

## BOOK REVIEW

PUBLIC LAW TOOLBOX: SOLVING PROBLEMS WITH GOVERNMENT by Mai Chen (Author), LexisNexis, 2012. 1050 pp, recommended retail price NZ\$184 (paperback).

This book has been over 15 years in the making. It represents the product of the first public law legal practice formed in the 1990s. Mai Chen, with Rt Hon Sir Geoffrey Palmer, established the first explicitly public law practice, which recognised that those giving public law advice required not only a knowledge of the law, but also an understanding of the policy and political process. Palmer had set out the case for a new approach to public law teaching and practice in a lecture to Otago law students in 1992, which was published in the Victoria University of Wellington Law Review. His view of the proper practice of public law was summed up in that article as follows:<sup>1</sup>

My contention is that no one can be an adequate public lawyer without understanding not only the laws of the constitution, but also the practice of it, how it works. If one restricts oneself to the rules recognised by the courts, one will understand very little about how we are governed, or how public power in New Zealand is distributed. From the lawyer's point of view, there is a further deficiency in the traditional approach – it teaches you little about how to produce outcomes for clients.

The formation of Chen Palmer law practice in 1993 provided the opportunity to put this new approach into practice. As I was teaching public law at the newly established Waikato Law School at the time, this approach to public law was incorporated within the curriculum in an effort to introduce students to the context within which law is made.

The focus of this approach to public law in practice was problem solving. Public law problems were best resolved through a combination of case analysis and risk assessment within the relevant political and policy context. Clients needed their legal advisors to be proactive problem solvers. It was also appropriate for the legal advisors, on behalf of their clients, to participate in the law making process through engaging with the policy and political decision makers. While today this approach to legal practice is taken for granted, at the time it was seen as radical. It also reflected a professional response to the fundamental changes that were taking place in New Zealand through the adoption of a neo-liberal approach to policy making. With the decline in the role of public institutions – such as the public service – to protect the public interest in the traditional sense, it was necessary to ensure client interests were protected through a change in the nature of the provision of legal services.

Palmer recognises in his Reviewer Comment in the introduction to the book that if the interests of New Zealanders generally are to be protected in public decision making, there must be knowledge of how those institutions work. As he notes:<sup>2</sup>

There is great value in the focus because it adds to the sense that New Zealanders govern themselves through their democratic institutions of which Parliament is the prime mover.

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1 Sir Geoffrey Palmer “The New Public Law: Its Province and Function” (1992) 22 VUWLR 1 at 7–8.

2 Mai Chen *Public Law Toolbox* (Lexis Nexis, Wellington, 2012) at v.

Palmer characterises the approach of the book as that of the engineer who is explaining how the engine room of law making works. The book certainly sets out to explain the practice of public law in New Zealand. Chen notes in the Preface that this is not a book for theorists.<sup>3</sup> It is for practitioners, and this is reflected in the content and organisation of the book. As such it is aptly described as a toolbox. The toolbox approach is best described by Chen as:<sup>4</sup>

public law, including public accountability and transparency mechanisms, like the Official Information Act 1982, officers of Parliament, complaints bodies, institutions of government and constitutional conventions, and regulation of the private sector as problem solving tools for business and clients.

Although this practical approach is primarily aimed at clients and business, the book also makes an important contribution to explaining how the constitutional institutions operate in practice, and support democratic decision making. It is therefore essential reading for anyone who wants to know how the regulatory framework incorporating the institutions of the executive and Parliament works, or should work in practice. Knowledge of the regulatory toolbox is not sufficient, however, to protect or promote a citizen or client interest. It is the skill of knowing what is the appropriate or most effective instrument in the circumstances that is also required to get the full benefit of the tools available. This is where the book is also helpful with its use of practical examples.

At the outset of this substantial text, the author helpfully clarifies the role of the public lawyer by identifying common myths about the role. She notes first that the role of the public lawyer is not as simple as the lawyer “having access” to decision makers.<sup>5</sup> Although the lawyer may get access, that access is only effective if there is a clear understanding of the problem and options for how to it is to be resolved. That the public lawyer also must deal with all political parties in an MMP environment is sometimes forgotten. Although ideology defines political parties, in the day-to-day business of law making there is a need to find solutions to complex problems, and ideology is not often helpful in these circumstances. What is required from the public lawyer is practical advice on how to solve the problem. Also, regardless of the ideology of the government of the day, all governments are required to observe the constitutional infrastructural obligation for transparency and accountability. It is through astute use of these constitutional instruments that a client’s problem may be resolved. Finally, Chen asserts that public lawyers are not merely lobbyists. As she notes:<sup>6</sup>

the magic is in knowing, in any particular situation, which public law tools to deploy, and when and how to do that for best results.

The book is divided into five Parts that cover both institutions and processes. Although the material covered is not exhaustive, it is comprehensive. The descriptive commentary is illustrated by case studies that demonstrate the practical application of the law making process, or the various ways in which to resolve a problem. For example, Case Study 2.1<sup>7</sup> provides a narrative

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3 At xi.

4 At 3; see also Mai Chen “The Public Law Toolbox” (10 February 2012) New Zealand Lawyer Magazine Online, Issue 177 <[www.newzealandlawyer.co.nz](http://www.newzealandlawyer.co.nz)>.

5 Chen, above n 2, at 21.

6 At 21.

7 At 32.

describing the issues that have arisen recently in the settlement of parliamentary salaries and allowances, while Case Study 7.1<sup>8</sup> takes the reader through the various stages of the law reform process that resulted in the Commerce Amendment Act 2008, which amended Parts 4 and 4A of the Commerce Act. Part A of the book deals with the institutions of government decision making and the various regulatory controls on that process. The underlying theme is how to make executive decision making accountable. Material in this Part deals with the formation of governments, the implications of the electoral system and working within a MMP environment, as well as the legislative process. It also includes chapters on Treaty of Waitangi settlements, human rights protections, the impact of international law and the use of inquiries.

Part B moves onto an often neglected area, namely the Officers of Parliament, whom Chen describes as “constitutional watchdogs”.<sup>9</sup> She describes how the Offices of the Ombudsman, Auditor-General and Parliamentary Commission for the Environment can not only hold executives to account for their actions, but also provide individuals with the means to redress wrongs in public administration. This chapter is followed by an assessment of the powers and capacity of various complaints agencies to provide remedies.<sup>10</sup> The Privacy Commissioner, the Health and Disability Commissioner, the Independent Police Conduct Authority, the Regulations Review Committee, the Judicial Conduct Commissioner and the intelligence and security agencies are all examined in these chapters. The proliferation of such complaint agencies means the courts are not the primary source of the redress for wrongs experienced by clients. Knowledge of these agencies’ powers and procedures is therefore essential for the public lawyer.

Parts D and E deal with the regulators and litigation respectively. While much has been written about the central regulatory role of the Commerce Commission, less is understood of the various professional regulatory bodies. The regulatory bodies that govern health professionals, lawyers, real estate agents, financial advisors, actuaries and auditors are all analysed in the text.<sup>11</sup> Chen describes the trend towards “heavy-handed”<sup>12</sup> regulation of professions and industries as an example of a search for more accountability and transparency by clients and citizens who have suffered financial loss as a result of unprofessional conduct exposed by the financial recession. It is not surprising that a treatment of litigation comes toward the end of the book.<sup>13</sup> It is seen as a tool of last resort, given that it is “expensive, time consuming and uncertain”. It does have a place, however. Importantly, court judgments provide guidance for future cases and thus influence client behaviour. The increasing use of arbitration is therefore a concern if it undermines litigation in the courts.

The final two chapters address the issue of fraud and corruption with a focus on the Serious Fraud Office, and finally consideration is given to future constitutional change. This chapter is timely given the current constitutional review being undertaken by the government. Chen argues for the establishment of a Constitutional Commission as an independent non-partisan body to prevent constitutional changes being undertaken in a hasty ad hoc manner, without proper public education and understanding of the implications of any change. This seems like a sensible notion

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8 At 229.

9 At 675.

10 At Parts B and C generally.

11 At ch 25 generally.

12 At 925.

13 At Part E.

as a pre-requisite to any constitutional change that may emerge from the current constitutional review. The problem with the current review is that it lacks the legitimacy that comes with independence.

In conclusion, this text will be essential reading for public lawyers and those interested in understanding how public institutions work in New Zealand. Chen wrote that the purpose of the book:<sup>14</sup>

is to empower those dealing with government to be more effective and successful; and to make constitutional issues ordinary and not extraordinary. This book seeks to re-conceive the citizen/state relationship to a more level playing field. It also aims to raise consciousness about government and how it operates, and hence allows greater sophistication and quality of public debate about complex issues of law and policy and the constitution.

In terms of the text's content and clearly written style, it succeeds with these objectives. The cost of the text will limit access, however, and it is difficult to see how this could be overcome given the comprehensive nature of the text. There will also be a need for regular updating, as the law-making process is dynamic and subject to constant change. This leads to the observation that the value of the text may be increased if it can be reproduced online.

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14 At 8.

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