PUBLIC SERVICE LEGISLATION

Sir Geoffrey Palmer QC
Distinguished Fellow, Victoria University of Wellington
Faculty of Law and Centre for Public Law
Global Affiliated Professor, University of Iowa

Notes for Contribution to Panel Discussion on New Public Service Legislation Bill

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The Public Service Legislation Bill raises many issues of real significance.

This is a voluminous Bill with interesting architecture- seven parts, numerous sub-parts and 11 Schedules. Many words, and they all have to be read carefully.

In such a Bill important provisions may not be evident at first. For example, consider Clause 8 of Schedule 6, concerning Long-Term insights briefings, in which sub-clause (2)(b) says the purpose of the briefing "is not to express either agreement or disagreement with any particular policy or policy option." Seems a strange sort of briefing to me! Is this "free and frank advice"?

There are so many issues contained in this Bill I will have to be highly selective.

We are in Wellington, where such legislation is regarded as being important. This is a city of government and of constitutional "tragics". Is there any interest or awareness of this Bill in Auckland?

The public service is never going to be an issue of widespread popular concern, despite its constitutional importance. Such is the state of our civic culture.

The State Sector Act 1988 is more than thirty years old. Some of us here can remember what it was like to be present at its creation. The public sector reforms of those days generated considerable interest overseas, on account of their innovation.

What I mourned the most about that legislation was the early repeal of the Senior Executive Service provisions.

But the caravan moved on and the system evolved, as it inevitably would. And the way the 1988 Act works now is not the same as it was at the beginning. Of course, administrative fashions and theories change and many of them do not last.

It is a sound idea to revisit the Act. Some serious weaknesses in public administration have emerged over time. Some of them can be traced to the 1988 Act but the origins of others are not so clear, and some are not due to the legislation at all.

In 2014, I expressed the view publicly that the State Sector Act 1988 should be re-thought. It was my view that this was best done by a Royal Commission, as had preceded both the 1912 Act and 1962 Acts and even in 1866! But no such policy process preceded the 1988 Act.

Whatever the merits or defects of the policy process that led to the introduction of the present legislation, it is important to discuss it in a practical way. This is legislation that must work and work well.

It is a fundamental truth that the production of a high-quality statute will not necessarily produce an excellent public service.

The legal powers and framework contained in such legislation are distinct from the manner in which it works. Law cannot produce the desired culture, the necessary resources and leadership.

Good statute law is a necessary ingredient for success but not a sufficient one.

There is a tendency in New Zealand to try and do too much via law and then be disappointed when it does not work as intended.

It is of course the unintended repercussions of human actions that provide many policy problems.

The optimal performance of this set of legislative proposals depends to an important extent on Ministers. Yet this legislation does not and cannot set standards Ministers have to meet, only public servants. For ministers such issues are in the hands of the electorate.

In the final analysis, however, when the statute is passed, its words can only be authoritatively interpreted by the courts. This creates issues for legislation like this that attempts to state fundamental principles.

Inevitably that the statutory statement of principles will fall to be interpreted and the court’s interpretation will be binding and enforceable.

The purpose of the proposed Public Service Act, contained in the Public Service Legislation Bill, clause 9 states:

> *"The public service supports constitutional democratic government, enables both the current Government and successive governments to develop and implement their policies, delivers high-quality and efficient public services, and supports the government to pursue long-term public interest, and facilitate active citizenship."*

Hard to argue with that and active citizenship is devoutly to be wished for. I wonder, however, how clause 9 may relate to clause 3. This states the purposes of the Act, not the purpose of the public service. Clause 3 makes the point that the purpose of the Act is to continue to modernise the operation of the "public service" as clause 9 does. Clause 3 also mentions the "non-legislative conventions" that the public service operates under.

Here is an issue. Those conventions are not law. The Cabinet Manual makes a useful attempt to state many of them. How will legal cases that interpret the meaning of the conventions fare? The task is not impossible, but it is not easy. And it will be new for the New Zealand courts should it arise.

The legislation also contains in clause 10 five principles that will govern the public service. And they will not always be easy to interpret in particular factual circumstances. These include:

- to act in a politically neutral manner
- when giving advice to Ministers, to do so in a free and frank manner
- to make merit-based appointments
- to foster a culture of open government

- to proactively promote stewardship of the public service

This last provision includes a number of matters, long term capability, institutional knowledge and information, systems and processes, assets and legislation administered by agencies.

These principles are drafted in a spare manner, almost as bumper stickers, possibly to avoid providing too much scope for interpretation that may result if they were fully spelt out.

Clause 11 enacts "the fundamental characteristic of the public service is acting with a spirit of service to the community."

Clause 12 imposes important obligations concerning the Crown's relationship with Māori.

Clause 14 sets out public service values, which are impartial, accountable, ethical, respectful and responsive.

Clause 20 provides that all public servants have the rights and freedoms contained in the New Zealand Bill of Rights Act 1990. What about all the other law that benefits them?

The principles are welcome. Their novelty will change things more than a little in my view. Their interpretation in specific fact situations may be challenging.

One fundamental topic that is missing from the package a principled commitment to the rule of law. Public Servants should be under a strong obligation to follow the law. Please put it in.

Ministerial responsibility lies at the heart of the Westminster system. I think that perhaps should be stated in the law at this point, if all these other principles are. It is a pivot upon which political accountability rests.

One worrying aspect of this legislation is the effect some of the changes could have in muddying accountability and diminishing ministerial responsibility.

Many of the provisions up to and including clause 20 are forward looking and helpful. And I support them, despite the interpretive challenges outlined above.

We must not be afraid of change.

The courts are not going to monster the public service.

They have dealt sensitively over a long period with legislation containing Treaty of Waitangi issues.

The principles in this legislation are no harder and in political terms may be easier.

It is in many ways the legislation creates a new world, but I believe we should travel there.

I am much more reserved about Parts 2 and 3 that establish a host of new features such as inter-departmental executive boards, interdepartmental ventures and joint operational agreements, leadership teams and advisory committees.

Then there are these new Functional Chief Executives. I worry about them from an accountability angle. There could be clutter at the top.

Putting administrative matters in legislation does not appeal. It could easily lead to difficulties. For example, clause 38 limits the enforceability of joint operational agreements. Why then put them in the law at all?

I well understand the need to get rid of the silo effect, but the risk here is the creation of bureaucratic entanglements that will cause high transaction costs.

The aim is admirable, but I wonder why interdepartmental committees cannot perform many of the same functions more easily. They do not appear to be used as much as they once were. They do not need legislation.

It is best to keep such things as simple as possible.

Administrative frameworks are one thing, legal frameworks another.

I have one fundamental objection to the Bill as it now is. I do not believe the State Services Commissioner should be one person. I think the former pattern of a three-member Commission is better and New Zealand should return to it.

Concentration of power in one person in a stronger centre seems undesirable. Key decisions and recommendations to Ministers from the Commission will be better tested by a collective responsibility of three.

And a three-person Commission would enhance the mana of the Commission with the rest of the public service. Further, the quantity of work resulting from this legislation is too much for a single person to supervise.

The creation of public policy faces wicked and complex problems in the medium and long-term future. Getting it right is much more difficult than once it was. Think climate change as a prime example.

There is a problem in New Zealand about the need to ensure that decision making at the political level takes a longer view than the next election. We are deficient in futureproofing ourselves.

Furthermore, the cult of management that has afflicted the New Zealand public service results more from more management theory than from the 1988 legislation. The theory is that managers can manage anything whether they know anything about the substance or not. Such has not been my experience.

The decline of the tradition of providing free and frank advice is serious. And it will not be easy to fix. I hope that the situation will be improved with this legislation. But what do you do with a Minister who does not want free and frank advice and sends it away the moment it arrives in his office? The terms and conditions of employment for chief executives in the Bill do not militate in favour of “free and frank” advice. And does it apply to the Commissioner?

I also think that the unattractive nature of the Chief Executive's job these days means that many able people do not want to apply. Too much staff churn.

There have been far too many restructurings of departments, yet no one has looked at the overall government departmental structure for some years. I favour 20 departments for 20 Ministers.

Further, there is inadequate training in much of the public service and less than there was in years gone by. And in my opinion, a weak centre has lost its way. There have been increasingly serious policy failures. Think Pike River, building deaths in earthquakes, leaky buildings and the housing crisis.

This project aims to strengthen the constitutional role of the public service. It cannot be over-stated how important the role is to a free and democratic society.

In conclusion, let us wish this new legislation well after it has been rigorously scrutinised and changed in the House, but let us also remember there is a vast field of Crown entities and other organisations mentioned in the Crown Entities Act that need urgent accountability attention as well. There is some of this in the Bill but not enough.