;
2. Mr Leask was informed that should his behaviour be found to have breached appropriate standards, it was likely that he would be in effect identified in the Final Report as committing such breaches;
3. in advance of the Final Report, Mr Leask was advised of the specific standards that his behaviour was being measured against;
4. Mr Leask was provided with sufficient and timely information in respect of:
 - (a) the specific topics to be addressed in the interview phase of the inquiry;
 - (b) the existence and identify of witnesses being questioned, and the nature of their evidence about the role Mr Leask played in the change process; including whether he should have been provided opportunity to cross examine these witnesses or, at the minimum, to controvert or provide comment on their evidence;
 - (c) the details of the evidence relied upon to substantiate the findings that Mr Leask persuaded a person/s to leak material;
5. Mr Leask was provided with an opportunity to consider and respond to significant amendments to the Final Report, including:
 - (a) the *'Focus'* and *'Media and Political Commentary'* sections, which created a framework that sought to justify the inquiry's approach to unauthorised disclosures;
 - (b) new material identifying the elements of the State Services Code of Conduct, Standards of Integrity and Conduct, which the Final Report said that Mr Leask had breached;
 - (c) the accusation that Mr Leask had *'put [his] personal interest in protecting [his] legacy'* at MFAT *'before [his] professional obligations'*;
 - (d) the allegation that Mr Leask's actions had *'fuelled the political debate'*;
6. there was a lack of an *'open mind'* or *'predetermination'* regarding Mr Leask's conduct as evidenced by:
 - (a) the changing description of his alleged wrongdoing over the course of the various draft reports;
 - (b) the manner in which the statements from Mr Leask's expert witnesses were evaluated and weighed in the various draft reports and in the Final Report;

- (c) the strong views expressed by the inquiry during its early stages about the role of Tier 3 managers in the change process as well as the standard and practices within MFAT at the time relating to the use of 'In Confidence' classification;
- 7. there was disproportionate criticism of Mr Leask given that his actions were not shown to be materially different from other Tier 3 managers who were not named in the Final Report; and
- 8. the findings against Mr Leask in the Final Report exceeded the terms of reference for the inquiry.

B Whether the following findings in relation to Mr Leask were wrong and/or unreasonable:

- 1. the finding that Mr Leask *'deliberately disregarded the Secretary's instructions about the process to provide formal feedback and took other actions'*;
- 2. the finding that Mr Leask's actions in disclosing information classified as 'MFAT In Confidence' without the permission of the Secretary constituted *'unauthorised disclosure'* of government information;
- 3. the finding that Mr Leask acted outside his authority in providing personal advice direct to Ministers and DPMC;
- 4. the finding that Mr Leask had created *'a perception that it was acceptable for [his] opposition to the change proposal to be leaked and to be used for political purposes'*;
- 5. the finding that Mr Leask had breached the State Services Code of Conduct by engaging in a course of action to stop or substantially amend the change proposals and acted in a manner contrary to the requirement to remain impartial and maintain political neutrality;
- 6. the finding that Mr Leask had supplied unauthorised information to FSA and Partners Group for use in public campaigns; and
- 7. the finding that Mr Leask had *'developed strategies to oppose the change proposals and to disrupt or stop the change process ...'*

C Whether the decisions to accept the Final Report and publish it, including in effect identifying Mr Leask, were unreasonable, unjust and/or oppressive

- 1. was Mr Rennie's acceptance of the inquiry's Final Report unreasonable, unjust and/or oppressive;
- 2. was Mr Rennie's decision to publish of the Final Report, insofar as it related to Mr Leask unreasonable, unjust and/or oppressive given the deficiencies in the conduct of the inquiry and the findings of the Report; and
- 3. were Mr Rennie's public statements on 12 December 2013 unreasonable, unjust and/or oppressive.

Appendix 2. Relevant statutory provisions

Ombudsmen Act 1975

13 Functions of Ombudsmen

- (1) Subject to section 14, it shall be a function of the Ombudsmen to investigate any decision or recommendation made, or any act done or omitted, whether before or after the passing of this Act, relating to a matter of administration and affecting any person or body of persons in his or its personal capacity, in or by any of the departments or organisations named or specified in Parts 1 and 2 of Schedule 1, or by any committee (other than a committee of the whole) or subcommittee of any organisation named or specified in Part 3 of Schedule 1, or by any officer, employee, or member of any such department or organisation in his capacity as such officer, employee, or member.

...

22 Procedure after investigation

- (1) The provisions of this section shall apply in every case where, after making any investigation under this Act, an Ombudsman is of opinion that the decision, recommendation, act, or omission which was the subject matter of the investigation—
- (a) appears to have been contrary to law; or
 - (b) was unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with a rule of law or a provision of any Act, regulation, or bylaw or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory; or
 - (c) was based wholly or partly on a mistake of law or fact; or
 - (d) was wrong.
- (2) The provisions of this section shall also apply in any case where an Ombudsman is of opinion that in the making of the decision or recommendation, or in the doing or omission of the act, a discretionary power has been exercised for an improper purpose or on irrelevant grounds or on the taking into account of irrelevant considerations, or that, in the case of a decision made in the exercise of any discretionary power, reasons should have been given for the decision.
- (3) If in any case to which this section applies an Ombudsman is of opinion—
- (a) that the matter should be referred to the appropriate authority for further consideration; or
 - (b) that the omission should be rectified; or
 - (c) that the decision should be cancelled or varied; or
 - (d) that any practice on which the decision, recommendation, act, or omission was based should be altered; or

- (e) that any law on which the decision, recommendation, act, or omission was based should be reconsidered; or
- (f) that reasons should have been given for the decision; or
- (g) that any other steps should be taken—

the Ombudsman shall report his opinion, and his reasons therefor, to the appropriate department or organisation, and may make such recommendations as he thinks fit. In any such case he may request the department or organisation to notify him, within a specified time, of the steps (if any) that it proposes to take to give effect to his recommendations. The Ombudsman shall also, in the case of an investigation relating to a department or organisation named or specified in Parts 1 and 2 of Schedule 1, send a copy of his report or recommendations to the Minister concerned ...

State Sector Act 1988

4A Role of Commissioner

The Commissioner's role is to provide leadership and oversight of the State services so as to ensure the purpose of this Act is carried out, including by—

- (a) promoting the spirit of service to the community; and
- (b) promoting the spirit of collaboration among agencies; and
- (c) identifying and developing high-calibre leaders; and
- (d) working with State services leaders to ensure that the State services maintain high standards of integrity and conduct and are led well and are trusted; and
- (e) overseeing workforce and personnel matters in the State services; and
- (f) advising on the design and capability of the State services; and
- (g) evaluating the performance of Public Service leaders, including the extent to which they carry out the purpose of this Act; and
- (h) supporting the efficient, effective, and economical achievement of good outcomes by the State services; and
- (i) promoting a culture of stewardship in the State services.

...

6 Functions of Commissioner

For the purpose of carrying out the Commissioner's role, the principal functions of the Commissioner are to—

- (a) review the State sector system in order to advise on possible improvements to agency, sector, and system-wide performance; and
- (b) review governance and structures across all areas of government, in order to advise on—

- (i) the allocation and transfer of functions and powers; and
- (ii) the cohesive delivery of services; and
- (iii) the establishment, amalgamation, and disestablishment of agencies; and
- (c) review the performance of each department and each departmental agency; and
- (d) appoint leaders of the Public Service, which includes—
 - (i) acting as the employer of chief executives of departments and chief executives of departmental agencies; and
 - (ii) reviewing the performance of chief executives of departments and chief executives of departmental agencies; and
- (e) promote leadership capability in departments and other agencies; and
- (f) promote strategies and practices concerning government workforce capacity and capability; and
- (g) promote good-employer obligations in the Public Service; and
- (h) promote and reinforce standards of integrity and conduct in the State services; and
- (i) promote transparent accountability in the State services; and
- (j) exercise such other functions with respect to the administration and management of the Public Service as the Prime Minister from time to time directs (not being functions conferred by this Act or any other Act on a chief executive other than the Commissioner).

7 Powers of Commissioner

The Commissioner shall have all such powers as are reasonably necessary or expedient to enable the Commissioner to carry out the functions and duties imposed upon the Commissioner under this Act or any other enactment.

8 Power of Commissioner to conduct inspections and investigations

- (1) This section applies when the Commissioner is carrying out his or her functions in respect of the Public Service.
- (2) The Commissioner may conduct any inspections and investigations, and make and receive any reports, that the Commissioner considers necessary or the Minister directs.

...

23 Delegation of functions or powers

- (1) The Commissioner may from time to time, either generally or particularly, delegate to any person or persons any of the functions or powers of the Commissioner under this Act or any other Act, including functions or powers delegated to the Commissioner under any Act.
- (2) Every delegation under this section shall be in writing.
- (3) No delegation under this section shall include—
 - (a) the power to delegate under this section; or
 - (b) the Commissioner’s powers under sections 35 and 36 (which relate to the appointment and reappointment of chief executives); or
 - (c) the Commissioner’s powers under section 39 (which relates to the removal from office of a chief executive).
- (4) In any case where the Commissioner has, pursuant to subsection (1), delegated any of the functions or powers of the Commissioner to any person, that person may, with the prior approval in writing of the Commissioner, delegate such of those functions or powers as the Commissioner approves to any other person or to the holder for the time being of any specified office in the State services.
- (5) Subject to any general or special directions given or conditions imposed by the Commissioner, the person to whom any functions or powers are delegated under this section may exercise those functions or powers in the same manner and with the same effect as if they had been conferred on that person directly by this Act and not by delegation.
- (6) Every person purporting to act pursuant to any delegation under this section shall, in the absence of proof to the contrary, be presumed to be acting in accordance with the terms of the delegation.
- (7) Any delegation under this section may be made to a specified person or to persons of a specified class, or to the holder or holders for the time being of a specified office or of specified classes of offices.
- (8) No such delegation shall affect or prevent the exercise of any function or power by the Commissioner nor shall any such delegation affect the responsibility of the Commissioner for the actions of any person acting under the delegation.