

The Constitution and the Public Service

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The public service in a “Post Truth” age

The problems confronting New Zealand in the future will be harder to solve than they have been in the past. The thinking has to go beyond the triennial election cycle. A parliamentary term of four years would be better than a three year term, if we had more constitutional checks and balances. Think climate change and the transition to a low carbon economy. The challenges facing the public service have never been greater.

The Oxford Dictionaries of both Britain and American announced recently a joint US-UK word of the year “post-truth.”¹ The new word, an adjective is defined as

...relating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeal to emotion and personal belief.”

This condition has been described as a political culture in which politics have become entirely disconnected from policy and substance.²

Because of the “Post-truth” politics that seems to be enveloping many of the countries with whom we compare ourselves. Vigilance is required. Greater care is required in an age in which the New Zealand media is breaking, if not yet broken. Parliament, politics and public policy are often reported in the media in ways of stunning superficiality.

In a recent letter to the editor of the *Dominion-Post* Dr Kerry McDonald, the economist and company director, gives it as his view that the public service will

¹ *The Daily Telegraph* on-line edition, 16 November 2016.

² Nicolas Ross Smith “The Trump phenomenon proves that electoral politics has failed. Time to try something new”

<http://thespinoff.co.nz/politics/11-11-2016/the-trump-phenomenon-proves-that-electoral-politics-has-failed-time-to-try-something-new/>

not be “effective, efficient or credible until there is a revolution.”³ He thinks it has been a shambles for far too long, resulting in adverse consequences:

“Performance is often mediocre with frequent failures, but performance management of its leadership is poor or non-existent. It makes little contribution to public debate on policy and seems more subservient than strategic or visionary. I see no sign of “free and frank” advice and “no surprises” is a noose around its neck.

The Ombudsman’s report on the Rebstock-Rennie debacle is frightening. Fundamentally, it is a senior leadership problem.”

In my view there does exist a serious set of issues in this space.

The public service and the wider state sector comprise a vital part of our system of government. The health and wellbeing of our public service and public sector goes to the very heart of our wellbeing as a nation, a topic of pervasive constitutional importance. We have a long tradition of a politically neutral, incorruptible, competent and far-sighted public service.

The public service in New Zealand has a long and proud history. But it is neither as strong or resilient as once it was. The culture, leadership and spirit of those involved are critical factors in producing a high quality public service. Serious problems beset our public sector that must be addressed in a principled and comprehensive fashion.

Fundamental principles need to be re-asserted. The public service belongs to the public. It is not an exclusive plaything of ministers. We need to protect its integrity and its quality. In 2014 “The Dominion-Post” ran an op-ed piece of mine calling for a Royal Commission into the public sector and giving 14 reasons in support.⁴ It was a theme I had developed in some detail in my 2013 memoir *Reform*.⁵ The conclusion was:

³ Letter to the Editor, Kerry McDonald “Stale Civil Service” The Dominion-Post 16 November 2016, A8.

⁴ Geoffrey Palmer “Why the Public Service Needs Review” Op-ed article *The Dominion-Post* 25 February 2014.

⁵ Geoffrey Palmer *Reform-A Memoir* (Victoria University Press, Wellington,2014) 720.

There needs to be a Royal Commission into the public service to refurbish it and clarify the principles upon which it is based, including political neutrality. The structures need attention, and the need to develop more strength at the centre needs consideration. The way in which management theories are implemented in the public service needs analysis.

I believe still that to be the case. We had such Royal Commissions in New Zealand in 1912 and 1962 and both of them served us well. They produced enduring and beneficial change.

But the theme we are promoting here today is slightly different. It is that the public service and its values need constitutional protection to avoid their being lost. Constitutional protection means setting out the principles and making them more enduring so they cannot easily be whittled away.

A written Constitution

Andrew Butler and I are calling for a codified written constitution in New Zealand for three principal reasons. First, because the current constitution is hard to find, it does not exist in one place and important elements of it are too vague.

The most fundamental aim of this project is to state the Constitution in one place so that it is certain and accessible for everyone. The unfilled spaces in our constitution need to be coloured in. People should be able to know and see the rules that govern those carrying out public duties. People should know what their fundamental rights are and how to enforce them. A single basic law, accessible to all, allows that to occur. In this regard we echo the words of Professor Robert Blackburn of King's College, London, who has been of great assistance to us in this project:⁶

The primary argument for a written constitution is that it would enable everyone to know and see what the rules and institutions were that governed and directed ministers, parliamentarians, civil servants, and all senior state officials and public office holders, in performing their public

⁶ Robert Blackburn "Enacting a Written Constitution for the United Kingdom" (2015) 36(1) Statute Law Review 1 at 3.

duties.

But we go further in two respects. We want to preserve much of our current constitutional tradition in a supreme law constitution so that it cannot be whittled away. Second, we think that some features of our current constitutional arrangements are simply not fit for purpose in the political and social realities of modern New Zealand. That needs to change. New Zealand needs a constitution fit for the modern age.

There are underlying structural issues in the way the public service is administered which create problems for effective governance. Departments have been endlessly restructured on an ad hoc basis, resulting in massive discrepancies in size and resources which do not correspond to need. There is also a distinct lack of central organisation that has exacerbated the silo effect occurring between departments. This causes a lack of coordination, cooperation and communication between departments.

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 and adversely affect 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 the system is supposed to work.

Related to this is a tendency to think about legislation and policy only in relation to the three-year election cycle, rather than looking beyond to the possible long-term effects of a decision. This reflects a wider issue with the way that legislation design has been approached in recent years. We need legislation to be more rigorously developed in order to deal with the problems confronting New Zealand in the future which will be harder to solve than they have been in the past. The future gets short changed in our existing system.

The 2013 changes to the State Sector Act made the law less coherent. The principles upon which the public service is meant to operate are unclear and difficult to discern. Given the increased difficulties and complexities of policy design, much higher standards are required than ever before. We need to future-proof the New Zealand system of governance against many challenges. We need to avoid future policy failures such as are disclosed in the Kitteridge Report on the Government Communications Security Bureau, the leaky homes

saga, Novopay and the Pike River Disaster. These policy failures indicate that improvements are needed. We could also do better on emergencies flowing from earthquakes.

Not all the ills outlined here can be addressed in a Constitution. Some are for the Royal Commission mentioned above. But the main principles that have been tried and tested in the Westminster tradition can be and should be embedded in the Constitution so that they are preserved and protected.

The Constitution we advance contains other checks and balances that are of significance to the public service, such as changes to the Official Information Act and the processes for making law.⁷

Here is the text of Article 26 that we propose relating to the public service:

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

⁷ Geoffrey Palmer & Andrew Butler *A Constitution for Aotearoa New Zealand* (Victoria University Press, Wellington, 2016) Article 26, p43-44.

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 an effective workforce 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 want to know what you think about these proposals. We are taking submissions so we can produce a better and more refined version of our proposals. Please help us.

Make a submission on our website:

www.constitutionaotearoa.org.nz