9 Safeguards

Public power can be an incredibly coercive and destructive force if used arbitrarily or for improper purposes. In order to minimise the possibility of that occurring, New Zealand has adopted a system of checks and balances within our democratic system to maximise accountability and transparency so as to ensure that those wielding the power in our country cannot abuse it. The Constitution aims to strengthen that system.

This chapter discusses a number of institutions that play a vital role in maintaining those checks and balances which we believe are worthy of constitutional protection. It needs to be understood that the Constitution cannot contain everything that is desirable, as we explain in chapter 13. What we do here is outline the key normative values to be protected by some of the key institutions.

In order to protect the public and democracy from abuses of power by the State, we propose to include in Constitution Aotearoa the existing institutions of the Ombudsman, the Auditor-General, Parliamentary Commissioner for the Environment and the police.

We also recommend:

- setting up a new independent Information Authority to restructure the administration of official information and improve transparency: **Article 114**
- including certain principles in the Constitution to reinvigorate the public service and protect its values: **Article 26**
- reinforcing the constitutional significance of the offices of the Attorney-General and Solicitor-General: **Article 107**
- a revised approach to, and more transparent oversight of, the intelligence agencies: **Article 109**
- constitutional protection for local government: **Article 110**
- establishing a new Constitutional Commission to review the Constitution every 10 years and report upon possible amendments. **Article 117**

Separation of powers

Earlier we dealt with the distinctions between the legislative, executive and judicial functions of government. The principle mandating their separate functions is known as the separation of powers. This principle is at the heart of our legal system, alongside other principles including the rule of law. Our proposed Constitution supports and strengthens these keystone principles.

The three great branches of government in New Zealand—legislative, executive and judicial—should, and do, perform separate functions so that power is not concentrated in one person or group but divided to ensure that none have total control over the citizenry. The separation of powers is an important safeguard when designing constitutional arrangements.

There clearly needs to be some degree of separation and division between the Government and Parliament on the one hand and the courts on the other.[1] A concentration of power in one group or one person always presents dangers. Where power is divided between several groups, such dangers will be reduced as each branch of government watches over the others. Divisions of power contribute to both good governance and the legitimacy of the exercise of public power.

However, in New Zealand we do not have pure separation of powers and indeed that would be impossible; Parliament and the Executive are fused to some degree since the Cabinet Ministers who make up the Executive must be Members of Parliament.[2] Thus those who enforce the law can also be described to some extent as those who make it, as the party in power at the time usually has a majority in the Legislature to pass the laws that they want enacted. This has been curtailed somewhat by the introduction of MMP; since 1996 no single party has held an outright majority in the House of Representatives and must therefore negotiate with other parties to pass legislation. This produces some degree of protection against concentrations of power.

1 MJC Vile *Constitutionalism and the Separation of Powers* (2nd ed, Clarendon Press, Oxford, 1998).

2 In this we are no different from most Commonwealth countries, including Australia, Canada, the United Kingdom, and most continental European countries.

Practically, we cannot have either complete separation or complete fusion of powers. Some coordination of the various policies and administration in government as a whole is necessary; it would be impossible with complete separation of powers. Complete fusion, on the other hand, would tend to produce tyrannical government. The trick is to get sufficient coordination between the branches, but not so much that it becomes oppressive and unresponsive to the wishes of the public.

Checks and balances

An important part of the framework of government is the system of checks and balances in place. As part of its functions, each branch of government has various means of ensuring that the other two branches do not abuse their powers. For example, the courts can judicially review decisions of the Government to ensure that they were made in accordance with the law set by Parliament; at the same time Parliament can pass a law to overrule a decision of the courts.

However, the checks against excessive, unfair or unprincipled use of public power in New Zealand provided by the three branches of government against one another are sadly insufficient in a modern democratic society. In order to protect vital democratic freedoms and values, there is a need for other institutions that provide a further, supplementary check against arbitrary uses of public power by the various branches of government so as to ensure:

- accountability for decisions taken by central government:
- government is open and its decisions transparent:
- the machinery of government acts with integrity and high ethical standards:
- government decisions are lawful and the values of the rule of law are protected:
- public money is not misused or stolen:
- there are avenues for people with grievances against public officials and decisions to have their complaints examined by an independent person.

In New Zealand most of the institutions necessary to provide these safeguards already exist, but Constitution Aotearoa offers them a constitutional status to protect their existence. The aim is to maintain healthy governmental institutions over the long-term.

Continuing institutions

There are various institutions which our Constitution proposes to continue or be strengthened in order to help preserve democracy. Among the institutions we propose to continue are the Ombudsmen and the other officers of Parliament, and the police service.

The Ombudsmen and the other officers of Parliament

Article 111

The Ombudsmen are appointed by Parliament to investigate grievances with local and central government. Their services are free and available to everyone.

Their investigations act as a check on the power of the Government. The Ombudsmen are appointed as officers of Parliament,[3] which means that they are Parliament's people and owe no allegiance to the Executive Government, whose activities they are primarily involved in investigating. Even their funding decisions are made by the Officers of Parliament Committee rather than by Cabinet. They are usually appointed for five-year terms. The names have to be approved, by convention, by both the Opposition and Government caucuses before being submitted to Parliament for approval.

The Ombudsmen can investigate complaints made to them by members of the public, or can, on their own initiative, investigate any administrative decision, recommendation, act or omission of government departments, related organisations and local authorities affecting a person individually. A large number—nearly 100—other organisations connected to Government (including state-owned enterprises) are also subject to the Ombudsmen.[4]

3 Ombudsmen Act 1975.
4 See the Schedule to the Act for a complete list.

Once an investigation has been carried out, the Ombudsmen must decide whether the decision was made fairly. The Ombudsmen have no power to alter decisions; they simply investigate and report on them.

The introduction of the Ombudsmen in 1962 has had a healthy effect on decision-making within the New Zealand government. New Zealand was the first non-Scandinavian country to provide for an Ombudsman. The office plays an important role in checking the use of public power in our country and it deserves constitutional protection.

Similar arguments can be made for the other independent officers of Parliament: the Auditor-General keeping a close watch on the expenditure of public money, and the Parliamentary Commissioner for the Environment, whose objectives are to maintain and improve the health of the environment, review government policies and report on them, investigate planning and environmental management and report to the House of Representatives. The proposed Constitution provides constitutional protection for them as well.

Article 112, 59

The police service

We are unusual in New Zealand in having a single, nationwide police force. They do not have one in the United Kingdom, Australia or Canada and it would be unthinkable in the United States. From a practical point of view, much of the coercive power of the state as it impacts on the daily lives of people is exercised by the New Zealand Police. They are the people entrusted to go amongst the public and enforce the law, protect property, maintain order and keep the peace. They have a wide mandate to carry out these duties, and with significant discretion.

Accountability for the exercise of great powers is vital. For many years the Police were accountable only to the courts. This caused significant problems as people who felt they had been wronged often could not afford to take claims before the courts and press their case. This led to a serious lack of accountability, something which often fosters mistrust of police in communities. There are sound reasons why ministers should not control large aspects of police operations, but the old mechanisms of

Article 108

accountability through the courts proved insufficient. This led to the establishment of the Independent Police Conduct Authority in 1988. The Authority is an independent body that is responsible for considering and investigating complaints against the police and overseeing their conduct. It is a necessary and important watchdog on the use of police power as it affects people in individual cases. The Authority receives about 2,000 complaints a year from members of the public, which it investigates or refers to others for investigation depending on the severity of the complaint.[5] This is a much more accessible mode of accountability than the previous system.

Our proposed Constitution expressly recognises the importance of an accountable police force, setting out the principles that govern the police and providing for their accountability through the constitutional recognition of the Independent Police Conduct Authority. It also preserves the principle of constabulary independence which prevents directions being given about whom to apprehend and prosecute.

Strengthened institutions

Official information

New Zealand has had an Official Information Act since 1982 and it has made much more transparent the decision-making of the Government.[6] The former State Services Commissioner Dr Mark Prebble remarked in 2010 that 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] The Act was groundbreaking in its day and there was

5 For example, see Clio Francis "Suspect's death prompts review" *The Dominion Post* (New Zealand, 25 January 2013).

6 The Act applies to all government departments, ministers, and most government entities (such as the Police Service). It does not apply to MPs, the courts, tribunals, Royal Commissions, and other inquiries, or to the Parliamentary Service Commission. (Ministers must therefore be clear about when they are holding information as ministers and when they are holding it as MPs).

7 Television interview with Dr Mark Prebble, former State Services Commissioner (*The Nation*, TV3, 3 April 2010) as cited in Law Commission *The Public's Right to know: Review of the Official Information Legislation* (NZLC R125, 2012) at [2.2].

nervousness about how it would impinge upon the activities of the Government. After all this time many ministers and their advisers remain suspicious of the Act and nervous about the political consequences of the release of information. There are good reasons why not all information should be released, but that is not an adequate justification for the manner in which the Act is currently approached within Government.

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.[8] She made 48 recommendations for change but these were strictly confined to administrative and other practices within the bureaucracy as to how improvements could be made. 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 30 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. Change is needed and the Constitution requires that the Ombudsmen no longer be the sole resolvers of disputes with regard to the release of official information. The time has come for an independent Information Authority to be established, one with the power to make binding decisions upon questions relating to the release or withholding of official information.

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 ministers the Act tends to lack support and acceptance. Some simply defy its requirements. Some public servants do not like

8 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).

the Act either. Successive governments have resisted efforts to improve the Act. However, the Act provides invaluable protection against corruption and questionable decision-making in both central and local government. The legislation needs to be strengthened.

The Law Commission in a 2012 report completed a comprehensive and excellent review of the Official Information Act.[9] The Commission made 137 separate recommendations concerning reform of the Act. The Government published its response to the Law Commission's report soon after.[10] 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.[11] It rejected any recommendations which could have instituted actual change. Rejected recommendations included proposals to extend coverage of the Official Information Act to the offices of Parliament—the Parliamentary Counsel Office, 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. 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. But a constitutional principle requiring a new Information Authority to take the place of the Ombudsmen in

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

10 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.

11 The Government accepted the recommendations that the administrative functions of the courts be incorporated, including information about expenditure, resources and statistical information about the court cases; it accepted new commercial protection be provided where material prejudice to competitive positions or financial interests could result; and it accepted the need for clarification of the relationship between official information and the Privacy Act.

making decisions under the revised Act means:

- removing the Cabinet veto on releasing information:
- producing a certain and predictable set of guidelines that will reduce uncertainty:
- allowing for appeal to the courts on a point of law.

Article 114

Restructuring the administration of official information in this way would allow the policy functions for the Information Authority, as recommended by the Law Commission, to be placed under one roof so that what is learned in one arm of the office's activities could reinforce the activities in the other arm. The independent Information Authority should be entrusted with both the complaints function and the oversight function. The new model would be along the administrative lines enacted by the Commonwealth of Australia in 2010 in the Australian Information Commissioner Act 2010.

Increased access to official information is important for any number of reasons, not least because:[12]

- 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.

12 Committee on Official Information *Towards Open Government* (Wellington, December 1980) vol 1 General Report.

The 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. We have had two Royal Commissions of inquiry into the public service in 1912 and 1962. We need another now; serious problems beset our public sector that must be addressed in a principled and comprehensive fashion. But that suggestion is not within the purview of a new Constitution so we discuss it no further.

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 concern 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 fit for purpose as the problems confronting New Zealand in the future (like climate change and the transition to a low-

carbon economy) will be harder to solve than they have been in the past. The thinking has to go beyond the three-year election cycle, in which serious issues can be brushed under the carpet.

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 and the many serious operational and policy failures of recent years, such as 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.

Article 26

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 nation, a topic of pervading constitutional importance. We have a long tradition of a politically neutral, incorruptible public service. The public service belongs to the public. We need to review the application of ministerial responsibility and accountability and strike a new balance between serving the government of the day, and serving the long-term interests of the public.

Not all the ills outlined here can be addressed in a Constitution. 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 most important of these are:

- the public service should be a career-based service where appointment and promotion are on merit:
- the first duty of the public service must be to uphold the Constitution:
- the public service shall be politically neutral and impartial and serve loyally the government of the day:
- the public service must provide ministers with free and frank policy advice whether they want it or not:

- the public service must uphold the concept of stewardship to plan for the long-term interest of the country:
- the State Services Commissioner, who oversees the public service, shall be appointed by Parliament and be independent from the Government.

The law officers and the rule of law

The Attorney-General is the senior law officer of the Crown and the Solicitor-General the junior law officer of the Crown. The Attorney is a politician and the Solicitor a public servant. They have very heavy responsibilities in their roles as law officers, providing legal advice to Government, running the system of criminal prosecutions, litigating cases brought against the Government and upholding the rule of law generally.

The positions are influenced by a number of important constitutional principles, including the idea that ministers do not make decisions on whom to prosecute. This rule was designed to preserve the separation of powers. Many of these necessary constitutional functions are already carried out now, with a degree of success, but we believe they need to be reinforced by the Constitution. It is important that the independent nature of the offices is preserved and that the fundamental functions of the offices are given protection by including them in the Constitution. To achieve this, we have:

Article 107

- ensured the law officers are charged to uphold the rule of law independently from Cabinet and that they shall provide legal advice to ministers and departments to ensure they act lawfully and conduct litigation brought against the State; and
- provided that no minister shall make any decision concerning whom to prosecute, giving the responsibility for that area of activity to the Solicitor-General instead.

The intelligence agencies

New Zealand, like most democracies, has intelligence agencies that operate in secret in many respects. In an age when worldwide terrorist activity is a big issue, these agencies are necessary to help protect the security of New Zealand, and the United

Nations sometimes even demands that the Government change our laws to conform with Security Council Resolutions. Our two lead agencies are the New Zealand Security Intelligence Service and the Government Communications Security Bureau (GCSB). They have been granted significant powers allowing them to spy on citizens and intercept their communications. It is important, therefore, that constitutional protections exist in relation to their activities in order to protect individuals against the possibility of an overzealous or illegal use of these particularly invasive powers.

A government review of our intelligence agencies conducted by two independent reviewers, Sir Michael Cullen and Dame Patsy Reddy, was completed in 2016. Their report was a thorough and comprehensive analysis, beginning from first principles, examining all the relevant security legislation and reporting on whether it strikes the appropriate balance between protecting future national security and protecting human rights, particularly intrusions into privacy.

The protection of human rights has to be strong and the intrusions limited to what is necessary to protect New Zealand security. On the other hand, robust intelligence agencies that carry out important work assessing the risks to the security of New Zealand are essential in the national interest and must be allowed to carry out their functions without undue burden from endless administrative and legal hoops. Ultimately in a representative democracy the agencies have to be answerable to Parliament. They need to behave in a more open manner than they do at present.

Article 109

We have drafted the provisions in the Constitution relating to the security agencies around the principles contained in the report of the Independent Review of Intelligence and Security in New Zealand published in April 2016. We think the principles set out there will protect the values of an open, free and democratic society.[13]

13 Report of the First Independent Review of Intelligence and Security in New Zealand *Intelligence and Security in a Free Society* [2016] AJHR G24a.

Local government

Alongside central government in most countries runs some form of local government, generally carrying out a variety of functions including implementing central government policies on a local scale, managing infrastructure and otherwise dealing with government matters on a narrower, day-to-day basis. Some measure of local government is necessary in all properly governed countries. The issue as to the form it should take is rather more complicated. The powers of local government are an important part of the public power that can be exerted in New Zealand, and finding the right balance between accountability and efficiency, and between local and central government can be difficult. As it stands, there is an unsatisfactory and unfinished character to current local government structures.

While local government in New Zealand is subordinate to central government, and ultimately is controlled by legislation passed by Parliament, it is nonetheless invested with substantial law-making and regulatory powers. Most of its activities revolve around network infrastructure of roads and public transport, water supply, waste water, storm water, solid waste and cultural and recreational facilities. People rightly think of local authorities as being responsible for roading, water, sewerage, parks and reserves, and collecting the rubbish. But they have a much wider range of responsibilities, particularly of a regulatory character. A good example is the power to grant consents required under the Resource Management Act 1991.

Local governments carry out a variety of health and environmental functions, such as registration and inspection of restaurants and cafés. They often hold substantial amounts of land and carry out public works. They are sometimes engaged in housing activities and encouraging industrial development. They must provide cemeteries. They have functions concerning noxious plants, litter, clean air, animals, offensive trades, wildlife and civil defence. They have important responsibilities concerning the sale of liquor.

A local authority's most important power is to levy rates. Rating, a form of tax on land, is by far the most important

source of revenue available to local government, though there are some other sources, such as charges for services and loans.

Local government makes up a vital and continuing feature of governance in New Zealand. It can achieve a great deal for people. In the ever-widening diversity that characterises modern New Zealand there is a great deal of difference between various regions and their attitude to local government. For instance, the situation in Auckland is vastly different from that in Southland.

Central government has traditionally regarded local government as its agent and not a political body that enjoys autonomy. This has the serious effect of diminishing the quality of local government. In a variety of ways, the approach of central government to its local counterpart has made the latter risk-averse, tentative and unduly humble, which causes a raft of administrative issues and bureaucracy that citizens have to deal with when they need anything from local government.

There is a troubling pattern of constant amendment of local government legislation by central government aimed at allowing central government to get its own way. We tend to vacillate between strong local governments with a wider range of activities and restricting the scope of responsibility of local government to try to ensure they do not get involved in activities that are wide-ranging or novel, even if that is the preference of the local population. Central government also has a propensity to load up local government with new tasks and new legislation, while providing no funding to carry out those tasks.

A further issue is that too often local government accountability frameworks are interfered with by central government, sometimes with a worrying lack of transparency. In 2011 Canterbury, and particularly Christchurch, suffered grievously from multiple earthquakes. The Canterbury Earthquake Recovery 2011 Act was rapidly passed to ensure that urgent action could be taken. The prime purpose of the Act was "to provide appropriate measures to ensure that greater Christchurch and the councils in their communities respond to, and recover from, the impacts of the Canterbury earthquakes".[14]

14 Canterbury Earthquake Recovery Act 2011, s 3(a).

As a result of the Act, the Christchurch City Council lost much of its governance powers, powers which were instead vested in the temporary Canterbury Earthquake Recovery Authority (CERA), which was placed under the direct authority of the Department of the Prime Minister and Cabinet, with the appointment of a Minister for Canterbury Earthquake Recovery to oversee the efforts. Vast swathes of statute law, democratic protections and due process requirements were swept away. No doubt some extraordinary powers in Canterbury were necessary. But emergency powers, like other Government powers, are capable of being abused, and remedies against that abuse are greatly diluted by emergency legislation. It easily goes wrong.

The relationship between local government and central government in New Zealand is not satisfactory. The lessons seem to be clear. Democratic government is frequently troublesome. The replacement of the Canterbury Regional Council elected members by Government appointed Commissioners by statute in 2010 was a sad day for local democracy. And it is not yet restored. Local decision-making, local responses to local issues, and local accountability are critical components of our democracy. Central governments in New Zealand frequently think they know best, but that confidence sometimes proves not to be justified. What local government needs is an infusion of inspiration, vision and community involvement. The time has come to provide local government with a greater measure of autonomy.

Article 110

Local government in New Zealand could be more vibrant, effective and responsive to its communities on local issues if it were provided with a robust constitutional place upon which to stand and a more coherent and principled set of legal requirements under which to function.

This is the principle we have placed in the Constitution. There is a long road ahead for New Zealand on local government reform. But it is a road that should be travelled. Divided powers between central and local government add to the constitutional protections available to citizens. We hope that in providing for a strong, transparent and accountable system of local government, which has a right to manage its own affairs and is adequately

funded, we can improve the system of governance we have here in New Zealand and improve people's ability to participate in their community, and in government more generally. The division of powers between central and local governments needs to be carefully considered, as it is a complicated issue.

A new Constitutional Commission

Article 117

The Constitution we are proposing will play a vital role in protecting the rights of New Zealanders and in ensuring that our democratic system is preserved. In order for it to carry out this function as best as possible, we think that a new Constitutional Commission should be established. The Commission will review the Constitution every 10 years and report on possible amendments to the House of Representatives. This way we can ensure that the Constitution remains up-to-date and relevant to New Zealand's needs. There will be much opportunity for public input and discussion, as there should be for a constitution that belongs to the people.