# Transparency and Accountability in Government Decision-Making: Devolved Service Delivery

**paper prepared for the Conferenz 6th Annual Public Law Forum**

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In this paper we explore the themes of transparency and accountability in the context of devolved service delivery by government. We live now in an era of collaboration and partnership between government and communities, where policy choices around the spending of public money are made by government and the delivery of services is increasingly undertaken by non-governmental organisations ("NGOs") in the private and voluntary sectors. There is a broad consensus about the involvement of NGOs in publicly-funded service delivery and the importance of values such as collaboration and mutual trust between governments and NGOs. This has been reflected in a number of positive developments, including an agreed statement of government intentions as regards the voluntary sector.

However, a collaborative approach does not on its own ensure either transparency or accountability. The growth of NGO service delivery has been at the expense of some transparency, especially over where the boundary lies between the public and private sectors. Traditional systems of accountability based on public law values have also struggled to keep pace. The discipline of public law has grown over the past three or four decades to encompass a wide range of accountability mechanisms and remedies, but these are of only limited application to NGOs. Designers of the devolved model have tended to place their faith in common law remedies, particularly those of contract.

The common law provides a robust means of specifying and enforcing service delivery by third parties. But the establishment, monitoring and enforcement of common law obligations is costly and resource intensive, and requires skill and persistence. Inadequate attention to these factors reduces the effectiveness of the common law as a means of ensuring transparency and accountability.

In an era of very high expectations of accountability over the use of public funds, this creates substantial risks not only for governments but also for NGOs – as seen, for example, in the issues involving the Waipareira Trust (2000), Te Hauora o Tai Tokerau (2002), and Donna Awatere Huata MP (2003). These spectacular failures of accountability show the size of the gap between expectation and reality as to what happens when things go wrong – in particular, who is to be held accountable (the NGO provider, or the funding department), how (whether through public or common law remedy), and by whom (e.g. by the funding department or the NGO's own stakeholders).

Despite the collaborative approach between governments and NGOs, there remain contrasting values and different levels of acknowledgement of public sector issues in the two sectors. These differences can themselves create major risks and have adverse consequences if not carefully articulated, understood, and managed. A recent example, which we explore later in the paper, is the case involving so-called "political lobbying" clauses in funding contracts between the Ministry of Health and certain NGOs.

***Summary of paper***

We first examine the origins of the current devolved system of social service delivery. We explore the development of the partnership approach and its strengths, and examine some of the tensions underlying the approach – especially in respect of transparency and accountability – in the context of recent public administration reforms.

We then describe briefly the system of public law checks and balances that applies to government decision-making, explore the dilution of those checks and balances when

service delivery is moved outside the public sector as traditionally defined, and describe the application (and limitations) of common law enforcement mechanisms.

Finally, we use two case studies to illustrate the public policy dilemmas brought about by devolution: the recent Auditor-General inquiry involving Donna Awatere Huata MP; and the controversy over government contracts with NGOs in the health sector that permitted them to engage in political lobbying.

***The Move from Government Provision to Government/Community Partnership***

Public sector accountability arrangements underwent a major overhaul in the last two decades of the twentieth century. Among other things, changes were driven by:

- the economic imperative: New Zealand, like many developed countries, could no longer afford public services as they had been delivered;

- a desire to reduce welfare dependency; and

- a loss of confidence in the effectiveness of government delivery of services to the disadvantaged – despite many government interventions, socio-economic inequalities persisted.

The first changes were structural. Until the mid- to late-1980s, operational functions of government were embedded in the divisions, and performed by the staff, of government departments. What was done, and expected standards of performance and conduct, were controlled by public service regulation by the State Services Commission and in the operating manuals and instructions of the departments themselves. Branch offices of the departments provided the local presence, controlled through the same centralised mechanisms.

Machinery of government reforms changed the structures, the accountability arrangements, and the underlying paradigm of control. The State Sector Act 1988 dismantled the system of central control and left government departments as discrete

entities in all but constitutional form[1]. Policy and service delivery functions in departments were separated. The Public Finance Act 1989 provided the foundation for a contractual model for government service delivery, underpinned by agency theory:

- A central policy department advised the responsible Minister on the services required by the Crown.

- The Minister purchased the required services as "outputs" from the department itself, or from a third party – which could be a public entity or an NGO.

- The policy department monitored the delivery of the required services under a purchase contract.

During the 1990s a range of public entities emerged under this model, each with more or less autonomy from central government control. Examples include the Health Funding Authority (a Crown entity), Crown Health Enterprises (Crown-owned companies – later known as Health and Hospital Services, and now District Health Boards), and Landcorp Farming Limited (a State-owned enterprise). They became involved in service delivery either directly, through NGOs, or in conjunction with them.

The private and voluntary sectors also became significant beneficiaries of the agency model. Consistent with the theory, the Public Finance Act authorised Ministers to purchase outputs from state-owned entities and NGOs alike, with no differentiation in terms of accountability or oversight [2]. Consequently, a wide range of NGOs found themselves in contractual relationships with the Crown, either directly (through a policy department) or through a state-owned agent. This raised a host of accountability issues on both sides of the fence – both for purchasers in their ability to specify and monitor service delivery to the required standard, and for providers in

[1] Departments remain part of "the Crown" and have no legal personality as such. But for funding, accountability, and criminal liability purposes, and as an employer of staff, they are *de facto* discrete entities.

[2] See section 9(2A)(d).

their ability to comply with reporting and other contractual requirements. The extent to which traditional public law forms of oversight – e.g. the Official Information Act 1982 and the jurisdiction of the Ombudsmen and the Auditor-General – should be available was also at once controversial[3] and problematic[4].

Governments in the 1990s were quite deliberate in their moves to involve the private and voluntary sectors in service delivery. From 1999, the Labour Alliance government conspicuously abandoned the agency theory underpinning the contractual approach – in part, to dissociate itself from the politics and rhetoric of the previous model. But there was no retreat from contracting itself: quite the reverse. The change ran much more deeply, steered by the emergence of social development as a key strategy in social service delivery. The range of services placed with NGOs continued to expand.

However, NGO providers had become increasingly concerned about the effect of the contracting model, and this re-focus on purchase of services and accountability for "outputs", on the infrastructure and core business of their organisations. They sought a partnership with government, that would:

- recognise the different expectations, objectives and procedures of NGOs and governments; and

- acknowledge the interdependence of government and community:

    - NGOs needed infrastructural support and access to government policy machinery.

    - Governments needed NGOs to do what they were not prepared or were

[3] See the example of funding contracts by Te Mangai Paho, the state-owned Maori broadcasting funding agency, to an NGO owned by a New Zealand First MP in 1997.
[4] The issue was explored in joint advice by the Treasury and the Office of the Auditor-General to the Finance and Expenditure Committee on the Public Audit Bill in 2000: available from the OAG web site. For a local government example, see the Auditor-General's report *Contracting out Local Authority Regulatory Functions* (1999), pp 21-22.

> unable or unwilling to bear the cost of doing, or that they could not do as effectively.

Optimal public engagement in social service activities depends on engagement of both government and community providers. But there is a tension between the need for:

- governments to acknowledge that the effectiveness of the government/end-user relationship depends to some extent on the NGO maintaining its independence and its accountability to its community; and

- NGOs to accept accountability to government (and the public) for their effective and efficient use of public money (and hence specific expectations of what the government funding is going to achieve).

Similar concerns had been one factor in a global trend towards the development of models of partnership between governments, business and the community sector – such as the compact between the Blair Government and the English voluntary sector, which had been replicated in several other countries.

Collaboration was seen to promote – among the key principles for developing effective regional co-ordination and integrated service delivery – clarity of purpose and function; and governance, leadership and accountability.

In December 2001 the Government signed a *Statement of Government Intentions for Improved Community-Government Relationships,* which envisages:

> *strong and respectful relationships between Government and community, voluntary and iwi/Maori organisations.*[5]

At the same time the Government affirmed the need to support the capacity and voice of the community sector. If government has a commitment to strengthening

[5] See www.beehive.govt.nz/maharey/community/statement.pdf.

partnerships with NGOs – as articulated in the *Statement of Government Intentions* – resources would be needed to build not only the capacity and voice of the NGO sector but also meaningful partnerships with it.

This need was addressed through the system of capacity building grants, which first emerged in the 2000 Budget.

Collaboration – defined as regional co-ordination, and integrated service delivery – has thus become a deliberate strategy to achieve devolved service delivery outcomes. But the effectiveness of a partnership approach was not necessarily proven. Ministry of Social Development research found that:

> *the literature does not answer the question of whether partnership models offer any benefits over other models in terms of the achievement of welfare goals.*[6]

And:

> *There is evidence that collaboration can improve services and offer benefits for organisations, including better processes, improved relationships, greater capacity to respond to local needs and more efficient use of resources. However, there is currently little clear evidence, either in New Zealand or internationally, that collaboration improves outcomes. This is largely due to the lack of effective evaluation of collaborative initiatives*[7].

Nonetheless:

> *the increasing reliance by Government agencies on the voluntary sector to fill service delivery gaps, has resulted in a partnership approach between the community and government.*[8]

***Review of the Centre and Beyond: Accountability Reforms***

Collaboration cannot, on its own, achieve process-related outcomes such as improved transparency and accountability. So the development of a partnership approach

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[6] *Models of Community-Government Partnerships and their Effectiveness in Achieving Welfare Goals,* MSD 2000, page 4.
[7] See www.ssc.govt.nz.
[8] Thames Valley Regional Economic Development Strategy, page 58

between government and community organisations was paralleled by a move towards centre/region/"whole of government" collaboration, in the Review of the Centre.

The State Services Commission undertook the Review of the Centre in 2001. The government/community interface was a relevant consideration:

> *A strong theme implicit in the* [Review of the Centre Advisory] *Committee's Terms of Reference was the need for a more 'citizen focussed' view of New Zealand's public management system.*[9]

The Review of the Centre has resulted in substantial reforms in the area of government accountability. Three aspects of the Public Finance (State Sector Management) Bill, currently before a select committee, will have critical flow-on effects to the government/NGO relationship:

- Managing for outcomes. Accountability arrangements have been reviewed to reflect a renewed emphasis on outcomes. This has caused government agencies to re-examine the purpose and outcomes of the contracts they have with NGOs, an area where, in our view, there remains a high level of risk.

- Changes to the oversight of Crown entities. The new Crown Entities Act will clarify the governance relationship between the Crown and various classes of Crown entities, including in respect of the power of Ministers to direct Crown entities on matters of government policy.

- Ethics, values and standards. Wider application of public service ethics, values and standards is to some extent embedded in the legislative reforms. This reflects the public concern that – regardless of contractual obligations being met – public service standards of conduct must be adhered to when the use of public resources is involved.

[9] See http://www.ssc.govt.nz/display/document.asp?navid=105

***The legal framework for a devolved system of service delivery***

A collaborative approach must go hand-in-hand with an adequate legal framework to enable service delivery to be specified, monitored, and if necessary enforced.

*Public law*

Government decision-making is subject to a wide range of public law and administrative controls designed to ensure lawfulness, consistency, transparency, and accountability. The essential elements of the public law framework include both general and sector-specific regulatory and accountability statutes, and a range of administrative and ethical requirements and guidelines administered by central agencies such as the Cabinet Office, the Treasury, and the State Services Commission.

The legislative framework can be summarised as follows:

- overarching "machinery of government" statutes – e.g. the Constitution Act 1986, State-Owned Enterprises Act 1986, State Sector Act 1988, Public Finance Act 1989, Local Government Act 2002;

- sector- or entity-specific legislation – e.g. the Education Act 1989, Health and Disability Commissioner Act 1994, New Zealand Public Health and Disability Act 2000;

- rights-related legislation – e.g. the New Zealand Bill of Rights Act 1990, Human Rights Act 1993, Privacy Act 1993; and

- oversight and accountability legislation – e.g. the Local Authorities (Members' Interests) Act 1968, Ombudsmen Act 1975, Official Information Act 1982, Local Government Official Information and Meetings Act 1987, Fiscal Responsibility Act 1994, Protected Disclosures Act 2000, Public Audit Act 2001.

General commercial legislation, such as the Commerce Act 1986 and the Fair Trading Act 1986[10], applies to services delivered by the Crown and state-owned entities.

Key administrative and ethical requirements and guidelines include the *Cabinet Manual 2002*, a host of Cabinet circulars and directives, the State Services Commission's *Public Service Code of Conduct*[11], and Audit Office and Treasury guidelines on fee-setting, purchasing, and contracting by government departments.[12]

The legislative and administrative framework is reinforced by judicial and parliamentary oversight mechanisms:

- parliamentary oversight of the Executive and other public sector organisations – e.g. through select committees' financial review and inquiry powers; and

- judicial oversight (primarily through the Judicature Amendment Act 1972).

Public law mechanisms and remedies apply directly to the Executive and those entities which are defined for particular purposes as being part of the public sector. Some remedies are available no matter which side of the public/non-public line the provider falls: for example, those under the Privacy Act[13] and the Health and Disability Commissioner Act, and the disclosure provisions of the Protected Disclosures Act. However, other mechanisms and remedies become seriously diluted once service delivery is devolved out of the hands of those entities which form part of the public sector. In some cases their availability depends on the terms of the service delivery contract. For example:

- The Official Information Act applies primarily to information held by an independent contractor to a Minister, department or organisation ("principals"). Section 2(5) of the Act deems information held by an "independent contractor" of a principal to be held by the principal. However, a requester's ability to access

[10] See in particular s 4(1) and the definition of "trade" in s 2.
[11] Available from www.ssc.govt.nz.
[12] The contracting guidelines can be accessed through the Treasury web site, www.treasury.govt.nz.
[13] Although the right of access to personal information under Principle 6 is judicially enforceable only in respect of public sector agencies: s 11.

that information through the Act's request provisions is contingent upon the principal either holding the information itself or having power to require its production under the contract of engagement.[14]

- The Ombudsmen Act does not apply to the administrative acts or omissions of a contractor that is not itself a department or organisation as defined in that Act.

- The requirements of the Public Finance Act in relation to parliamentary appropriations (in particular, the prohibitions on money appropriated by Parliament being spent otherwise than in accordance with appropriation) apply only to the Crown and not to any Crown entity or other third party.

- The jurisdiction of the Auditor-General can be exercised only in relation to "public entities" as defined in the Public Audit Act, and not NGOs – although the Auditor-General does have powers under the Act to "follow" a public entity's money into another organisation when acting in the capacity as the auditor of the public entity.

- Parliamentary financial oversight of an NGO is possible only if the entity is declared a "public organisation" under Standing Orders[15]. Select committees' inquiry powers could however be exercised in relation to an NGO[16].

- The availability of judicial review is primarily limited to the extent to which statutory powers of decision are involved. However, the precise limits of the reach of judicial review are unclear, as the courts are becoming increasingly willing to review exercises of power which in substance are public or which have important public consequences, no matter how the origins of the power and the body exercising it are characterised.[17]

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[14] See discussion of this in *Contracting Out Local Authority Regulatory Functions*, note 4 above.
[15] SO 328.
[16] Subject to the matter being related to the committee's subject area: SO 189(2).
[17] See e.g. *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1 at 11 (CA). In *Waitakere City Council v Waitemata Electricity Shareholders Society* [1996] 2 NZLR 735 at 742-43 and 747 (HC), Fisher J summarises different ways in which judicial review applications could be made on public law principles against seemingly private bodies: where the organisation is publicly owned and its decisions in the public interest could adversely affect the rights and liabilities of private

*The law of contract*

The law of contract is readily adaptable to the delivery of social services by NGOs. Contracts are a means by which funding entities can safeguard their own interests (and those of the Crown) by:

- apportioning risks in respect of service delivery;
- specifying delivery standards;
- imposing accountability obligations;
- building in performance incentives (e.g. by providing for payment by instalment conditional upon performance and satisfaction of accountability measures); and
- tailoring other enforcement measures to suit the particular requirements of the funding arrangement.

Use of the contracting model is nevertheless problematic for a number of reasons. For example:

- specification of services and quality measures is difficult, especially for services that are intangible;
- risk allocation can be similarly problematic – for example, if an end-user suffers loss or harm as a result of the provider's default, the user can be left without a remedy unless the provider is in a position to provide compensation;

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individuals without other form of redress (eg *Mercury Energy v Electricity Corporation of New Zealand* [1994] 2 NZLR 385 (PC)); where the organisation exercises quasi-public functions (eg *R v Panel on Take-overs and Mergers, ex parte Datafin* [1987] QB 815); and "perhaps" where the organisation's decision could have significant direct impact on the public (eg *Finnigan v New Zealand Rugby Football Union (No 2)* [1985] NZLR 181). Also, in *He Putea Atawhai Trust v Health Funding Authority* (unreported, 8/10/98, HC Auckland, CP497/97) Fisher J went on to suggest that it is a question of degree as to the point at which a private commercial operation merges into a public one attracting judicial review.

- issues around ethical standards and public sector values can be difficult to specify, and even more difficult to enforce; and

- it can be difficult to assess the nature and extent of loss or damage to the funder in the event that the provider defaults – especially if the benefits under the contract are delivered not to the funding entity but to members of the public.[18]

Careful drafting can to some extent address these issues. But the transaction and compliance costs can be significant, both for funding entities and for providers. From NGOs' point of view, compliance costs have been a contributing factor in the move to the partnership approach described earlier. But it is probably also a fair criticism of the devolved funding approach that insufficient resources have been devoted to monitoring and enforcement. As our first case study shows, a risk-based approach to this activity is one means of ensuring that the available resources are used effectively and efficiently.

The second case study illustrates the difficulties in contract specification and enforcement, in the particular context of a contract that provided funding for policy development activities – in keeping with the partnership approach to government/NGO relationships.

***First case study: the inquiry involving Donna Awatere Huata MP***

The Auditor-General's *Inquiry into Public Funding of Organisations Associated With Donna Awatere Huata MP*[19] is an example of:

- the difficulty in determining the reach of public law remedies – in this case, the jurisdiction of the Auditor-General under the Public Audit Act 2001 – in a case

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[18] For some interesting and more detailed discussion of these issues, see Seddon, *The enforcement of government contracts* (Commonwealth Law Conference paper, 2003) and Zamprogno, *Contracting the Delivery of Government-funded Human Services*, 109 Canberra Bulletin of Public Administration (September 2003), 37.

[19] Presented to the House in October 2003, and available on the Auditor-General's web site www.oag.govt.nz.

involving a failure of service delivery by an NGO funded by a government department; and

- the risks associated with common law enforcement, based solely on the law of contract.

The inquiry also raised unusual ethical issues concerning the involvement of a Member of Parliament in pre-contract lobbying and subsequent contractual negotiations. We will also discuss these issues briefly.

*Jurisdictional issues*

The inquiry involved allegations of financial impropriety in respect of an NGO known as the Pipi Foundation, which had been established by Donna Awatere Huata as a vehicle for a reviving a reading programme which she had developed some years earlier. To quote the background section of the report[20]:

> *The allegations involved money owned by the Pipi Foundation Trust ("Pipi"), a private trust established by Mrs Awatere Huata in 1999 to deliver a children's reading programme known as the Four Minute Reading Programme, which Mrs Awatere Huata had developed in the 1970s.*
>
> *The Auditor-General is not the auditor of private trusts. We therefore had no power to investigate the allegations of financial impropriety surrounding Pipi's funds. Both the Police and the Serious Fraud Office have made inquiries into those matters.*
>
> *But it was also apparent that some (if not all) of the money that was the subject of the allegations had originated from public sources – primarily through a series of funding contracts between Pipi and the Ministry of Education. As the auditor of public entities (including the Ministry of Education), the Auditor-General has an interest in ensuring the integrity of such funding arrangements.*
>
> *Our preliminary inquiries also revealed that:*
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> - *Pipi may have received funding from a number of public entities besides the Ministry of Education;*

[20] Pages 4 to 6.

- *some of Pipi's funds had (it was alleged) been paid to or from other private trusts and organisations with which Mrs Awatere Huata was associated; and*

- *those other organisations had themselves been the recipients of public funds.*

*In the normal course of events, we would have expected the funding agencies themselves to have taken steps – through the medium of the funding contracts – to check and verify that the funds they had made available had been spent properly and for the purposes for which they had been given.*

*We decided that an inquiry was justified because:*

- *Irrespective of whether the allegations of fraud involving Pipi funds were true, the suggestion that funds of public origin may have been available to be misspent at all brought into consideration the possibility either that the contracted services had not been fully delivered or that more public funds than necessary had been provided for the purpose. This raised a question about the integrity of the systems used by the individual funding agencies – both in the making of contracts with private organisations and in monitoring and overseeing their service delivery.*

- *At least five different funding agencies appeared to have been involved in providing funds either to Pipi or to other associated organisations. This raised cross-sectoral issues – such as the prevention of "double dipping" – that the Auditor-General (as the auditor of all the funding agencies involved) was well placed to consider.*

- *Mrs Awatere Huata herself had been personally involved in seeking, from Ministers and officials, funding for Pipi and other related organisations. Irrespective of whether she had done so in her personal capacity or as an MP, this raised a question about what is (or ought to be) expected of MPs when their private business interests bring them into contact with fellow politicians and the bureaucracy. Although the Auditor-General does not oversee the actions of MPs, the question is relevant to the integrity of public funding systems.*

- *The allegations had significant implications for Parliament itself, because of the move to suspend Mrs Awatere Huata's membership of ACT New Zealand until the allegations against her had been fully investigated.*

...

*We aimed to:*

- *identify all funding arrangements[21] (whether involving contract for services or grant) and between public entities and organisations with which Mrs Awatere-Huata has an interest[22] since her election to Parliament in 1996;*

- *examine the process by which each individual funding decision was made, including whether a contestable process was or ought to have been used, by the public entities concerned;*

- *review the appropriateness of the funding entities' arrangements for monitoring the implementation and performance of the individual contracts for services or grants and the effectiveness of that monitoring (that is, did it ensure they received what they contracted for); and*

- *identify whether the organisation receiving the funding appeared to have performed and/or complied with its contractual obligations or any grant conditions.*

The passage illustrates the Auditor-General's view that the primary mechanism for achieving accountability for an NGO's use of public funds for service delivery is, or at least ought to be, the funding contract – enforced by the funding entity (in the case of the Pipi Foundation, the Ministry of Education). As the principal in the contracting situation, the Ministry ought also to have had contractual powers to ensure that the funds were spent for the specified purpose.

Nevertheless, the Auditor-General, as the auditor of the Ministry, was also in a position to review the integrity of the systems surrounding contract specification, monitoring, and enforcement. To the extent that the Ministry was unable to do so contractually, the Auditor-General could also use his powers (under Part 4 of the Public Audit Act) to obtain information directly from the NGO about the expenditure of the funds advanced under the contract.[23]

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21 By "funding arrangements" the Auditor-General meant any grant of funds for any purpose (including capacity building) and any contract under which goods or services (including consultancy services) were provided to a public entity.

22 "Interest" included both financial and non-financial interests.

23 These powers must, of course, be exercised for the purpose of performing functions under the Act, in the Auditor-General's capacity as the auditor of the Ministry.

*What was found – the contractual approach*

The report contains a detailed review of the Ministry's funding contracts with the Pipi Foundation.[24] The overriding expectation was that:

> *the Ministry would have had policies and procedures, consistent with good practice at the time, to select a provider for the [reading]* Programme *and to negotiate and monitor a contract with the provider.*

The Ministry's policies and procedures covered the selection process, setting up a contract, managing it, and reviewing and reporting. Overall, the Auditor-General found that the policies and procedures complied with good practice. The report also acknowledged the particular difficulties encountered in relation to the Pipi situation (which it addressed in some detail). However, it was critical of elements of the contract specification process – including in respect of the Ministry's identification of contractual risk. Similar concerns were expressed about the performance of other funding agencies (including Te Puni Kokiri and the Community Employment Group of the Department of Labour) in relation to funding contracts with other organisations with which Mrs Awatere Huata had been associated.

The fundamental proposition underlying this part of the Auditor-General's report is that the process of contract specification is not limited to a simple drafting exercise. Equally important is the assessment of contractual risk – of which an exercise of "due diligence" in relation to the NGO is an integral part. To quote again from the report[25]:

> *All the entities need to establish procedures to review the governance and accountability arrangements of organisations that have applied for funding. Such a review should include:*
>
> - *checking the legal status of the organisation (including a review of its constituting documents);*
> - *checking that there is adequate segregation of duties between the governing body and management;*
> - *assessing the potential for personal benefit to any of the Trustees;*
> - *assessing the ongoing financial viability of the organisation; and*

[24] See Chapter 4.
[25] Pages 9-10.

- *checking whether or not the organisation has applications to or is receiving funding from other government agencies for the same or a similar purpose.*

*Each of the funding entities needs to better document their decision-making processes. This is especially important in cases where the entity has departed from its own policies and procedures. In such cases, the entity should fully document the reasons for departing from the applicable policies and procedures, the effect of the change, and what additional procedures have been put in place to mitigate any risks arising from the change – for example, more intensive monitoring.*

*Each of the funding entities needs to identify potential conflicts of interest, and develop procedures to address these over the duration of the contract.*

The risk-based approach serves two objects for the funding entity. First, the entity must satisfy itself as to the *operational* capability and suitability of the provider it has selected to deliver the services required. Secondly, it should assess the provider's governance and management arrangements for indicators of its ability to:

- sustain service delivery to the required standards (expected in the public sector) over the duration of the contract;

- satisfy accountability requirements under the contract – which in turn flow into the funding entity's own accountability duties (enhanced under the reforms resulting form the Review of the Centre); and

- ensure that standards of ethical behaviour expected in the public sector are maintained.

The results of this assessment process should flow into the contract specification and drafting process.

It is recognised that there are significant transaction costs for a funding entity in doing this "front-end" work – especially when the entity has multiple contracts to administer. But the risk-based approach has the advantage of enabling the funding entity to concentrate its (equally resource-intensive) monitoring and enforcement effort on those contracts which are identified as carrying high risks.

The Auditor-General's report also identified a number of similar inadequacies in the funding entities' monitoring processes[26]:

> *Each public entity needs to:*
>
> - *ensure that it obtains an in-depth breakdown of the actual costs of the projects funded and review these costs for reasonableness;*
> - *require production of, and make sure that it receives, annual audited financial statements of the organisations that it is funding, within specified time frames;*
> - *better document the contract monitoring and management undertaken – this includes:*
>   - *recording the funded organisation's compliance with all contractual obligations associated with the funding arrangement;*
>   - *documenting the results of site visits and management meetings held with the funded organisation; and*
>   - *documenting all significant issues that arise during the contract and how these issues are addressed;*
> - *ensure that final project reports are received on a timely basis.*
> - *where a contract is to be varied or extended for a future period, review carefully the costs of the project, what has been achieved to date, and what still has to be achieved – before progressing on to the next phase.*

Risk-based monitoring of projects in this way underlines the need for the parties to a contract to be clear as to the expectations and mutual obligations when investing public resources.

*Ethical issues*

The most highly-publicised aspect of the inquiry concerned the involvement of Donna Awatere Huata in:

- lobbying of Ministers to obtain Cabinet commitments of funding for Pipi; and

[26] Pages 9-10.

- subsequent negotiations with the Ministry of Education (on behalf of Pipi) during the contract formation stage.

This conduct raised significant issues of transparency, which Chapter 3 of the report addressed at length. For the most part, the issues concerned the responsibilities of Donna Awatere Huata herself as a Member of Parliament. However, the report also noted[27] that the Auditor-General would have expected the Ministry to take steps to manage the risks of conflict of interest arising from her close involvement in the reading programme that was to be funded.

In relation to the conduct of MPs, the report noted that there are currently no formally recognised standards governing MPs' conduct, other than in the context of parliamentary proceedings, when seeking funding for programmes or organisations on in which they have an interest. This contrasts with the position in the United Kingdom, for example, where the recently introduced *Code of Conduct of the House of Commons* expressly covers extra-parliamentary activities such as approaching Ministers and civil servants for funding contracts.

The report articulated the following standards which, although not formally recognised, are understood to apply in New Zealand[28]:

- An MP must not use, or be perceived to use, his or her position for any direct financial benefit, whether personally or for a near relative.

- In any dealings with Ministers or officials, an MP must always act transparently and disclose his or her professional or personal interests (including those of near relatives, friends, and business or other associates).

- It is acceptable for an MP to lobby Ministers for funding of programmes and projects in which they have a political or professional interest.

[27] At page 67.

[28] At page 33.

- Some degree of overlap is acceptable between an MP's non-financial personal interests and those of the MP's constituents or community.

- An MP must not subject officials to pressure by direct contacts in matters in which the MP has a personal interest (whether financial or otherwise).

- An MP can never be seen to act solely in a private capacity when seeking financial or other benefits from Ministers or officials.

The list itself illustrates the point that the standards of conduct for MPs are not always clear, and fine distinctions and questions of judgment can be involved.

A significant development since the Auditor-General's report was the introduction of the Members of Parliament (Pecuniary Interests) Bill. This will require all MPs to declare certain financial interests on an annual basis – including the names of NGOs that receive Government funding, in respect of which they have an interest.

The Bill is currently before the Standing Orders Committee for consideration. As well as being a significant advance in ensuring transparency in government decision-making, it provides an opportunity for the House to consider the desirability of a Code of Conduct along UK lines.

***Second case study: Ministry of Health "lobbying" contracts***

Government departments that have a high level of interface with the community – such as the Ministry of Health – have given considerable attention to the development of a collaborative partnership approach with NGOs, especially since the Government's *Statement of Government Intentions for Improved Community-Government Relationships.* It has not always been easy for such departments to balance the tensions between public accountability and expectations of conduct, and the mutual trust and respect that partnership requires. This is very evident when

public resources are made available to community organisations to implement or advance public policy initiatives.

The different roles and functions of government entities and NGOs are highlighted when they make some form of agreement with each other, particularly by contract. Such contracts have been used in the health sector, for example, to:

- broaden the base of input to public policy, giving a health perspective that differs from that of a government entity;

- promote/build engagement in health-related activities; and/or

- deliver health services that the Ministry or a District Health Board cannot deliver, or cannot deliver as effectively.

Contracting NGOs to develop and promote public policy has the potential for involving NGOs in activities which the Ministry of Health itself may not engage in, as the Ministry has discovered.

The Cabinet Manual sets out a number of constitutional conventions which govern the behaviour of Ministers. The *Public Service Code of Conduct* sets out several principles which govern the conduct of public servants – a key obligation being the principle of political neutrality[29].

The Ministry of Health and NGOs are under different constraints as regards political neutrality. Both can advocate for/promote good health practices. The Ministry however cannot lobby, whereas NGOs can – within the law and their own rules. Indeed, NGOs would see this as "core business" in many cases. As we have already observed, constraints placed on such core business was a major source of concern that NGOs have about contractual relationships with government.

[29] "Public servants must be politically neutral, i.e. that must perform their job professionally and without bias towards one political party or another", SSC Fact Sheet 1 (28 September 2003).

On 8 October 2003 issues were raised in Parliament about the propriety of Ministry of Health contracts with some anti-smoking groups that included clauses requiring them to lobby MPs. A review of the contracts was undertaken, resulting in a report released on 26 November 2003: *Contracts with non-Government Organisations – Compliance with Public Service Standards (*"the *Report").*

The *Report* found that it was clear that the policy analysis and health promotion (and disease prevention) role of the Ministry, at least in respect of the identified clauses in six contracts, had become entangled with the advocacy and lobbying role of NGOs. This was unacceptable under public service standards and could compromise the political neutrality of the Ministry. The *Report* concluded that contracts with NGOs, which specified liaison with MPs, were unacceptable, and made a number of points in relation to advocacy, lobbying, and the respective roles of government entities and NGOs.

The Ministry admitted that:

> *the enthusiasm and energy of public health staff have coloured the approach to NGOs contracting. This desire to engage and help resolve key public health issues is commendable although it does not make political lobbying any less unacceptable.*

By mutual agreement between the Ministry of Health and the relevant providers, a number of provisions in contracts were deleted or amended.

What the so-called "contract for lobbying" case made clear is that considerable confusion exists about the application of public transparency and accountability responsibilities within the partnership model. This need not be so. As the Ministry concluded:

> *The Ministry functions under the Public Service Code of Conduct and also has reference in a public health context to documents such as the Ottawa Charter. These are not inconsistent if the Ministry is appropriately clear in regard to the outputs for which it contracts.*

There were also deficiencies in the contracts themselves. Not only did they lack clarity about what they were meant to achieve, but they did not contain sufficient specifications enabling either the Ministry or the NGOs themselves to manage the "public sector" risks involved in the contracted services.

***Concluding comment***

These case studies underline the need for a risk-based approach to contract monitoring. Returning to the overall theme of the paper, this approach underpins the effectiveness of contractual decision-making in the area of devolved social service delivery.

Both governments and NGOs should see the approach as complementary to, rather than in conflict with, the partnership or collaborative approach that now characterises inter-sectoral relationships generally. By enabling the more resource-intensive aspects of specification, monitoring, and enforcement to be concentrated in areas of greatest risk, the approach also offers a helpful means of addressing the transaction costs problem, which is the key dilemma posed by contractualism.