Governing an unimaginable future

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This symposium is about 'governing for the future'. The title is redolent of the optimism that must motivate any school of government: a belief that the future is something we can govern.

That 'we,' of course, speaks to an irreducible plurality of political views. Let me caricature the two poles between which so much political activity oscillates. There are those of progressive persuasion who *know* what a better future could look like and simply need the legislative and financial keys to unlock it. And there are those of conservative persuasion who are sceptical of governmental action and would prefer to keep familiar things the way they are.

Common to most political actors is the premise that they are in control. That they can either build imagined futures or preserve us from them. For those of us who work on environmental issues, the evidence suggests that we have set in motion forces well beyond our control. It is an unimaginable future that will be ours whether we like it or not. So everything depends on our ability to govern in a future where we are likely to be playing catch up; on the resilience of our institutions in the face of shocks and uncertainties.

Crises and discontinuities certainly galvanise governments into action. The demands of the moment also cause governments to disavow their intentions. We have recently seen governments around the world – including here – dial back fuel excise taxes at the very moment they are claiming to be responding to a climate emergency. The short term has a way of occluding the future.

Things like wars and pandemics aren't generally good for laying out long-term responses. But crises can provide windows of opportunity. Sir Geoffrey Palmer's legacy, which we are here in part to celebrate, owes much to crisis and discontinuity. The prairie fire of reform that engulfed New Zealand in the mid-1980s was a response to economic and political dysfunction that brought the country to the edge.

It started with an economic crisis abroad. The oil shocks of the 1970s and the ensuing stagflation threw sand in the gears of the global economy. In New Zealand it led to a chapter of reckless economic intervention and the promotion of vast energy projects. The notorious National Development Act of 1979 was passed to hurry them along with limited environmental or economic scrutiny. The political fallout created an opportunity for the far-reaching economic reforms still associated with those years. The somewhat cynical maxim that a government should never waste a good crisis entered our political folklore.

That crisis certainly wasn't wasted! By the time the next economic crisis hit in the form of the 1987 stock market crash, an almost hallucinatory level of reform was underway: sale of liquor, criminal records, trustee law, securities law, Māori fisheries, constitutional reforms, a Royal Commission on Social Policy and, of course, the resource management law reform process. Sir Geoffrey was involved in all of this – and more. I don't think I am overstating it when I say that only his extraordinary capacities made such an ambitious programme possible.

The resource management reform was a direct result of the National Development Act saga. But it was not a rushed affair. A review process that came to be known as RMLR started in 1986 and culminated in a Bill that, while not passed, was carried over into the subsequent Parliament in which I took ministerial responsibility for its passage at the end of 1990.

It must have been a disappointment for Sir Geoffrey not to see the Bill passed during his Premiership. But it was not a policy failure. If you read the second reading debate that took place in August 1990 you will find a remarkably bi-partisan tone.[1] As Sir Geoffrey has subsequently said, " the development of policy through an open-textured process of public consultation can provide robust proposals that will survive because they have been thought through and because interested groups and experts see their advantages and constitute a body of opinion in favour of the changes."[2]

In 1990, the spring cleaning that the consolidation and repeal of 54 statutes represented, seemed rational and irresistible. The reforming optimism that Sir Geoffrey had unleashed continued beyond his departure from office. The Government of which I was a part went along with most of those 'robust proposals' and continued the 'open-textured process of public consultation' that had been commenced even if some changes were made at the margin.

I think the survival of those robust proposals depended on the mood of the time. The trainwreck of Muldoonism inoculated us against the worst aspects of populism for a generation. A generation on, we are rewriting the whole code all over again. We have had a rather shorter external review process led by Tony Randerson and seen a very incomplete exposure draft. But a new Bill is imminent. Sir Geoffrey's shadow still looms large. The Bill will carry forward an idea he championed as long ago as 2013 for a single regulatory plan at the regional level to replace the multitude of separate plans currently overseen by regional and district councils.

Now you will be relieved to learn that I haven't come here to deliver a lecture on what our cornerstone environmental statute should contain. As Parliamentary Commissioner for the Environment I will have a chance to do that when there is a bill before a select committee. Rather, I should like to use the history of our attempts to legislate for the environment to ask whether future governments and governance will be equipped to weather the coming environmental storm; to ask whether Sir Geoffrey's 'open-textured process of public consultation' is enough to ensure that robust proposals will survive.

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[1] See New Zealand Parliamentary Debates, Vol. 510, pp.4109–4130.

[2] Sir Geoffrey Palmer KC, *The Resource Management Act – How we got it and what changes are being made to it,* Address to Resource Management Law Association, Devon Hotel, New Plymouth, 27 September 2013.

It has become received wisdom that the Resource Management Act has failed to deliver better environmental outcomes. And that the cause for that is an absence of national direction and insufficient resourcing. The implicit assumption seems to be that no one disagrees with the need for environmental protection. All that is lacking is political will and money.

I very much wish it were as simple as that because I want to see the environment taken seriously, to see the economy as a subset of the environment, not the other way round. There have to be limits to the pressures we place on the only planet that we have. The dedicated bipartisan legislation we have passed to try to bind ourselves to the mast on climate policy provides both political will and money: we have long-term legislated targets; we have incremental five-year budgets; we have a super-sophisticated emissions trading scheme that generates revenue for supporting policy measures. What could go wrong?

The RMA replacement will cover all the other environmental challenges we face. There will be environmental limits. There will be comprehensive national direction on policies. These will all be laid out in regulations. And where there are conflicts between them, the Minister will be charged with resolving them. With that direction and guidance available, it will be left to regional committees to oversee the environment. Again, what could go wrong?

Well, quite a bit actually. Firstly, setting an aspirational goal without knowing how you will get there is risky. We are very good at aspirational goals – net zero by 2050, predator free by 2050 and so on. Getting there is about hard work, consistent evaluation of that work and being as candid about what doesn't work as the things that do. Our election cycle doesn't encourage that.

Secondly, we risk asking too much of people. Central government has built a large, well-funded bureaucracy to support the citizens our electoral process delivers to Wellington. It needs to be wary of passing complex new tasks to elected officials at lower levels of government without the means to support them. Otherwise, will candidates of any quality offer themselves? I note that voter turnout in regional council elections was 56% in 1989. It has only topped 50% twice since then. In recent times it has hovered in the low forties.

The RMA was seen as a progressive and sophisticated piece of legislation. The motivation that underpins the current reform is no less progressive or sophisticated. It seems fair to bet that it will make even heavier demands on elected officials – in particular, regional-level politicians. If they cannot cope – let alone explain their role to electors – the environment will suffer.

I am acutely aware of how much environmental management already relies on regional councils – and how stretched they are. If central government wants to make new environmental and spatial planning demands of regional authorities, it must match its directions with resources or dial back its ambitions.

But even the best resourcing in the world is no guarantee. Unavoidably, this legislation cuts across every property right in New Zealand. It cuts across a huge debate about the place of the Treaty in relation to natural resources. Peel away the aspirational language and its subject matter is inherently contested. That is why the processes it establishes and the mandate they

can command will be so important. The question of who gains access to land for subdivision or water for industry is inherently conflictual.

Democracies are about enabling people with significant disagreements to coexist peacefully. That peaceful coexistence is usually secured through processes that enable people to concede that even if they don't end up prevailing, they respect the process that led to whatever final determination is made about the rules of the game.

The RMA's processes did it few favours. To non-experts they seemed at once arcane and endless. While plans had to be reviewed every ten years, it seemed to take the best part of a decade to conduct them. The proposed reforms will radically streamline that process under national direction. In doing so it will create new risks. If the business of limits and national direction is to be left to ministers using regulations, those powers must be subject to a process that provides proper scrutiny and limits the room for environmentally questionable trade-offs. Legislation cannot assume environmentally benign ambitions on the part of future ministers.

But, of course, legislation itself can be changed and legislated protections can also be eviscerated. This brings us to the brink of the 'constitutions and rights-based discourses' that appears in the title to this session. We can attempt to bolster environmentally benign ambitions by inventing either capital 'C' or little 'c' constitutional forms designed to make it more difficult for them to be undermined in the face of crises or determined lobbying pressure.

But whether they can be protected may depend not just on the state of the law but the state of the body politic as well. We have seen in America how tribal politics and monied interests can undermine seemingly cast-iron constitutional protections. Constitutional processes are only as good as the integrity of those charged with upholding them.

My role is that of an Officer of Parliament. You could regard it as forming part of the small 'c' constitution. My powers are ones of review and recommendation only. So you could say they are not very power*ful*. They are rooted in the contention that somebody accountable to the Parliament, rather than the Executive, is needed to hold office holders and agencies to account for their performance in carrying out the environmental duties conferred on them; and that the exposure of 'the facts' – dare I say the '*truth*' – will limit backsliding from whatever environmental goals and limits we erect.

One of the limitations I have faced in exercising that power to audit and review has been a near universal absence of high-quality information. Early on, I reviewed our Environmental Reporting Act 2015. I discovered that its sponsoring minister had assured her colleagues that it would require no new information. Yet it had been known for years that our data were riddled with gaps. I am still waiting to see my recommendations addressed (I am hopeful they will be). But even if we had excellent information, would it be used to make a difference?

This symposium comes a week too early to answer that question comprehensively. Next week I will be tabling in the House a major report proposing that we should scrutinise both the quantum and the quality of environmental expenditure in the light of what environmental reporting is telling us. To do that means amending the Public Finance Act 1989 so that select committees have the information they need to do a better job.

But even if we had super information and a transparent budgetary process, would the Parliament I am supposed to be assisting make the best use of it?

This brings me to what I consider to be the weakest link of our system of government and governance – the part played by our select committees. This is the procedural loop that needs serious attention. The Executive is well supported to take good decisions if it wishes to. Our courts are similarly well equipped to do what is asked of them. But what of the legislature? Can select committees in a single chamber Westminster parliament really hold the Executive to account?

I make no comment on the diligence or interest of Members of Parliaments. I was one and I am certain I could have done a better job. But the workload is heavy, time is limited and select committees are not where most MPs want to be. They want to be in the Executive – after the next reshuffle (if they're in the governing caucus) or after the next election (if they're in the opposition caucus). Our system creates a serious motivational conflict for backbench MPs. What happens when a governing majority decides it wants to upend environmental protections and has the numbers to do so? Government MPs are there to do the bidding of the Executive of which they aspire to be a part. They cannot be guaranteed to walk the road to Calvary as Mike Minogue and Marilyn Waring did during that last period of crisis.

I've pondered this conundrum for years and have to say that I don't believe it can easily be solved in a unicameral system. I found the chapter in Sir Geoffrey's and Andrew Butler's book *Towards Democratic Renewal* entitled 'Why New Zealand does not need an upper house' wholly unsatisfying. Calling a second chamber an 'upper house' is a good way of arousing Kiwi hostility to poncy hierarchy. But a second chamber whose members could not accede to the Executive and whose principal role was to review legislation could provide a better counterbalance. Select committee chairs might attain the profile and kudos that currently only attaches to ministerial roles.

This would not, in my view, be achieved by the proposal for a 'main committee' to which uncontroversial bills would be sent. It is controversial bills that deserve eagle-eyed scrutiny and that needs to come from people other than their promoters. Meanwhile, the House of Representatives could instead spend more time scrutinising the quality of public expenditure and whether any of it is making a difference.

In the next two or three decades we are going to see serious climate disruption. We are likely to experience fresh pandemics. We will learn what fraying biodiversity coupled with the dispersal of species and pathogens to new places will mean for food production, biosecurity and human health. We will find out what the global presence of plastics and industrial chemicals in the food chain will mean for our species. The world will not look as it did.

I referred, at the outset, to a future that is unimaginable – in the sense that seemingly unchangeable qualities of the physical world and the way we experience it will dissolve. It may be that the impact of colonisation for Māori can give us a glimpse. Imagine a world in which, over 700 years, you had invested every detail of the land, its biota and the rhythm of the seasons with a particular meaning. Then, other people arrive from nowhere. Forests are burned, wetlands disappear, a new round of extinctions commences. The dawn is no longer the same. I commend again the late Geoff Park's *Ngā Uruora – The Groves of Life: Ecology and*

History in a New Zealand Landscape – one of the most remarkable texts to issue from Victoria University over its 125 years.

The people of Pakistan must now have a vivid sense of what ecological upheaval will mean. And so it will be for all of us as coastlines erode and forests bake. We will be on the receiving end of feedbacks over which we have no control. Designing legislative frameworks that will be able to withstand the sort of political economy pressures that a disrupted environment will impose will be no easy task.

New Zealand has, over the last three decades, invested heavily in top-down reform – some of it aspirational, some institutional. Big theory of all sorts has had a good press. I have contributed to it myself. Implementing stuff down in the weeds is much less glamorous. But it is down in the weeds that the environment is literally changing before our eyes and changing the way we live.

If we are tempted by constitutions and rights-based discourses – the title of this session – then we need to focus on processes that engage ordinary citizens. Our legislature must be wary of delegating complexity of its own making. It needs to empower or finance lower levels of government if it wants them to do its bidding. It needs to find new ways of communicating directly with citizens long before it starts legislating.

Three decades ago as a very young MP I had the job of trying to help traumatised farming constituents understand the events that Colin James described in his book *The Quiet Revolution: Turbulence and transition in contemporary New Zealand*. I invited Colin to join me at meetings I held in a remote, draughty rural hall. I'm not sure if he remembers it. But I learnt then, that an MP's most important job was first to listen and only then try to explain – not to justify. People pick advocacy very swiftly. It immediately sets them on their guard. But if you are determined to share what you know without insisting they agree with your conclusions they will be largely respectful.

There is an educational role to being an MP. The medium for doing so has changed out of sight. Draughty halls are empty. But the thirst for frank engagement remains if we're prepared to try. Sir Geoffrey has, above all else, been an educator and explainer. He has talked to New Zealanders about the need for processes to underwrite good government from one end of the country to the other.

I don't share his particular passion for formal constitutionalising. I am more wary of top to toe reform than I once was. But I am absolutely clear that environmental disruption will deny us the possibility of complacently muddling through. It will create disruption – not just biophysical disruption but economic and social disruption – that will test our institutions and our trust in them. They need to be strong enough to resist both opportunism and short-termism. The meagre contribution I can make to shoring up the quality of the information available to MPs is my contribution to the authority and legitimacy of our political institutions. Others need to be thinking about their design and the motivations of those who occupy them.