Environmental Responsibility:

Leadership Inclusion and Good Governance

2012 ECO Annual Conference

6 to 8 July, Salvation Army Citadel, Wellington 2012

Due Process in Policy and Law

Introduction

"The question of markets is really a question of about how we want to live together. Do we want a society where everything is up for sale? Or one where certain moral and civic goods that markets do not honour and money cannot buy."

I have opened my few comments with this quote from Michael Sandel's latest book What Money Cannot Buy: The Moral Limits of Market because I think it provides the context for the comments I wish to make about the growing concern at the lack of due process in policy. To address the issue that is the subject of this session it is therefore necessary to look first at the meaning of due process in a public policy context, which will require a brief consideration of New Zealand's constitution; and secondly to try and analyse why the apparent current disregard for proper process seems to seems to be causing such concern. This involves an inquiry into the type of society New Zealanders want to live in. Hence the relevance of Michael Sandel's analysis of society under neo-liberalism.

The growing concern of a lack of due process has been fuelled by government decisions that come as a surprise to most people. This is because they have not been clearly articulated in election policy statements or preceded by a transparent process that enabled not only consultation but participation in the matters subject to a government decision. I am sure you will all have your own list of examples. Given this conference has a focus on environmental issues, the announcements relating to mining on conservation land, off shore drilling for oil, changes to access to national parks and the use of conservation land are only a few examples that may come to mind.

It is however not only in the environment policy area that government decisions have not only appeared to lack due process but have in fact not done so. The most notorious example is the Hobbit legislation that deprived the workers in a whole industry of fundamental employment rights, without any opportunity to comment before the legislation was enacted. The implementation of Charter Schools came as a complete surprise to many people as did the increase in class room sizes and school rating system. There was a feeling that these policies were introduced by stealth because although they had been signalled by the government (in the ACT Manifesto and 2012 Budget) there had not been an opportunity to discuss the implications of such policy changes on the well being of children and young persons education.

Definitions

As a lawyer I feel the need to begin with a definition of what is meant by the notion of 'due process'. I shall not embark on a dissertation but merely state that the notion goes back to the Magna Carta. Put simply it means following the process for decisions making that is mandated by the law or formally recognised rules or where there are no formal rules or laws, by following the principles of natural justice. Those principles simply stated are the right to have notice of decisions that affect you, the right to be heard before the decision is made and the right to be represented by another before those who make the decision. In summary there is an expectation that you will be treated fairly.

The notion of due process will not be found clearly stated within what passes for the New Zealand constitution. This is because there is no formal constitutional document but a collection of legislation, conventions and practices, all of which may be changed without any resort to due process, that is, Parliament can pass laws under urgency that give no opportunity for real debate or the right of citizens to be heard. Politically this is unlikely but is useful to remind ourselves of the fragility of our constitutional rights and the fact it is political activism that is the prime means to prevent abuse of political power.

Constitutional Arrangements

Our constitution has been described as flexible and pragmatic and according to the Select Committee Constitutional Review in 2005 not in need of much change because it is reasonably robust and there does not appear to be a crisis. There appears to be no public demand for constitutional change, though Maori have constantly called for constitutional

review and recognition of the Treaty of Waitangi. The Maori Party in its 2008 coalition agreement with the National Party made a constitutional review a condition of their support. That review has been set up but its working to date has not been very transparent. The challenge for the government group will be to ensure it engages as many New Zealanders as possible. Much could be learnt from the Australian experience where the constitutional debate was taken into the highways and byways of Australia to engage the people.

I think our constitutional arrangements may be described as very political in the sense that it both requires and enables citizens to directly express their views on issues of public policy, not only every three years, but through a maze of formal and informal rules during the life of a Parliament. The fact our Parliament reinvents itself after every election contributes to the flexibility and fragility and lack of consistent medium and long term public decision-making. Apart from the fact the constitution, or more accurately the Electoral Act, guarantees the people the right to vote every three years for the political party of their choice, it is more difficult to find other constitutional guarantees of the obligation on governments to follow due process.

It must be noted however that New Zealand scores well in ensuring the vote is conducted in a non corrupt way. Also once the result is known, the political parties undertake an orderly process for the formation of government. The principles followed in this process are laid down in the Cabinet Manual and are not legally binding but politically are followed, or have been to this date. The importance of a fair electoral system for the legitimacy and credibility of Parliament and political decision making cannot be under estimated in such an informal constitutional system as New Zealand's. This is why it was so important to change the first past the post electoral system when it was clear people were losing confidence in it to produce a fair outcome. Under the first past the post electoral system, it became apparent that it did not produce a fair outcome because so many citizens votes were not represented in the Parliament, and because under our majoritarian system the Party with the majority of votes did not always become the government.

As many of you will recall the campaign for a change to a fairer electoral system was not easy and may not have happened if both David Lange and Jim Bolger had not made commitments to a referendum without reference to their Parties. David by accident in a television interview committing the Labour Party to a referendum on electoral reform and Jim Bolger as part of a political strategy to out manoeuvre Labour in the 1990 election

because they had not honoured the commitment. The fact that New Zealanders got the right to vote on these changes to the electoral laws is amazing when it is recognised that there is no legal requirement for such a process. It is a feature of our constitutional arrangements that we resist formal rules but seem happy to follow conventions or protocols for public decisions when it suits us or we think the issue is important enough. The acceptance of majority decisions is also a distinctive feature of our constitutional arrangements.

Rules for Due Process

The issue for most people however is not the electoral process but what happens after the election and governments are formed and begin to make decisions on resource allocation and or legislation. Both activities affect citizens directly and indirectly. Because election manifestos and coalition agreements are general in nature the question on what process governments are required to follow when making decisions is important. In terms of the executive, the Cabinet Manual provides a code of practice on process, but it is not enforceable except through political pressure 'to do the right thing' if the matter becomes one of media interest. For example, Ministerial expenses, or conflicts of interest are recent examples of media interest. However the Cabinet Manual also requires all policy be consistent with the principles of the Treaty of Waitangi, the NZ Bill of Rights Act, the Human Rights Act and is consistent with principles of gender equality. The question is who checks up on these requirements? Perhaps a better question is whether the process is transparent so an assessment can be made of executive compliance with its own code of good practice.

In terms of Parliament, it is the Standing Orders that provide the rules for due process to be followed in the consideration and enactment of legislation. These Standing Orders are made and reviewed by the Members of Parliament themselves. They are transparent in that they are publicly available but few people, including Members, know or understand the implications of the rules. Their compliance is reliant on vigilant Members of Parliament and the Speaker to ensure they are followed. It is Standing Orders that give the right for Bills to be referred to Select Committees and the right of the public to make submissions. It is also the Standing Orders that give the government the right to pass legislation under urgency and on occasions exclude any public participation. I understand you will be hearing more on the appropriate and inappropriate use of urgency and how it measures up to a due process constitutional standard.

When considering the right to expect due process to be followed by governments, it is necessary to understand the importance of the NZ Bill Of Rights Act, and the Human Rights Act. It is the Bill of Rights that guarantees the right to free speech and association, as well as the right not to be the subject of discrimination as defined in the Human Rights Act. Although these Act have no superior status and can be repealed by simple majority, the Courts have recognised their importance to protect the rights of citizens and ensure a form of due process is followed. The recent Atkinson Case taken by the Human Rights Commission on behalf of families caring for family with disabilities instead of placing them in care, is an encouraging example of use of the legal process in ensure government followed due process, that is, it implemented the obligations under the Human Rights when allocating resources. The problem is the time and cost involved in ensuring citizens legal rights are observed in policy making through the court system.

Role of the Law and Due Process

The whole notion of due process is a legal one that emerged from the courts of equity to complement the common rules where no just remedy was provided. The concept of natural justice of which due process is a part was developed by the courts. In my own field of employment law the English courts developed the notion of proper process to provide some rights to those unfairly dismissed under contracts of employment that provided no real remedy. The Employment Contracts Act was an attempt to remove such notions and rely solely on the contractual rules between an employer and employee. The role the courts can play in New Zealand is limited however by the terms of the legislation under interpretation, and the concept of Parliamentary sovereignty, which asserts Parliament is the only institution to make laws. The courts here however have worked within the limits imposed on them by testing those limits and using the law of judicial review as a means to test that proper process has been followed in executive decision making.

The recent judgment of Justice Winkelman in the Kim Dotcom Case finding that the police relied on invalid warrants when they searched DotCom's properties is an example of the courts exercising their fundamental duty to uphold the rule of law by ensuring the powers of the state are exercised in compliance with the law. Although the question of whether the police action was in breach of the s. 21 NZ Bill of Rights was not in direct issue in the court, the Judge invited argument on the point from counsel. Section 21 is the New Zealand citizen's right to be secure from unreasonable search or seizure, whether of the person,

property or correspondence or otherwise. The fact this rights and other rights in the NZ Bill of Rights Act are not entrenched in our constitutional law, it a question the constitutional review should be addressing.

The Crafar Farms Case was also a useful example of the role of the courts to ensure the proper matters were considered when the executive is making decisions. That case identified the lack of a transparent process as being a fundamental problem is executive decision making. An equally serious legal question arises however with the increase in the use of public money for private profit in public/private partnerships. Where is the accountability to the public? Issues of transparency and accountability need to be clarified to ensure a proper process is followed when those bodies make decisions that affect the public, for example the price of energy, the management of education, health, social welfare or the imprisonment of people convicted of a crime. The steady change in public/private arrangements requires a rethinking of the rights of the public to ensure their resources are used according to the law and proper process.

Political Culture

There are then very few legal or constitutional requirements for governments to follow due process. More importantly however is the lack of a political culture that sees the need to observe fundamental rights when faced with immediate political issues. There is a great deal of truth in the description of New Zealand's constitutional arrangements as being pragmatic and flexible. Political decisions appear to be influenced as much by focus groups and opinion polls as long term policy. I think however it would be a mistake to underestimate the influence of ideology in New Zealand politics.

It appears to me that since the 1970s New Zealanders have been engaged in a process of deciding whether we want to embrace the reality of globalisation through adopting the corporate market model as the organising principle for all our relationships, or whether we want to face the challenge of globalisation on our own terms by reference to traditional values of community and cooperation. In many ways it is amazing how so many New Zealanders have engaged since the 1980s in both passive and active resistance to the corporate model for public policy while striving to evolve a new model that incorporates traditional values with the realities of globalisation.

The basic ideology of a political party will influence their approach to due process when they become governments. This does not mean centre/left governments are always transparent and follow proper process that enables not only consultation but participation. The pressure on governments to make decisions in a timely fashion in the three year term is great. It does mean however that they understand the need for such a process and are open to public consultation and participation where possible. Centre/right governments use a different model that sees little purpose in transparency or participation if it gets in the way of getting the job done. The commercial model requires a different type of process for decision making.

For instance the Prime Minister is reported in the recent Listener article as seeing nothing wrong or unusual about foreign ownership of New Zealand because we run a great country that anyone would want to buy. I have no doubt this is true but the question is who makes such a decision? The government alone or do we need rules that ensure the people also have a say in such decisions beyond the election. This is a constitutional issue that requires serious debate. The non-inclusive approach to decision making is consistent with the corporate model which has a vertical authoritarian approach to decision making. The Sky City negotiations over a conference centre in exchange for more pokie machines is a very clear cut sensible decision according to the corporate model.

The slow but steady attempt to turn New Zealand into NZ Incorporated has been underway since the 1980s. It is driven by the powerful argument that it is the economy that counts most. It is the price and the cost in financial terms that has driven government decision making. The argument is very simply and powerfully farmed as was evidenced in the Hobbit Saga example – if you want jobs at any price (preferably a low price) then you follow the demands of Warner Brothers and Sir Peter Jackson and change the status of workers in the industry by legislation thus depriving them of their employment rights guaranteed by law. A similar rationale is being used with changes to social welfare. The focus is on employment, any type of employment. This policy model is consistent with that of the OECD and World Bank advice, though even these institutions appear to be questioning whether the growing inequality from this policy is desireable. The single policy focus of jobs at any price has had the support of many New Zealanders who see no other way to cope with the reality of globalisation. Whether all or most New Zealanders have benefited from this approach has come into question since the 2008 global recession that remains with us today and will continue for some time if they current model is followed. Also as the Occupy movement has

brought to the fore – low paid insecure jobs support the 1% and those of big salaries and bonuses.

It is apparent that there is a need to rethink the neo-liberal corporate model as applied to the public sector for a variety of reasons to which may be added the need for a constitutional recognition of due process in public decision making at all levels. The Report on Better Public Services and the foreshadowing of new legislation to regulate the state services provide an opportunity to rethink the role of the public service in public decision making. The time may have come to constitutionally recognise that New Zealand needs an independent public service to provide governments with professional independent policy advice without fear or favour. There appears to be a tendency to apply the corporate management model to not only the core public service but the education sector. While administrative efficiency is fundamental for democratic process, the public interest cannot always be equated with government interest so there is a need for governments to receive public interest advice whether that be through the public service or community organisations. Governments will still make the decisions but the advice that is taken before the decision is made should be transparent and inclusive of differing points of view. What New Zealand does not need is a public service that has morphed into a government service to service the interests of government only.

In conclusion the point I am making is that due process is a notion that is interpreted according to the ideology of the parties in government. This is primarily because we lack as a country a strong constitutional framework that applies to whoever is the government of the day and guarantees an inclusive participatory process will be followed when public decisions are made. The current constitutional review provides an opportunity for this issue to be considered and to formalise the concept of due process within our constitutional arrangements. I hope we take that opportunity. Thank you for the opportunity to share some of these ideas with you and all the best for the rest of the conference.

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