

Transparency, governance and Constitutions

Sir Geoffrey Palmer QC Speech notes

Address to Transparency International New Zealand
Chapman Tripp, Wellington Monday 22 May 2017, 5.30 pm

The Project

Thank you for this wonderful opportunity to speak to Transparency International New Zealand tonight.

My purpose is to connect the principles of constitutional design to transparency, thus reducing the risk of corruption.

That risk, of course, is central to your organisation's reason for being.

The book *A Constitution for Aotearoa New Zealand* by Andrew Butler and me launched in September last year and sold out and has been reprinted.¹

That book proposes a written, codified, Constitution for New Zealand that we have drafted and is contained in the book.

We have spoken to more than 2,500 people around New Zealand .

We are on Twitter and Facebook.

We have received hundreds of submissions

Submissions will close on 1 December this year.

Many of the submissions are thoughtful and very useful.

We shall make big changes to our proposals as a result.

Early next year we will produce a redrafted Constitution for further consideration.

¹ Geoffrey Palmer & Andrew Butler *A Constitution for Aotearoa New Zealand* (Victoria University Press, Wellington 2016).

The new book will also analyse how the project should then be advanced further.

One thing we have discovered out there is considerable interest in the project and an appetite for change.

Trust, understanding, obscurity and Civics

There are three general observations to make about what we have learned on the road and from the submissions so far.

Many New Zealanders know very little how they are governed. The questions at our meetings have revealed that.

Just one example. Many people seem to think the Governor-General can refuse to sign legislation passed by Parliament that she is advised by ministers to sign. I don't think so.

If people are to trust their democratic institutions and have confidence in them they need to know something about them and how they work.

The need for a solid civics programme in the schools and in our communities is urgent.

It has been called for in the last two government reviews of the Constitution but nothing significant has happened.²

Second, in legal terms the Crown is central to the existing system. The Crown is the legal source of executive power. The Crown is the fountain of justice. The Crown is part of Parliament.

We think it preferable to have the powers that are exercised by the various branches and institutions of government clearly set out so everyone can know what they are.

This is impossible in New Zealand now. There is nowhere to go to find it.

One constitutional lawyer found the New Zealand constitution to be located in 45 Acts of Parliament, including six passed in England, 12 international treaties,

² Constitutional Arrangements Committee *Inquiry to review New Zealand's existing constitutional arrangements* (10 August 2005); Constitutional Advisory Panel *New Zealand's Constitution: A Report on a Conversation* (November 2013).

nine areas of common law, eight constitutional conventions, three-and-a-half executive instruments, one prerogative instrument, one legislative instrument and half a judicial instrument.³

Obscurity and lack of clarity is an enemy of transparency.

Third, some of the views out there on the Treaty of Waitangi are dangerously extreme and misguided.

We have been told the Treaty is a recipe for Apartheid.

They say there should be one law for all, which has never been the situation in New Zealand since its earliest days after European settlement.

With the common law from England came legal protection for indigenous people. A Supreme Court case reinforced them as early as 1846.⁴

Here is another reason to take measures to teach people civics.

Not only do New Zealanders fail to understand the workings of their own democracy, but also they know little about the history of their own country.

This brings me directly to transparency.

The DNA of this organization is to stop corruption.

It is to ensure that “government, politics, business civil society and the daily lives of people are free of corruption.”

New Zealand can take pride in the apparent fact that it has “one of the least corrupt public sectors in the world.”

In order to reach that condition a number of other features of public policy are necessary. Your website statement makes the point perfectly:

Integrity and good governance are important in that they underpin government legitimacy and the freedoms, civil liberties

³ Matthew Palmer “What is New Zealand’s constitution and who interprets it? Constitutional realism and the importance of public office holders” (2006) 17 PLR 133 at 142-145.

⁴ *R v Symonds* (1847) [1840-1932] NZPCC 387 (SC).

and ability to participate in a democratic state. When people trust their institutions, they are more likely to pay their taxes, fill in the census forms and to comply with laws and regulations.

The democratic deficit

Well, when one looks around the western world now one finds some worrying trends revolving around politics and public trust

Think Brexit and Trumpery.

People in the United Kingdom did not think their Prime Minister knew best about staying in Europe.

When offered the opportunity to vote in a referendum on leaving the EU, in order to prevent a split in the Conservative Party, the voters said yes, despite the Prime Minister campaigning to stay.

Similar forces of alienation were evident in the 2016 presidential election in the United States.

A large group of Americans felt the system of government was not serving their interests and needed to be cleaned out.

These are not good signs.

The reasons for these developments are complex and I cannot go into them here.

One important truth is to remember that democracy and democratic processes involve much more than elections.

If democracy comprises only elections, then participation and dialogue on particular issues between elections tends to be lost.

Inter-active conversations between the governed and the decision-makers seem more difficult to conduct now.

As one Dutch writer who wrote a book with the provocative title *Against Elections* has said the trend now is toward “deliberative democracy.”⁵

⁵ David Van Reybrouck *Against Elections-the case for democracy* (The Bodley Head, London, English translation, 2016) 109.

This he defines as follows:

Deliberative democracy is a form of democracy in which collective deliberation is central and in which participants formulate concrete, rational solutions to social challenges based on information and reasoning.

It has its origins in ancient Greece and combines political equality and deliberation.

To have a better democracy in New Zealand we need to thicken and deepen the Constitution.

We are quite some distance from being a deliberative democracy.

Open Government and Information

It is here where open government is such an important value.

Public opinion is one of the checks against arbitrary power, but only if people know what is going on.

As a famous American Judge Louis Brandeis once said:

Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.

That is why we have an Official Information Act and we have had it since 1982.

Remember what the Danks Committee said in 1980 which led to the legislation:

- A better informed public can better participate in the democratic process.
- Secrecy is an important impediment to accountability when Parliament, press, and public cannot properly follow and scrutinise the actions of Government.
- Public servants make many important decisions that affect people and the

permanent administration should also be accountable through greater flows of information about what they are doing.

- Better information flows will produce more effective government and help towards the more flexible development of policy. With more information available, it is easier to prepare for change.
- If more information is available, public cooperation with government will be enhanced.

Those principles remain sound but they are being imperfectly executed now.

The Act is showing signs of its age and it is in serious need of refreshment.

Despite two Law Commission reports that have recommended important improvements to it nothing has happened.

Very few changes have been made to the 1982 Act.

Despite two Law Commission reports on improving the Act there has been clear political resistance to making changes and freeing up further the release of information.

There is disquiet about the administration of the Act within the journalistic community and the Chief Ombudsman conducted an investigation published in 2015.

She made 48 recommendations for change but these were strictly connected to administrative and other practices within the bureaucracy as to how improvements could be made. Nothing about legislative improvements.⁶

The report was not well received by journalists, who generally maintained that the report did not go far enough or address the right issues, and neither was it likely to be effective if implemented.

The conclusion to be reached after more than 35 years of the law in action is that the present policy settings are inadequate and do not serve the interests of transparency in government as well as they should.

⁶ Report of the Chief Ombudsman *Not a Game of Hide and Seek—report on an investigation into the practices adopted by central government for the purposes of compliance with the Official Information Act 1982* (2015).

Despite the fact that New Zealand has had the Official Information Act since 1982, it is still often difficult to get information about public affairs in a timely fashion.

With some ministers the Act tends to lack support and acceptance. Some simply evade its requirements.

Some public servants do not like the Act either, although the former State Services Commissioner Dr Mark Preeble said the Act “is the best reform that’s happened during my whole time in the public service; it has been good for every agency it’s been applied in.”⁷

Successive governments have resisted efforts to improve the Act. Yet a strengthened Act would increase protection against corruption and questionable decision-making in both central and local government.

The Law Commission in a 2012 report completed a comprehensive and excellent review of the Official Information Act.⁸

The Commission made 137 separate recommendations concerning reform of the Act. The Government published its response to the Law Commission’s report soon after.⁹

The response was seriously disappointing since the policy leaves the law in an unsatisfactory state.

The Government did not agree with most of the major recommendations. It rejected any recommendations would have resulted in significant change.

Rejected recommendations included proposals to extend coverage of the Official Information Act to the officers of Parliament, the Parliamentary Counsel Office, the Office of the Clerk, Parliamentary Services and the Speaker; the statutory creation of a new oversight office; and combining the Official Information Act and the Local Government Official Information and Meetings Act into one Act.

⁷ Television interview with Dr Mark Preeble, *The Nation*, TV3, 3 April 2010.

⁸ Law Commission *The Public’s Right to Know: Review of the Official Information Legislation* (NZLC R125, 2012).

⁹ Government Response to Law Commission Report *The Public’s Right to Know: Review of the Official Information Legislation*, presented to the House of Representatives 4 February 2013.

The response indicated that reforming the Act was just not a priority.

We believe that redrafting the whole Act is essential if real progress is to be made in improving access to official information.

Redrafting the Act is not a job for the Constitution. The work has been done and the Act needs to be reconstructed.

Like much New Zealand legislation the Act should be conscientiously enforced.

The Ombudsmen have the function of recommending disclosure after complaints.

The performance of the office has been spotty and somewhat soft in this regard, although it has improved recently as evidenced by an address of the Chief Ombudsman Judge Peter Boshier.¹⁰

There needs to be a greater commitment to openness and the Act needs to have teeth that it presently lacks.

Butler and I think that a powerful commitment to greater openness of government information in a written codified and judicially enforceable constitution would be a safeguard worth having.

It would be a strong nudge to the executive government not to game the Act. And to improve it.

In this aim we need your help.

Please make a submission to us on the best way to word a constitutional guarantee of official information.

We have put forward a proposal in the book. It calls for setting up an Information Authority with power to decide on release of information.

It may not be the best solution.

We have had no submissions on this point.

¹⁰ “Inside the Ombudsman’s Office”
<http://www.ombudsman.parliament.nz/ckeditor_assets/attachments/480/inside_the_office_of_the_ombudsman.pdf?1494215216> 4 May 2017.

And nothing could be more important in protecting the people against corruption.

Strengthening Institutions

There are other ways in which there is congruence between the move to a written and codified constitution and Transparency International New Zealand.

Strong state institutions are critical to promoting respect of the public.

We think the constitutional position of the public service needs constitutional protection.

The current state of the New Zealand public service is not satisfactory.

I have been saying for some years now there needs to be a Royal Commission into it. But more than that there needs to be cemented into the Constitution some principles that protect it from total ministerial control.

There has been an absence of free and frank advice offered to ministers in recent years.

If ministers do not receive free and frank advice there is a real risk that this will promote a tendency to politicise the public service and endanger its independence, thereby adversely affecting the quality of advice given and decisions taken.

The public service should not be seen as a tool of the government of the day used to justify policy decisions; rather, an independent service working for the good of the country as a whole.

The public service should serve up various options for dealing with issues and the ministers should choose between them. That is how a public service in the Westminster is supposed to work.

Here is what we propose for the Constitution:

26 The public service

- (1) The public service recognised by this Constitution is the public service in existence before this Constitution entered into force.
- (2) The public service is a career-based service, where appointment and promotion is on professional merit.

- (3) The first duty of the public service is to act in accordance with this Constitution and the law.
- (4) The public service must be politically neutral and impartial and must serve loyally the Government of the day.
- (5) The public service must provide ministers with free and frank advice.
- (6) The public service must uphold the concept of stewardship, that is active planning and management of medium- and long-term interests, along with associated advice.
- (7) The public service is headed by the State Services Commissioner, appointed by a resolution of the House of Representatives after receiving a recommendation from the appropriate select committee of Parliament.
- (8) The Commissioner makes decisions independently of ministers and is the employer of chief executives of departments and ministries of the public service.
- (9) An Act of Parliament in accordance with these principles provides for the public service and the wider state sector and the purposes of that Act are to promote and uphold a state sector system that—
 - (a) is imbued with the spirit of service to the community:
 - (b) provides free and frank advice to the Government:
 - (c) administers the policies of the Government:
 - (d) maintains high standards of integrity and conduct:
 - (e) maintains political neutrality and impartiality:
 - (f) is supported by effective work force and personnel arrangements:
 - (g) is driven by a culture of excellence and efficiency: (h) fosters a culture of stewardship:
 - (i) requires public servants to act within the law.

We think this could be improved and seek your help with that given your special vantage point.

There are other aspects of the draft Constitution that strengthen institutions.

Provisions concerning other key institutions specified in the Constitution include the Police, the Intelligence Agencies, the Ombudsmen, the Parliamentary Commissioner for the Environment and the Auditor-General.

You may wish to give attention to those provisions as well.

A word about political parties which are important institutions.

In many parts of the world political parties are corrupt.

Transparency International reports that these are the most corrupt institutions internationally as found by their surveys.¹¹

Many of them, even in Europe, are widely regarded in this way.

It would be prudent in New Zealand to ensure that we have sufficient regulation and oversight over political parties to ensure they do not develop corrupt tendencies in New Zealand.

The degree of regulation is light.

The recommendations on these matters by the Royal Commission on the Electoral system in 1986 that led to MMP should be revisited.

The rules of parties need more outside scrutiny.

Stronger Protection of Human Rights

On the human rights front we proposed entrenching the provisions of the existing New Zealand Bill of Rights Act and adding a number of new rights. These are

- an environmental right
- a property right
- a right to privacy
- a prohibition on slavery and servitude
- a right to free education at a state primary or secondary school
- a right to equality before the law

In the last 26 years of experience with the 1990 Bill of Rights the New Zealand

¹¹ <<https://www.transparency.org/gcb2013/report/>>.

Parliament has passed legislation contrary to the Bill of Rights on at least 37 occasions.

Some of those occasions have involved serious incursions into human rights.

Do you remember this instance?:¹²

... in 2013 Parliament enacted the New Zealand Public Health and Disability Amendment Act in a single sitting day. Its principal effects were first to prevent anyone ever making a complaint to the Human Rights Commission or bringing a court proceeding against any Government family carer policy no matter how discriminatory, and second, to exclude retrospectively the provision of remedies for past discrimination. It followed a decision of the Court of Appeal that had upheld the human rights of some of the most vulnerable people in our community—the disabled and family members who cared for them. There was no warning that the Bill was to be introduced; there was no public consultation on it; there was no Select Committee consideration of it. By any measure, it was a shocking piece of legislation that ousted well-known constitutional protections and removed New Zealand citizens' rights to be free from discrimination in certain cases. Yet it passed in a single sitting day despite almost immediate public outcry. Only another Act of Parliament can alter or remove it. That is how fragile our constitutional system currently is.

We think the Bill of Rights should not be capable of being over-ridden, except by a majority of 75 per cent of MPs after a judgment from the Supreme Court.

That is similar to the way we currently protect the vital democratic provisions of the Electoral Act, such as the secret ballot and we have done since 1956. It is either a 75 per cent majority in Parliament or a simple majority in a referendum of the voters.

If politicians think that they should not trust the electoral system to a majority of one in the Parliament, why should the populace entrust their rights to a majority of one on other issues of vital importance to them and to the whole

¹² The indented passage is from our book, describing the events that followed *Atkinson v Attorney-General* [2012] 3 NZLR 260 (CA).

system of governance?

Minority rights and fundamental values need better protection than they receive in New Zealand at present. And as we know respect for human rights makes an important contribution to transparency.

Conclusion

We think a written codified Constitution would improve New Zealand's system of government. It would make it clearer who has what power. It would remove much of the mystery and uncertainty. It would improve knowledge of how our democracy works by providing a readable single document. It will enable the public to know what the rules are that apply to ministers, parliamentarians, and the public service. A Constitution can make an important contribution to achieving the aims of Transparency International New Zealand. A healthy democracy requires democratic renewal. Please make a submission.