A CONSTITUTION FOR AOTEAROA NEW ZEALAND:
What does it hold for the public sector?

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In the first article in our new Books section, Miriam Bookman considers Geoffrey Palmer's and Andrew Butler's* A Constitution for Aotearoa New Zealand *(VUP, 2016).

The case for a written constitution has been a hot topic of academic discussion and many a public law essay for as long as anyone (or at least an IPANZ new professional like myself) can remember. In *A Constitution for Aotearoa New Zealand*, Sir Geoffrey Palmer and Dr Andrew Butler raise the stakes further by comprehensively setting out the content of their ideal Aotearoa New Zealand constitution, and the reasoning behind their proposals.

Palmer and Butler argue that under our current arrangements, constitutional law is inaccessible, vulnerable to political whim, and outdated. This is fair criticism. It is uncontroversial to say that the average New Zealander is unaware of our constitutional arrangements, and that most could not tell you the last time the constitution was amended (under urgency in a single sitting of Parliament!). That a politics or law degree is required to understand New Zealand's constitutional arrangements is not only a failure on New Zealand's part to cultivate any kind of meaningful civics education, but also a testament to the confusing nature of our constitutional arrangements.

The authors paint a damning picture of the current state of the public sector. The book notes, "The public sector in New Zealand has a long and proud history. But it is no longer as strong or resilient as it once was…serious problems beset our public sector that must be addressed in a principled and comprehensive fashion".

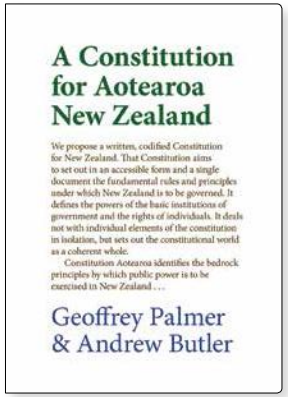
The book attributes this sorry state to a number of failings: ad hoc restructuring; politicised advice; short-term policy development; and incoherent underlying principles. The authors are not shy to criticise the structures that underpin the public sector of today.

Although not discussed in the book, an Ombudsman Report into the State Services Commission's investigation of former diplomat, Mr Derek Leask, is illustrative of these problems. The Report described the sorely deficient nature of the investigation and recommended a public apology be made and compensation be paid. While it is positive that the Ombudsman acted as a safeguard in making these crucial findings and that the Government and State Services Commission accepted them, the Report could have easily been disregarded by the whim of Government. It reflects the worrying culture discussed by Palmer and Butler.

The authors confess that their proposed solution to the long list of public sector woes is in no way a comprehensive fix-all, and consequently call for a Royal Commission of inquiry. However, they include in their written constitution an article dedicated to the public service and its underlying principles:

Article 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 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.

These expectations set out, in one accessible location, a high standard of conduct. They place an emphasis on an impartial and politically neutral public sector whose overall duty is to the constitution and the law. The article demands that a State Sector Act (or equivalent) embody these purposes and values. State Services Commissioner Peter Hughes has previously described the public sector as "a constitutional artefact… to be protected and nurtured". Here, Palmer and Butler are doing just that.

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The specific principles listed in subsection 9 are a reinforced and strengthened iteration of the purposes set out in section 1A of the State Sector Act 1988. One of the purposes in the State Sector Act is "maintaining appropriate standards of integrity and conduct", whereas under the proposed constitution, the public sector must "maintain high standards of integrity and conduct." The expectation of offering "free and frank advice" is adapted from section 32 of the State Sector Act. Currently, this duty is only explicitly imposed on chief executives. The proposed constitution would unequivocally imbue the entire public sector with this duty.

It is also no mistake that "free and frank advice" is mentioned twice in article 26. This is a deliberate re-emphasis that tendering free and frank advice lies at the heart of a successful public sector.

These (among other) changes to the State Sector Act, and their incorporation into the constitution, create more vivid expectations of the public sector as a body of high operational and philosophical standards.

But what, if anything, does including these aspirational statements in a constitution actually do? The first thing to note is that article 26 is no silver bullet. However, there are a number of benefits that constitutionalising public sector principles will inevitably bring.

For a start, having New Zealand's constitution codified will make it accessible. At present, due to its unwritten form, finding the entire New Zealand constitution is a bit like finding ten different needles in ten different haystacks. It follows that, by including principles of the public sector in a centralised form, and in the pithy language of article 26, the principles will be more widely known. This is likely to be true both inside and outside the public sector – one could imagine article 26 framed and prominent in many government offices. Awareness of the principles would foster a public sector culture that meaningfully upholds them.

A powerful tool

Second, Palmer and Butler's proposed constitution gives the courts a strike-down power, meaning that Parliament could not make legislation inconsistent with article 26. Anything of a lower standard could be challenged and consequently struck down by a court. The principles in article 26 therefore set the standard for any piece of legislation that references the operation of the public sector (such as the Public Finance Act, Crown Entities Act, State Sector Act). This would be a powerful tool to ensure that legislation constituting the public sector is kept in check with the high standards that one expects from our public service. Moreover, the proposed entrenched nature of the constitution would mean that these fundamental principles are protected against a bare majority of Parliament. They would be secured for a very long time, or permanently.

Giving sharpened legal status to the principles of the public sector could also result in heightened judicial scrutiny of government decisions that are made contrary to the principles. For example, enshrining free and frank advice in the constitution could mean that if a decision is made on the basis of advice that is neither free nor frank, that decision could be challenged. On the one hand, this could open up departments to frivolous claims that are politically motivated, particularly if judicial scrutiny is used as a tool to challenge the substance of policy decisions. At worst, this could also result in a chilling effect of quality advice that is hamstrung by overly cautious civil servants. However, we can take comfort that a court would set a high threshold for substantive review. Given the courts' deferential nature to political decisions, we can expect substantive review to take place only in circumstances of highly egregious conduct. In any case, one should not be put off by more robust legal recourse for decisions that are made contrary to the high standards we expect of our public sector.

These benefits then beg the question: would the deeply flawed investigation carried out on Mr Leask have occurred in an alternative Aotearoa New Zealand, where the high standards of public service are enshrined in a written constitution? While I cannot answer with certainty, it is at least entertainable that the embedded culture in the public sector that Palmer and Butler are concerned with might shift, just enough, in a way that would not have tolerated the kind of investigation that was carried out. More importantly, perhaps, we would not need to rely on the Ombudsman's discretion to investigate, and the government's discretion to ignore findings and recommendations.

A written constitution is not a cure-all. However, it is undeniable that improving and enshrining fundamental standards of the public sector would at least somewhat address the issues discussed above.

A Constitution for Aotearoa New Zealand is a good read for any New Zealander who cares about their individual rights and our collective values. Beyond that, it is also an important tool, and conversation starter, in considering what our constitution should look like, and the values that it should embody. While the codification of the public sector is but one small facet of this, if adopted, this particular proposal has the ability to make substantive positive change to the future quality of policy-making in New Zealand.

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