

# The Need for Localist Reforms

Sir Geoffrey Palmer and Andrew Butler recently released their draft constitution for New Zealand, which joins a rich body of work on the subject of constitutional reform. It is in the area of local government that the document departs from much of the literature and the current government's thinking on this important sector.

In short, Palmer and Butler propose that local government's place in New Zealand's decision-making structure be reorganised along localist lines, as seen in many European democracies. In these countries local authorities have their own distinct place in the constitution that is independent from that of central government. Palmer and Butler call for decision-making power to be based on the principle of subsidiarity, where decisions are made at the lowest appropriate level.

As such, where government is concerned, local bodies would make local decisions, regional bodies would make regional decisions, and central bodies would be concerned with national-level decisions.

Under their draft constitution, local authorities would manage their affairs independently within the areas of control ceded to them by Parliament, and guided by democratic community preference. Funding would predominantly come from the existing property rates system,

but they include scope for central government to share tax revenues with local authorities. Under their proposal, Parliament would retain the right to pass regulatory responsibility to local government, but it must consult on any new local government mandate, and detail any extra financial and administrative costs associated with these responsibilities (Palmer and Butler, 2016, p.73).

The proposed settings bear a close resemblance to the constitutional structure of the Netherlands and Switzerland, two countries whose governance arrangements are structured on a bottom-up rather than top-down basis (Krupp, 2016, pp.17-31).

## **Constitutional muddle**

To those less familiar with the current constitutional arrangements of local government in New Zealand it may seem as if Palmer and Butler's solution is begging a question. However, a closer examination of the country's governance arrangements shows that many of the challenges facing New Zealand right now, such as declining housing affordability and pressure on local infrastructure, are caused or made worse by our constitutional arrangements.

Before examining local government's place in New Zealand's legislative and constitutional structure, it is worthwhile describing how decision-making power is typically divided in developed countries. At one end of the spectrum are highly centralised countries, where the role of local government is limited to a set list of defined activities, principally the provision of local public goods. At the other end are more decentralised countries, where local government is regarded as an independent democratic entity in its own right. Pinpointing New Zealand's place on this spectrum is difficult because to some degree local authorities are both agents and independent authorities at the same time.

Under the Local Government Act 2002 the purpose of local authorities is to 'enable democratic local decision-making and action by, and on behalf of, communities' (s10). While conducting this duty, councils must also meet 'the current and future needs of communities for good-quality local infrastructure, local public services, and performance of regulatory functions in a way that is most cost-effective for households and businesses'. This would imply to the casual reader of the act that local authorities in New Zealand reside on the devolved/independent side of the spectrum, wholly answerable to their communities. However, in the absence of a formal constitution, local government's existence relies entirely on statute. As such, Parliament can – and does – pass on responsibilities to local authorities as part of the lawmaking process, which councils are obliged to accept. The Productivity Commission estimates that there are about 30 pieces of legislation that confer regulatory responsibilities on local government, and more by-laws are made under these statutes than under the Local Government Act (Productivity Commission, 2013, p.17). The scope of these activities ranges from building and construction standards to food and hygiene regulations, health hazards, the control of liquor and gambling activity, the storage of hazardous substances and waste management, to name but a few.

These arrangements mean that New Zealand's local authorities are positioned

at both ends of the centralised–decentralised local government spectrum at the same time. Notionally this arrangement should provide for double oversight, one where councils are democratically accountable to their communities, and also benefit from central government oversight and standard setting at the same time. In practice these governance arrangements fall far short of this ideal state, and could in some respects be described as dysfunctional.

#### **Accountability gap**

One of the problems with this arrangement is that it creates an accountability gap between those who set policy and those who bear the effects and costs thereof. A

that central government is likely to underweight the costs imposed on local communities as part of the legislative process. For example, the Treasury's Regulatory Impact Assessment Team, which assesses regulatory impact statements, requires policymakers to consider the significant impacts or risks associated with legislative changes. In theory this requirement should include the costs and risks posed to local government, but in practice these are often overlooked (Productivity Commission, 2013, pp.102-3).

Although the practice of passing unfunded or under-funded mandates is widespread, the true costs of the problem are unknown. One attempt to tally the costs imposed on councils by

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clear example of this was the introduction of minimum drinking water standards by the Ministry of Health in 2005 (Ministry of Health, 2008). The policy forced many councils to upgrade their plants to meet this standard. The costs of compliance were estimated at between \$309 million and \$527 million, yet central government set aside only \$150 million for this activity (CH2M Beca Ltd, 2010, p.82). The shortfall had to be funded out of local taxes, yet the communities were given little say in the setting of these standards. Some rural communities may have been happy to settle for less stringent standards than those set by central government, or to have upgraded their facilities over a longer time period, in order to lighten the tax burden on local ratepayers. These kinds of trade-offs, based on local preference, are not feasible with a one-size-fits-all approach to policy making.

The Productivity Commission's inquiry into local regulation shows

amendments to the Local Government Act 2002, the Public Transport Management Act 2008, the Health (Drinking Water) Amendment Act 2007 and the Land Transport Management Amendment Act 2008 estimated that it would take an additional 720,000 hours of council staff time to meet them. Conservatively priced at the average hourly wage at the time, this represented \$14 million in additional salary costs, and excludes \$25 million of one-off consulting costs (Statistics New Zealand, 2009; PricewaterhouseCoopers, 2009). The study did not explore how these costs are distributed between small and large local authorities.

Central government acknowledged this problem in its official response to the Productivity Commission, noting that 'improvements will be made to central government documentation, such as the Cabinet Office Manual, Cabinet Guide, Regulatory Impact Analysis Handbook and the Department of Internal Affairs

“Policy Development Guidelines for Regulatory Functions Involving Local Government” (New Zealand Government, 2014).

#### Blame game

The current governance structure also allows councils to shift the blame for poor local performance onto central government. Rapidly rising house prices in Auckland are often blamed on the Resource Management Act (Bassett and Malpass, 2013, p.5). This legislation has certainly made it more difficult to build in New Zealand’s biggest city by making subdivision of land more difficult, but the problem has been made significantly worse by the city’s urban growth limit.

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This zoning rule, which delineates urban and rural land at the edge of the city, was found by one study to increase the cost of residential land by between eight and 13 times relative to that of equivalent rural land parcels of a similar size just outside the boundary (Grimes and Liang, 2007, p.31). Nowhere in the RMA are councils required to put urban boundary limits in place; it is a local policy preference.

The quality of local council decision making is also highly questionable. Under section 32(2) of the RMA, local authorities are required to assess the costs and benefits of any major spending item proposed in the district plan. To an economist this would imply a systematic measure of the expected net benefits of a proposal for affected members of a community. In practice many of the section 32 analyses do not meet this standard. For example, in the Kāpiti Coast District Council’s ten-year plan, the cost–benefit analysis that accompanies the infrastructure, services and associated

resource use section amounts to little more than a list of what might or might not be costs and benefits (Kāpiti Coast District Council, 2012). This listing process may be appropriate where the expense of a professional cost–benefit analysis is not justified based on the scale of the activity, but councils can still commission a professional cost–benefit assessment of the entire ten-year plan, as Auckland Council did with the Unitary Plan (Nixon et al., 2013). Unfortunately, Auckland is an exception.

This lack of transparency and accountability on both sides of the central–local divide could to some degree explain local voter disengagement. Preliminary estimates suggest that only

41.8% of eligible voters cast a ballot in the 2016 local government elections. This was marginally higher than the 41.3% turnout in 2013, but well down on 57% turnout in 1989 (Department of Internal Affairs, 2013; Local Government New Zealand, 2016). The public’s dissatisfaction is not limited to the ballot box either. Attitudinal surveys rate the overall performance of the sector at 29% (Local Government New Zealand, 2015).

#### Political intransigence

This distrust of local government appears to manifest itself as political intransigence, where communities resist moves by councils to increase rates, borrow more or sell assets to fund investments that should benefit residents in the long term by growing the ratepayer base (Krupp and Wilkinson, 2015, p.29). Community resistance to higher taxes or great council borrowing is not surprising, but it is perplexing that fast-growing communities like Queenstown are not

making greater use of debt to pay for infrastructure investments (total term debt was equivalent to 6% of assets in 2014) (ibid., p.53). Fast-growing areas, like Auckland, have higher term debt to asset ratios – in Auckland 14% in 2014, near the statutory borrowing limit – but the city also held investments equivalent to 556.1% of infrastructure assets in 2014 (ibid., p.46). Selling these assets to pay for infrastructure investments or to service debt has been labelled ‘a hot political issue’ by the city’s former mayor, Len Brown, suggesting that it will be unlikely or at least very difficult for the city to divest itself of these assets to fund infrastructure development or pay off long-term debt.

A concern is that the current situation may worsen. The lack of transparency and accountability at a local level may increase voter intransigence, which in turn is likely to frustrate central government’s efforts to encourage faster economic growth. Central government’s response may be to legislate around political roadblocks, further blurring the lines of accountability, transparency and local choice, forming a vicious policy circle.

This is already playing out to some extent. The 2012 amendments to the Local Government Act made it easier for local parties to propose local council amalgamations in their area. Three such applications to merge councils in Northland, Greater Wellington and Hawke’s Bay regions were made under this legislation. The Northland and Greater Wellington proposals failed to win sufficient popular support to proceed to a poll, and the Hawke’s Bay amalgamation proposal was voted down by a ratio of 2:1 (Local Government Commission, 2015; Hawke’s Bay Today, 2015). Central government’s response was to table further amendments to the Local Government Act. Should these amendments become law, it will make it easier for councils and the Local Government Commission to propose amalgamations and consolidations of local council assets into regional council-controlled organisations. Many in the local government sector see this as an attempt to legislate around local preferences.

### Constitutional remedies

A constitutional separation of powers would go a long way to remedying these problems. Under the separation of powers laid out by Palmer and Butler, each tier of government would be pre-eminent within the sphere of its constitutionally mandated duties. Were the costs of a locally provided public service to suddenly rise, or quality deteriorate, the affected community would immediately know which agency was responsible. Likewise, communities would be directly faced with the costs of their decisions (taxes) and the consequences of their decisions (approving poor policies). The transfer of authority is low-risk, as the majority of these tasks are largely already managed by local authorities, such as the provision of roading, water and other services.

Where there are benefits from central government passing regulatory tasks to local authorities, the draft constitution stipulates a mechanism by which the cost this would impose on communities is made transparent. Where these costs are deemed to be greater than the benefits, local authorities, given the power to 'manage their own affairs independently within subject-matters established in Acts of Parliament' (Palmer and Butler, 2016, p.73), should be within their rights to reject these policies. Even if councils are not given the ability to opt out, greater transparency about the costs that central government imposed on communities should provide greater oversight and scrutiny of these mandates.

Conceptually, the constitutional reforms proposed by Palmer and Butler would go a long way to resolving the blurred lines of accountability and mixed responsibilities that currently exist. It is notable that New Zealand is one of the few countries in the world that does not have a written constitution (New Zealand's constitutional arrangements are codified in numerous pieces of legislation). However, those looking to improve on the local government arrangements through a formal written constitution are unlikely to find much success any time soon. Palmer and Butler's work shows that there is interest in a written constitution, but it is largely

confined to academia. Appetite among the public and policymakers is low.

Research by Rachael Jones shows that various attempts have been made by government to begin this process over the past two decades, to little avail. These include the Building the Constitution conference, which was hosted in Parliament in 2000, and the Constitutional Arrangements Committee, which was established in 2005 (Jones, 2013, pp.14-15). The former failed to achieve any 'general consensus' on constitutional reform. The latter produced a report which recommended that government avoid a constitutional debate for fear of stirring disagreement and division in the community.

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More recently, the National-led government, which was elected into power in 2008, agreed to set up a framework to review New Zealand's constitutional arrangements as part of its confidence and supply agreements with the ACT, United Future and Māori parties. This led to the formation of the Constitutional Advisory Panel in 2011. The panel finished its recommendations in November 2013; they included that New Zealand wrap up its various constitutional protections (such as those contained in the New Zealand Bill of Rights Act 1990) in one statute (Constitutional Advisory Panel, 2013, p.22). The panel's recommendations were not binding, and at the time of writing government has not issued an official response.

### Contractual workaround

Developments in the United Kingdom, however, suggest there are other means of achieving the same ends as the Palmer-Butler written constitution. Like New Zealand, the United Kingdom does not

have a constitution, but the country has opted to devolve powers to city-regions on a contractual basis. The first and most well-known of these is the Greater Manchester 'city deal'. Under this arrangement central government has devolved a number of powers and responsibilities to the city-region, a regional body made up of ten constituent local councils (Greater Manchester Combined Authority, n.d.). The powers and responsibilities conferred include control over health and social programmes, housing and planning, skills and employment development, and the setting and collecting of business rates (Krupp, 2016, p.15). This deal provides some of the outcomes that the Palmer-Butler constitution would achieve. The

Greater Manchester Combined Authority is contractually assured that it has full control over the policy areas devolved to it, guided by democratic preference. Officials in Whitehall can of course use parliamentary power to amend the terms of the deal, and again dictate standards at the local level, but it would not be without political cost.

In some respects the malleable nature of these arrangements is preferable to a constitution. Once enacted, constitutions are robust legal documents, and require a high measure of public support to change. Should the local government arrangements proposed by Palmer and Butler prove to be a poor structure for deciding local matters, it would be a very difficult and slow process to reverse. A contractual arrangement, on the other hand, could be reversed, and quickly, by mutual agreement.

Furthermore, a constitutional separation between central and local government achieved by contract could be changed as the capacity of councils change. It would also allow central



government to tailor the handover of powers according to different types of councils, as opposed to taking a one-size-fits-all approach.

Precedent for this kind of contractual devolution already exists in New Zealand. Under the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, the Crown handed a group of iwi the power to set the strategic direction of management of the Waikato River. This power was previously held by Waikato Regional Council. Under the act, local authorities have to ensure that regional, coastal and district plans align with the vision and strategy set by iwi. Notably, iwi decisions supersede national and coastal policy statements, two areas under central control (Local Government New Zealand, 2011, pp.19-20). If this kind of arrangement can be established with iwi, the same framework can surely be used to achieve a separation of powers between central and local government.

### Conclusion

In concluding, it is worth restating the problem that the contractual or constitutional reforms would both address. That is to fix the dysfunctional aspects of the relationship between central government and local authorities that has been created by the way New Zealand structures its governance affairs. This relationship is characterised by poor lines of accountability and overlapping regulatory responsibilities. This makes it difficult for the public to tell which tier of government is ultimately responsible for which service. The same arrangements mean central government gives too little consideration to the costs its policies impose on local communities and, in turn, allow councils to blame their poor performance and decision making on central government. The effects are high levels of frustration among communities who live under, and pay for, these governance arrangements.

One means of addressing this would be to formally stipulate the respective roles of local government in a written constitution, as proposed by Palmer and Butler. The lack of public and political appetite for a constitutional discussion, however, suggests that this process may not be achievable any time soon. This need not derail much-needed local government reform, as the devolution process in the United Kingdom, and specifically Greater Manchester, shows. Unlike a constitutional discussion, there is great interest among the public and policymakers in improving the efficiency and effectiveness of local government. Making local councils more accountable to the communities they serve is a means of getting there.

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1 Local Government Act 2002 Amendment Bill (No 2)

### References

- Bassett, M. and L. Malpass (2013) *Priced Out: how New Zealand lost its housing affordability*, Wellington: The New Zealand Initiative
- CH2M Beca Ltd (2010) *Drinking Water Standards New Zealand Cost Benefit Analysis: engineering input*, Wellington: CH2M Beca Ltd for the Ministry of Health
- Constitutional Advisory Panel (2013) *New Zealand's Constitution: a report on a conversation*, Wellington: New Zealand Government
- Department of Internal Affairs (2013) 'Local authority election statistics 2013', [https://www.dia.govt.nz/diawebsite.nsf/wpg\\_URL/Services-Local-Elections-Local-Authority-Election-Statistics-2013?OpenDocument](https://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Services-Local-Elections-Local-Authority-Election-Statistics-2013?OpenDocument)
- Greater Manchester Combined Authority (n.d.) *Greater Manchester City Deal*, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/221014/Greater-Manchester-City-Deal-final\\_0.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/221014/Greater-Manchester-City-Deal-final_0.pdf)
- Grimes, A. and Y. Liang (2007) *Spatial Determinants of Land Prices in Auckland: does the metropolitan urban limit have an effect?*, working paper 07-09, Wellington: Motu Economic and Public Policy Research
- Hawke's Bay Today (2015) 'Big NO in amalgamation referendum', *Hawke's Bay Today*, 15 September, [http://www.nzherald.co.nz/hawkes-bay-today/news/article.cfm?c\\_id=1503462&objectid=11513412](http://www.nzherald.co.nz/hawkes-bay-today/news/article.cfm?c_id=1503462&objectid=11513412)
- Jones, R. (2013) 'The problem of constitutional law reform in New Zealand: a comparative analysis', LLB (Honours) dissertation, University of Otago
- Kāpiti Coast District Council (2012) *Kāpiti Coast District Plan Review Section 32 Analysis: summary report: infrastructure, services and associated resource use (part 1: infrastructure and network utilities)*, Wellington: Kāpiti Coast District Council
- Krupp, J. (2016) *The Local Benchmark: when smaller is better*, Wellington: The New Zealand Initiative
- Krupp, J. and B. Wilkinson (2015) *The Local Formula: myths, facts and challenges*, Wellington: The New Zealand Initiative
- Local Government New Zealand (2011) *Local Authorities and Māori: case studies of local arrangements*, Wellington: Local Government New Zealand
- Local Government Commission (2015) 'Amalgamation decisions: Wellington and Northland', <http://www.lgc.govt.nz/commission-news-and-contact-information/media-statements-and-speeches/amalgamation-decisions-wellington-and-northland/>
- Local Government New Zealand (2015) *Building a Stronger Local Government for New Zealand: a survey of New Zealanders' perceptions of local government 2015*, Wellington: Local Government New Zealand
- Local Government New Zealand (2016) 'Preliminary voter turnout 2016', <http://www.lgnz.co.nz/vote2016/preliminary-voter-turnout-2016>
- Ministry of Health (2008) *Drinking-water Standards for New Zealand 2005 (Revised 2008)*, Wellington: Ministry of Health
- New Zealand Government (2014) 'Government response to recommendations of the Productivity Commission's report *Towards Better Local Regulation*', Wellington: New Zealand Government
- Nixon, C., P. Clough, R. Peterson and M. Douché (2013) *Section 32 RMA Report of the Auckland Unitary Plan*, Wellington: New Zealand Institute of Economic Research
- Palmer, G. and A. Butler (2016) *A Constitution for Aotearoa New Zealand*, Wellington: Victoria University Press
- PricewaterhouseCoopers (2009) *Costs of Regulation on Local Government*, Wellington: PricewaterhouseCoopers for Local Government New Zealand
- Productivity Commission (2013) *Towards Better Local Regulation*, Wellington: New Zealand Productivity Commission
- Statistics New Zealand (2009) 'New Zealand income survey: June 2009 quarter', [http://www.stats.govt.nz/browse\\_for\\_stats/income-and-work/Income/NZIncomeSurvey\\_HOTPJun09qtr/Commentary.aspx](http://www.stats.govt.nz/browse_for_stats/income-and-work/Income/NZIncomeSurvey_HOTPJun09qtr/Commentary.aspx)