



Inquiry to review New Zealand's existing constitutional arrangements

Report of the Constitutional Arrangements
Committee

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Recommendation to the House of Representatives

We recommend to the House of Representatives that it considers developing its capacity, through the select committee system, to ensure that changes with constitutional implications be specifically identified and dealt with as they arise in the course of Parliament's work, as outlined in Chapter 2 of this report.

Recommendations to the Government

We make the following recommendations to the Government.

1 Some generic principles should underpin all discussions of constitutional change in the absence of any prescribed process.

- (a) The first step must be to foster more widespread understanding of the practical implications of New Zealand's current constitutional arrangements and the implications of any change.
- (b) Specific effort must be made to provide accurate, neutral, and accessible public information on constitutional issues, along with non-partisan mechanisms to facilitate ongoing local and public discussion. (By majority*)
- (c) A generous amount of time should be allowed for consideration of any particular issue, to allow the community to absorb and debate the information, issues and options.
- (d) There should be specific processes for facilitating discussion within Māori communities on constitutional issues. (By majority*)

2 To foster greater understanding of our constitutional arrangements in the long term, increased effort should be made to improve civics and citizenship education in schools to provide young people with the knowledge needed to become responsible and engaged citizens.

3 The Government might consider whether an independent institute could foster better public understanding of, and informed debate on, New Zealand's constitutional arrangements, as proposed in this report. (By majority*)

* The ACT New Zealand member dissents from public education proposals he considers susceptible to partisan promotion, as explained in the report.

Terms of reference

On Tuesday 14 December 2004 the House of Representatives

Resolved, That a committee be established to undertake a review of New Zealand's existing constitutional arrangements by identifying and describing—

- New Zealand's constitutional development since 1840
- the key elements in New Zealand's constitutional structure, and the relationships between those elements
- the sources of New Zealand's constitution
- the process other countries have followed in undertaking a range of constitutional reforms and
- the processes which it would be appropriate for New Zealand to follow if significant constitutional reforms were considered in the future;

the committee to consist of seven members to be nominated to the Speaker as follows: New Zealand Labour 4, Green Party 1, ACT New Zealand 1, and United Future 1.

1 Overview comments

1 A constitution governs the exercise of public power. It sets out the rules under which the various branches of government operate. It affects, and is affected by, our economy, society, and culture. We consider that the nature and operation of New Zealand's constitution should be of interest to all those who are interested in the exercise of public power in New Zealand.

The importance of social acceptance to constitutional stability

2 A key lesson that we have taken from our consideration of New Zealand's constitution, and of overseas examples and reform processes, is that the enforcement and stability of a constitution depends on the extent to which it is accepted and supported by all branches of government and, most importantly, by the various groupings within that society. This is so whatever the form of a constitution. It does not matter whether the country has a formal document called "The Constitution" (known as a "written" constitution, as in the United States and Australia) or whether the country's constitutional rules are contained in a mixture of statutes, court decisions and practices (known as an "unwritten" constitution, as in New Zealand and the United Kingdom). The most elegant written constitution will not endure if there is no "buy-in" by the society it regulates. Conversely, the untidiest unwritten constitution will operate effectively if the people and those holding formal offices share its norms and values.

What is constitutional?

3 A constitution can also embed some of the core values of a society in the machinery of government. In Belgium, for example, the constitution protects the right of choice of education, including moral or religious education, with public funding. And in Fiji, the laws governing the status of tribal land are given special protection in the constitution, as is the recognition of customary law and customary rights. The effect of giving constitutional protection to such matters is to put them out of reach of ordinary political debate and contest. Therefore, substantive values should not receive constitutional protection without broad and enduring social agreement.

4 In New Zealand, in the absence of a written and entrenched constitution, there is room for much debate whether key values or policy settings are so embedded that they have become "constitutional" in this way.

New Zealand's constitution is not in crisis

5 Looking at New Zealand's constitution, we have concluded that the lack of consensus on what is wrong, and how or whether it could be improved, means that the costs and risks of attempting significant reform could outweigh those of persisting with current arrangements. We suspect that this is the conclusion most societies reach about such fundamental issues in "normal" times.

6 Although there are problems with the way our constitution operates at present, none are so apparent or urgent that they compel change now or attract the consensus required for significant reform. We think that public dissatisfaction with our current arrangements is generally more chronic than acute.

7 The view that “it isn’t broke” was put forward by a number of submitters, including Lord Cooke of Thorndon, who wrote:

In any democracy there will be from time to time some grey areas of overlapping or competing powers. And wherever rights or interests are not implemented, protected or furthered, some citizens or interest groups will feel frustrated, be they a majority or a minority. Frustration is part of the price to be paid for having democracy rather than totalitarianism. Given acknowledgement that checks and balances are always necessary to rule out absolute power, it would seem that by and large the present New Zealand constitutional arrangements work reasonably well. On a comparison with those of other countries for which I have served judicially ... I see nothing disadvantageous to New Zealand in these respects. (Submission from Lord Cooke of Thorndon, p. 6.)

8 This view was not universally shared. Some Māori submitters, in particular, thought change was necessary, and necessary now. For example, the Treaty Tribes Coalition maintained “that the greatest shortcoming of New Zealand’s current constitutional arrangements is their failure to fully recognise the fundamental significance of the Treaty of Waitangi”. It recommended “that the review should consider, as a key issue, *how*—not *whether*—the guarantees enshrined in the Treaty can be given greater legal and constitutional protection” (submission from Treaty Tribes Coalition, paras 3.1, 6.1.1). And Te Rūnanga o Ngāi Tahu wrote:

Constitutional reform is needed to answer the clarion call from both Māori and non-Māori to settle the Treaty in the constitutional order, and to ensure that the constitution provides for a structure and functioning of government in which all New Zealanders have confidence. (Submission from Te Rūnanga o Ngāi Tahu, p. 4.)

9 There are undoubtedly various topical questions to be debated and many suggestions on large and small ways in which our constitutional arrangements might be amended. But there is nothing to suggest that a constitutional crisis is just around the corner.

10 Moreover, we note that the process of embarking on a discussion of possible constitutional change may itself irretrievably unsettle the status quo without any widely agreed resolution being achievable. This point was also made by a number of submitters.

The need for public understanding of current arrangements a prerequisite to any discussion of constitutional change

11 We appreciated the expression, by the Chief Justice and other judges we met with, of support for our committee’s role in the examination of New Zealand’s constitutional arrangements through this inquiry. Yet they, like us, are acutely aware of the need for public understanding and discussion of constitutional issues and wide public participation in the process of any constitutional change. We agree with one of our most eminent historians, J C Beaglehole, who wrote more than fifty years ago that the constitution should not be “some silk-wrapped mystery, laid in an Ark of the Covenant round which alone the

sleepless priests of the Crown Law Office tread with superstitious awe". (*New Zealand and the Statute of Westminster*, Wellington, Victoria University College, 1944, p. 50.)

12 We are also mindful of significant ongoing discussion within Māoridom on constitutional matters. The demand for constitutional change to give effect to the Treaty of Waitangi has been persistent and from a variety of sources, as reflected in the constitutional milestones document in Appendix B. It was most recently given expression in submissions to the House of Representatives on the Supreme Court Bill and the Foreshore and Seabed Bill.

13 We are therefore of the view that a valuable next step would be to consider establishing processes to enable wider public understanding of New Zealand's constitution. This is important, even if no specific changes are contemplated. All New Zealanders need to be able to access information that will enable them to understand the basis on which government operates, and the way in which public power is organised. We wish to add our voice to the many calls for improved civics and citizenship education in schools to provide young people with the knowledge needed to become responsible and engaged citizens.

14 Some areas are more topical or potentially controversial than others. While this report identifies these areas of controversy, we emphasise that we are not recommending for or against any particular change. Rather, we have worked within our terms of reference to create a picture of New Zealand's current constitutional arrangements, how our arrangements developed, and how New Zealand might approach changes in the future should such change be desired. It has been a scene-setting or stocktaking exercise, designed to provide a platform of information and the beginnings of a roadmap, if New Zealand does want to pursue these questions.

15 It was not our task to form a view on the merits of particular constitutional changes. The issues are not clear-cut. We see little merit in debate in isolation by experts commissioned to come up with a grand overall design. Constitutional issues are subtle and interlinked, and New Zealand's strong tradition has been to deal with them piece by piece, through a process of pragmatic evolution over time.

The need for systematic attention to constitutional issues

16 We have concluded that New Zealand may be better served if it developed its capacity for paying systematic attention to constitutional issues as they arise. There is a risk at present that individual changes are sometimes made without sufficient appreciation, by Parliament and the public, that they have constitutional ramifications. We can do no better than to endorse the much-quoted words of the late Professor Quentin-Baxter:

A constitution is a human habitation. Like a city, it may preserve its life and beauty through centuries of change. It may, on the other hand, become either a glorious ruin from which life has departed, or a dilapidated slum that no longer knows the great tradition of its builders. Constitutions, like ancient buildings, need the care and protection of an Historic Places Trust, to draw attention to weaknesses in the fabric, and to suggest how present needs can be met without sacrificing the inspiration of the past. They also need an enlightened and interested general public, with a strong collective feeling about the difference between a folly and a landmark of enduring

significance. (“The Governor-General’s constitutional discretions: an Essay towards a Redefinition” (1980) 10 *Victoria University of Wellington Law Review* p. 290.)

17 We have developed three recommendations for consideration to address this need. The first is a select committee to give specific consideration to constitutional issues as they arise in the course of Parliament’s regular activity, which is discussed in Chapter 2. The second relates to fostering public understanding of New Zealand’s constitution. The third, discussed in Chapter 6, is to suggest that consideration be given to improving civics and citizenship education in schools.

18 We have also developed a recommendation on the generic principles that we believe should underpin all discussion of constitutional change. The discussion leading to our view and the recommendation is in Chapter 6.

2 Term of reference 1: New Zealand's constitutional development since 1840

Describing New Zealand's constitutional history

19 The first term of reference instructed us to describe New Zealand's constitutional development since 1840. As a first step we had a draft document prepared outlining what could be considered the “milestones” of New Zealand's constitutional development since 1835.

20 Compiling this description proved to be challenging. The primary difficulty was deciding what was and was not a significant event in New Zealand's *constitutional* development. There were many events that were clearly socially and politically significant and undoubtedly had had a major impact on the evolution of the role of the state in New Zealand. But were these events constitutional?

21 In the context of a constitutional framework made up of written and unwritten sources this is an especially difficult question. The assertion and exercise of power and authority by and within Māori society, for example, could be viewed as a constitutional issue although it is an aspect often omitted in “orthodox” accounts.

22 Views differed within the committee, and our expectation was that the debates we were having would be mirrored in any wider public discussion on the topic. We therefore adopted a relatively inclusive approach to compiling our timeline, and published the paper on our website as a draft with further comment invited. The milestones paper, amended to reflect the comments received, is Appendix B of this report.

23 Settled views of comparatively recent history are rare, amongst either academics or the public. Our history is actively debated, like that of most countries, as a source of lessons and authority for contested views. There is potential to add depth, colour and contrast to existing views of history, as historians delve into detail and search for differing perspectives and personal experiences, and citizens seek to interpret that work influenced by their own world view. For example, the Waitangi Tribunal documents parts of our history that have not been accessibly recorded until now. Similarly, it is only in recent years that detailed histories have been produced describing the lives of the early Chinese settlers in New Zealand. There are many more examples.

24 Attempting to achieve some sort of consensus on the key events that have formed our current constitution is not warranted. It would likely be temporary, and it is unlikely to be considered authoritative in any event. Even an extensive and organised consultation process, not just amongst the academic elite, but also amongst those who possess the living memory or oral traditions of this history, and other interested members of the public, would be unlikely to achieve consensus. The ACT New Zealand member of the committee believes that there is an argument that New Zealand is already too engrossed in its past for its own good.

25 In our view, the settling of a description of our constitutional development, and the sifting out of “constitutional” matters (as we have considered them in this report) from major social and political events, will not cease until they become too remote to be relevant to current arguments.

Pragmatic evolution: the New Zealand approach to constitutional development

26 Although the characterisation of New Zealand’s constitutional history did not come easily to us, we rapidly agreed on the characteristic qualities of New Zealand’s approach to constitutional change throughout its modern history. We adopted the tag of “pragmatic evolution”. By this we mean New Zealanders’ instinct to fix things when they need fixing, when they can fix them, without necessarily relating them to any grand philosophical scheme. Occasionally, there will be a push to reform a more fundamental or comprehensive part of our constitutional arrangements—the move to MMP is one such example. But in general, New Zealand’s approach to constitutional change has been cautious. Some submitters see this approach as reflecting a history of colonialism and having the effect of constraining the indigenous people within a colonially based framework. Other submitters simply see the approach as pragmatic.

Keeping an eye on the constitution: a new select committee?

27 Sometimes, however, this traditional approach of fixing things as and when they arise means that we inadvertently alter some part of the “big picture”. Minor repairs here and there may alter the overall balance between the branches of government in a way that is not necessarily foreseen or intended. We are concerned that this has happened recently. Committee members offer different examples. Among them are

- the conferring of powers of general competence on local government
- the postulation of “principles of the Treaty of Waitangi” in legislation and the judges’ role in elucidating them in the course of interpreting the phrase in the context of the particular statute
- the question whether state education is required to be secular.

28 We believe that Parliament may be better served in the future if it had specific systems in place to ensure that changes with constitutional implications receive active attention as they arise in the course of Parliament’s work. We note that the House of Lords has established a standing committee to address constitutional issues.

29 We suggest that it may be worth considering the introduction of a specific system to draw Parliament’s attention to constitutional issues. We offer some suggestions as to how that might be achieved, but can see that the options have both advantages and disadvantages. We considered recommending that the House of Representatives gives consideration to the creation of a select committee that would meet as necessary to examine constitutional issues.

30 It might be desirable for this committee to follow the model of the Regulations Review Committee, and carry out its work in a non-partisan fashion. The aim is to enable constitutional issues to be isolated from the day-to-day politics of the context in which they arise. In particular, the new committee could adopt a convention that it is chaired by an

Opposition member of Parliament, and consideration could be given to providing for all parties in Parliament to be represented, in addition to the usual allocation of select committee places to political parties. Such a move would emphasise the non-partisan, watchdog role that the committee would perform.

31 Consideration can be given to whether the function of a constitutional watchdog could be grafted onto the existing work of the Regulations Review Committee. We are not sure if this is the best approach, primarily because we see a risk in tampering with a committee that is already working well.

32 An alternative option for creating this committee, which would not increase the overall numbers of select committees, could be to combine the current Law and Order Committee with the justice part of the Justice and Electoral Committee (thereby creating a single committee to consider justice, law, and order matters) and establishing a new non-partisan committee to consider constitutional and electoral matters.

33 Another alternative might be to look for a non-structural way of ensuring that the attention of the House is drawn to constitutional issues. In this regard, we considered the work of the Legislation Advisory Committee, which for many years has provided careful and valuable advice to select committees on public law issues raised by proposed legislation. The Legislation Advisory Committee's terms of reference already include the following functions:

- to scrutinise and make submissions to the appropriate body or person on aspects of bills introduced into Parliament that affect public law or raise public law issues
- to help improve the quality of law-making by attempting to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform with the Legislation Advisory Committee Guidelines, and discouraging the promotion of unnecessary legislation
- to monitor the content of new legislation for compliance with the Official Information Act 1982 and the purposes and principles of that Act.

34 It would be possible for the Government to amend these functions to give greater prominence to the need for submissions on the constitutional implications of individual reforms. However, as an advisory committee established by Cabinet, the Legislation Advisory Committee is ultimately a creature of executive government. Further, it would still be making submissions to a general select committee operating on party lines. It would not guarantee that the House took the time it needed to consider the points made, however learned the submission itself might be.

35 However such a committee is established, it should have, as a primary responsibility, the role of Parliament's constitutional watchdog. We would hope that bodies such as the Legislation Advisory Committee would work with this select committee, and provide it with advice and support.

Summary

36 There are no urgent problems with New Zealand's constitutional arrangements. Dissatisfaction with current constitutional arrangements is chronic rather than acute and any significant constitutional change must proceed with great care.

37 However, there are constitutional issues that will need to be addressed in the future. There are also some constitutional issues, large and small, that merit more public understanding and discussion. Many arise incidentally in the course of other reforms and can be overlooked.

38 Therefore, Parliament should enhance its ability to recognise matters of constitutional significance and to deal with them in a principled way.

Recommendation

39 That the House of Representatives considers developing its capacity, through the select committee system, to ensure that changes with constitutional implications be specifically identified and dealt with as they arise in the course of Parliament's work, as outlined in this chapter.

3 Term of reference 2: The key elements in New Zealand's constitutional structure and the relationship between those elements

Developing a list of constitutional issues

40 Having worked to describe the constitution under the first term of reference, we interpreted this term of reference as calling for an identification of issues arising from the way in which key elements of New Zealand's constitutional structure related to one another.

41 We approached this task in two ways: by calling for public submissions on this term of reference, and by asking our advisers to prepare a menu of constitutional issues that might be considered topical or "live" at present in New Zealand. We then expanded and modified that initial broad "trawl" across the issues by discussion within the committee, drawing on our own experience, and by reference to issues raised in submissions to the committee. The resulting list of issues is set out in Appendix G.

42 The menu of issues was constructed by

- focusing on topical issues
- focusing on broad issues (though specific questions were identified in order to crystallise certain significant areas)
- leaving out less significant issues, issues that are consequential on others, and issues which have been addressed by recent reforms that do not appear to have been controversial (for example Crown entity reform)
- including a broad range of issues that may be considered by politicians, commentators, and the public to be topical.
- including issues even where committee members views on their significance differed, on the grounds that such questions were better recorded even if most of us did not think them to be pressing.

Prioritising the issues

43 In prioritising the many issues identified, we have blended three strands of thinking. First, from our own discussions as we grappled with the various issues before us, it became clear to us that a core issue at the heart of New Zealand's constitution was the balance of authority between the judicial and legislative branches of government and the authority of Parliament in relation to the Treaty of Waitangi. We do not take any view on these matters; rather we simply conclude that improved public understanding of, and debate around, this set of issues should be at the heart of any future constitutional discussions.

44 Second, we noted the thrust of the many thoughtful public submissions received. The issue that attracted the most comment from submitters was the relationship of the

Treaty of Waitangi to the constitutional arrangements of modern New Zealand. Following from this were questions about the respective roles of Parliament and the judiciary, and whether it might be desirable to move to a written constitution. The question of becoming a republic also arose frequently.

45 Third, we adopted a systematic matrix to assess the list of issues before us. We rated each issue in terms of the following factors:

- the *importance* of the issue
- the *urgency* of the need to deal with the issue
- the *feasibility* of dealing with the issue
- the *risk* of unintended consequences from dealing with the issue and in particular the risk of stalling fruitlessly without a sufficiently compelling solution after having raised the public temperature.

46 Few if any of the issues required *urgent* attention. Many of them are *important* questions, but that is not the same as there being an urgent problem.

47 Additionally, many of the issues that are *important* are also the ones where the *feasibility* of tackling the questions is low: the broad questions about the fundamental structures and relationships in our constitution tend to be less tractable than the more focused and mechanistic questions. Considering the *risks* involved in opening up discussion on particular questions resulted in a similar pattern to the assessment of feasibility. The hard questions are also the most polarised: they are the questions about overarching relationships, rather than technical implementation.

48 We concluded that the important questions for New Zealand at present are those that go to the sources of political legitimacy, including the import of the Treaty of Waitangi; the basic relationship between the different branches of government, including the way in which each branch of government calls the other to account, or acts as a check on power; and those that relate to the values that are or might be considered basic to the identity of New Zealand society. The main topical issues that have those characteristics are

- the relationships between Parliament, the executive and the courts, including the question of whether any principles or rights should be considered so fundamental to our constitutional system that the courts could rely upon them to override an Act of Parliament that breached them
- the relationship between the constitution and the Treaty of Waitangi including whether it should, or how it might, form superior law
- the functions and nature of the most appropriate head of state for New Zealand including the effect of any change to the balance of power.
- the relationship between New Zealand institutions of government and international law-making bodies, including questions about the way in which the government can enter into international commitments; and whether international laws can become part of New Zealand domestic law directly, without parliamentary involvement

- whether, in the absence of deliberate decision, inevitable evolution (particularly the pressures of unplanned events or jockeying between institutions and powerful individuals) will change the constitution in ways that the people would not choose if given the choice.

49 By and large, these are issues that go to the broad construction of our constitution, and our social contract. They are not simple questions amenable to concrete and mechanistic change. Our broad conclusion therefore is that on the important issues dominating political debate at present we will initially benefit from ongoing debate and consideration, rather than from hastily developed reform proposals. They are questions about our national identity and the way in which we want power to be organised in our country. They are questions that need to be mulled over slowly and carefully by all New Zealanders.

A cautionary note: the pros and cons of beginning discussions on change

50 We consider it appropriate to sound a note of caution. There is a natural tendency to want to open up reform discussions—change is always more interesting for the policy community and politicians than the status quo. But embarking on a discussion of possible constitutional change may itself unsettle the status quo and undermine established understandings of our current constitution, and there may be disagreement about whether this is a good or a bad thing. In this regard, the following comments made by Lord Cooke in his submission are worth noting.

Nevertheless, there is an arguable case on different grounds for constitutional change in two major respects. ... First, New Zealand does lag behind international standards and suffers by comparison with other developed democracies in the absence of a fully enforceable bill of human rights. As against this, it may be said that the present partially enforceable Bill of Rights works tolerably well, and that in practice human rights are not in the main in serious jeopardy. Secondly, the principles of the founding document, the Treaty of Waitangi, are not incorporated and entrenched as part of a formal constitution. Against this it may be said that in about the last quarter of a century much greater public sensitivity to the importance of the Treaty has developed and that an attempt to constitutionalise it further would create (exploitable) discord and confusion. So, in both these two major respects, the status quo may be the wiser option at the present time. (Submission from Lord Cooke of Thorndon, p. 7.)

51 The committee notes that significant constitutional changes have been made in New Zealand in the past, without a great deal of public debate. Our current arrangements in fact give considerable latitude for transforming rights and powers relatively imperceptibly. Views differ on whether this degree of latitude is a good or bad thing.

52 Pushing a constitutional agenda can raise the national temperature and generate resentment. This would be unfortunate, especially in relation to inherently intractable issues that may not yield a quick resolution. Any move towards significant constitutional change needs to be approached with great care and a genuine commitment to full and informed public debate. A “top-down” attempt to force constitutional change without debate is more likely to have an adverse effect. We believe it has happened at times, whether or not

the intent has been deliberate. It contributes to the fears of many, and it creates a risk that the courts and other agencies involved will lose legitimacy.

Conclusion

53 It is important for us as a nation to think and talk about constitutional matters. But most of us consider that there is no need to develop generic processes to promote change. That is the role of political parties, movements, and pressure groups.

54 It is important to continue to work to engage people in greater discussion on constitutional issues that go to the heart of how we want our nation to function. This conclusion from our stocktake of the state of constitutional debate in New Zealand has informed our approach to what needs to happen next, as outlined in Chapter 6.

4 Term of reference 3: The sources of New Zealand's constitution

55 There are a few academic treatments of this topic by constitutional lawyers but not as many as might be expected. A notable feature of these treatments is that they do not pretend to be exhaustive or definitive. Some of those who made submissions provided additional and useful views.

56 The most authoritative current treatment of the sources of New Zealand's constitution is Sir Kenneth Keith's six-page introduction to a succession of versions of the *Cabinet Manual* since 1990, including the current one. It has been agreed to by Cabinets of different political persuasions. It states that New Zealand's constitution is "to be found in formal legal documents, in decisions of the courts, and in practices (some of which are described as conventions)". It identifies the Constitution Act 1986 as the principal formal statement of the Constitution and identifies that the "other major sources of the Constitution" include:

- the prerogative powers of the Queen
- other relevant New Zealand statutes
- relevant English and United Kingdom statutes
- relevant decisions of the courts
- the Treaty of Waitangi
- the conventions of the constitution.

57 Of course, not all sources of an unwritten constitution are equal. For example, New Zealand statutes can override other constitutional sources. And, in general, the Treaty of Waitangi has a legally enforceable effect only when referred to in legislation. Over time, the Treaty has had an effect on the way in which Parliament and the executive carry out their functions, particularly in terms of the overarching norms or conventions that govern processes, as well as day-to-day procedure. It is much less clear, however, what the effect has been of vague and general references to the Treaty or its principles, in legislation or elsewhere. We note that the more recent tendency of Parliament to describe the specific implications of the Treaty for a particular policy area seems preferable to the previous practice of making generic references to the principles of the Treaty in legislation.

58 It is recognised that the nature of an unwritten constitution is that it lacks precise definition. While categorising the sources of New Zealand's constitution is undoubtedly important we regard it as rather abstract. Our approach has been to focus on what we regard as the important practical milestones of our constitutional arrangements under our first term of reference.

5 Term of reference 4: The processes other countries have followed in undertaking a range of constitutional reforms

59 We tackled this term of reference by having a paper prepared on overseas processes of constitutional reform. That paper was published in the committee's interim report and posted on the website. It is also included as Appendix C of this report to ensure that it remains available as a resource to those interested in the topic. The paper comments in detail on the experience of reform in Canada, Australia, the United Kingdom, Ireland and Israel, and also draws on activities in many other countries to make some general observations on the key elements of constitutional reform processes.

60 Many well-informed members of the public took the time to provide us with information and comment on constitutions elsewhere, often on the basis of considerable personal experience of those constitutions and their reform processes. The summary of submissions, Appendix E of this report, identifies those that included comment on this term of reference. The submissions are available on the committee website or can be accessed from the Parliamentary Library's information service.

61 We commend this information to all those who are interested in the topic. The key lessons we took from it were the importance of public engagement, and the difficulty of creating sufficient public engagement on constitutional issues when a society is relatively settled. Our recommendation in the next chapter to foster greater public understanding of constitutional issues is designed to respond to the difficulty of achieving public interest in constitutional matters.

6 Term of reference 5: The processes which it would be appropriate for New Zealand to follow if significant constitutional reforms were considered in the future

Past practice in New Zealand

62 There is minimal legal prescription for the way constitutional change occurs in New Zealand. Indeed, to the extent that New Zealand's unwritten constitution is composed of common law and constitutional conventions, constitutional change can eventuate from judgments of the courts or from a sustained change in practice and understandings. The only rules about constitutional change that require something more than ordinary legislation are the handful of entrenched provisions in the Electoral Act 1993 and the Constitution Act 1986. Some members consider that the 3-year term of Parliament is itself a constraint on major change, as it limits the ability of a government to promote constitutional change without sufficient popular support.

63 Various processes have been used to change New Zealand's constitutional arrangements since New Zealand acquired full law-making authority in 1947, depending on the nature and significance of the change under consideration. The core of the process has always been ordinary legislation but the process has at times been augmented in various ways. Techniques have included

- ordinary legislation (for example, the Constitution Act 1986)
- legislation passed with a "super-majority" of 75 percent or more (for example, entrenched provisions in the Electoral Act 1993 and the Constitution Act 1986)
- some combination of a public discussion paper, expert advisory group, and ordinary legislation (for example, the Supreme Court Act 2003 and the New Zealand Bill of Rights Act 1990)
- Law Commission report and select committee consideration (for example, changes to Parliament's role in Treaty making)
- referenda (for example, on the term of Parliament in both 1967 and 1990)
- a Royal Commission, followed by a referendum, parliamentary consideration of legislation, and a further referendum (for example, on the adoption of MMP).

64 The process of constitutional reform in New Zealand has always been pragmatic. This can be an advantage. The flexibility of our constitutional arrangements means that a process can be tailored to the actual importance of the reform, rather than dictated by formal rules. We are able to look to the best of international experience as we create the processes for any particular discussion. Of course the danger in this approach is that the government of the day decides what approach to take. It must also be expected that the

process chosen will be challenged by those opposing the reform; the fluidity of our arrangements means that there will never be an unquestionably right or wrong process.

65 We consider that an important general characteristic of New Zealand's processes of constitutional change is that any given issue is ultimately determined by political judgment and informed by a mix of legal or constitutional principle and public opinion. Perhaps that is a function of having a relatively stable social and legal order.

International comparisons

66 In looking to international examples of significant constitutional reform, we have noted that it is important to consider the context in which reform has arisen. That context will be relevant to the process that is followed and the procedural standards that are required to effect change. There were lessons for us in constitutional changes made in three quite distinct contexts:

- following conflict or war (for example South Africa)
- in moving from the status of a colony to that of an independent nation (for example Mauritius)
- within a settled social and legal order, in order to update or modernise aspects of a country's governance (for example Canada).

67 More details of the lessons are included in Appendix C and in the analysis in Appendix H, a paper prepared for us on possible options for processes for constitutional change in New Zealand.

68 We are particularly mindful of the examples provided by the constitutional reform initiatives in Australia in the 1990s, and the reform processes in Canada throughout the 1980s and 1990s. The experience in both countries was that it can be very difficult to generate the level of public engagement required by the formal processes for change in each country's constitution. Proposals for constitutional reform in both countries have failed to proceed, perhaps partly as a result of this lack of engagement. However, we have to be wary of explanations that assume that resistance to change is driven by a lack of understanding, when it could reflect a well-founded preference to let sleeping dogs lie.

69 The experience of constitutional discussion through the 1990s in Australia is highly instructive, given the similarities in our history and in our current social and political arrangements and areas of debate. Throughout that decade, the Constitutional Centenary Foundation assisted informed public debate on all aspects of the constitutional system. It was clearly independent of government and non-partisan in its structure and its activities. The Constitutional Centenary Foundation functioned only for the decade. At the end of its operation it produced *A Report on A Decade of Experience 1991–2000* (www.centenary.org.au) summarising its experiences. Key points made in that report include

- overwhelming public support for referenda as part of the process for constitutional change
- great public concern about the lack of public knowledge and understanding of constitutional issues

- the importance of establishing public trust in the process for generating discussion, by ensuring that
 - public information about the constitutional system is accurate and reliable
 - information and activities are impartial, enabling people to make up their own minds
 - information and activities are independent of party politics
 - activities are conducted in a way that avoids unnecessary division and controversy, while still enabling free expression of views
- the difficulty of engaging public interest, the need to create opportunities for people to be actively involved in discussions, and the need to relate discussions to topical and locally relevant issues
- the importance of any body overseeing the discussion process to
 - be connected with a wide range of the population (although there are difficulties with using membership organisations to achieve this)
 - have a link into the country's parliamentary and political process, whether by way of bi-partisan political representation on the board or by some requirement for regular briefings for political parties
 - have a broad and diverse funding base to maintain its independence.

The Treaty of Waitangi

70 A question that is unique to New Zealand is the relevance of the Treaty of Waitangi to processes of constitutional change, although the rights of indigenous people are a significant issue in a number of countries. We are advised that if the nature of a constitutional change being contemplated calls into question aspects of the relationships expressed by the Treaty, or could be perceived to do so, then it will become important, in practice and perhaps in law, to be able to demonstrate a broad measure of support from tangata whenua.

71 Most of us think it is difficult to identify significant constitutional questions that do not touch on the Treaty to a material extent, and that would not have social and political importance. The issues surrounding the constitutional impact of the Treaty are so unclear, contested, and socially significant, that it seems likely that anything but the most minor and technical constitutional change would require deliberate effort to engage with hapū and iwi as part of the process of public debate.

72 The ACT New Zealand member considers that such views attribute a breadth and import to the simple provisions of the Treaty that are entirely unwarranted. He considers that the inclusion of a powerful protection of property rights, prohibiting significant takings without compensation, and perhaps a comprehensive prohibition on race discrimination would correctly translate the Treaty to modern law.

What did people say to us about process?

73 Across all of the topics canvassed in the public submissions made to us, there was a clear message on what people thought is appropriate in processes of constitutional change

for New Zealand. That message is that major change should not be made hastily and should be made only with broad public support. There is a strong call for a major effort on public education as a first step, and wide and unhurried public discussion as any change is contemplated. Most submitters assume that major changes should be made only if supported at a referendum. Several suggest that constitutional change should require a “super-majority” of, say, 75 percent in a referendum or a parliamentary vote, or both. We note the strong assertion from some submitters that some changes would require the support of tangata whenua.

Conclusion on process

74 New Zealand has the luxury of flexibility in tailoring any process for constitutional change to the issues in question. But if the issues being debated are at all significant, we consider that key elements of any process would probably need to include

- accurate, authoritative, neutral and accessible public information
- non-partisan mechanisms to facilitate ongoing public discussion, engagement and deliberation (such as a neutral foundation, a citizens’ assembly or forum, a select committee or other multi-party parliamentary process, or a Royal Commission)
- specific processes for facilitating discussion within Māori communities on the issues (most of us consider that this involves specifically engaging with hapū and iwi, although the ACT New Zealand member considers that it is inappropriate for a government to engage separately with hapū or iwi on constitutional change in a manner not available to other citizens)
- processes for developing models or principles into detailed reforms, which might include processes for public input (preferably through engagement at a local level, otherwise an expert commission, or select committee, possibly supplemented by a convention or people’s assembly)
- processes for public decision making on whether to change, which might need to include a referendum
- a generous amount of time, to allow the community to absorb and debate the information, issues and options; experience suggests that haste is counterproductive.

75 Most of us consider that, while it is important to state these general principles, it is not necessary to go any further at present. We think that New Zealand is not yet at the point of developing a process for considering any particular constitutional reform. We conclude that each issue would require its own tailored process if it were to be pursued; there is no “one size fits all” solution. Some issues are diffuse and on these we are likely to benefit most from ongoing discussion and the natural evolution of constitutional and administrative practice over time. Other issues are more concrete and might in due course crystallise into specific proposals for change, which would need to be considered and decided upon by a broad process of public debate and engagement.

76 We therefore do not make any specific proposals on how to go about debating particular changes. We expect such processes to be worked out on a case-by-case basis as issues arise. As is the norm in New Zealand, the government of the day and Parliament

would be responsible for establishing processes for considering any particular issue. We hope that this report will assist.

77 The ACT New Zealand member considers that the time is overdue for codifying in law a requirement for ratification of significant constitutional changes by referendum, or at least a “super-majority” in Parliament. He considers that the majority preference for the status quo leads to suspicion that it is designed to allow significant constitutional changes to be made without an adequate mandate, and often without appreciation, even by ruling party members, of their significance. He considers that a number of such changes have been made in the last two decades.

78 In light of our conclusion that any significant constitutional change must proceed with great care, we make no specific recommendations as to particular directions that future constitutional reform should take. However the following constitutional issues have been identified during our work as significant and topical:

- the relationships between Parliament, the executive, and the courts, including the question of whether there are, or should be, principles or rights so fundamental to our constitutional system that the courts would be able to rely upon them to override an Act of Parliament that breached them
- the functions a head of state would perform if we ceased to have a monarch’s representative as our effective head of state
- the relationship between the constitution and the Treaty of Waitangi, including whether it should and how it might form a superior law
- the relationship between New Zealand institutions of government and international law-making bodies, including questions about the way in which the government can enter into international commitments, and whether international laws can become part of New Zealand domestic law directly, without parliamentary involvement.

Recommendation on process

79 Some generic principles should underpin all discussions of constitutional change in the absence of any prescribed process.

- A first step must be to foster more widespread understanding of the practical implications of New Zealand’s current constitutional arrangements and the implications of any change.
- Specific effort must be made to provide accurate, neutral, and accessible public information on constitutional issues, along with non-partisan mechanisms to facilitate ongoing local and public discussion. (By majority: the ACT New Zealand member warns that one person’s neutral advice may be another person’s propaganda.)
- A generous amount of time should be allowed for consideration of any particular issue, to allow the community to absorb and debate the information, issues and options.

- There should be specific processes for facilitating discussion within Māori communities on constitutional issues. (By majority: the ACT New Zealand member considers it is constitutionally important that the State not discriminate when providing processes for discussion.)

A new Constitution Institute to foster public understanding?

80 Underpinning all possible future processes, however, is the importance of good information being made available to the public and the need to foster understanding of New Zealand's current constitutional arrangements. In the future, information may need to be provided on the advantages and disadvantages of possible changes. But for now, the need is simply to foster understanding of the status quo. What works? What is challenged? What is accepted? What is contested? What is in our law? What is convention, or just established practice? Lack of public understanding of our constitution even carries the risk that it will change without the public knowing, let alone agreeing with the changes.

81 Like many others before us, we are concerned that too many New Zealanders do not have sufficient understanding of our current system. We have all ourselves, in the course of this committee's work, learned more about the intricacies of the current system and the way in which the balance of powers operates in practice. We also noted that New Zealand is not alone in this regard. Many of our concerns we found echoed in the Australian experience of its decade of constitutional discussion building up to its constitutional centenary in 2000. And we add our voice to those who call for greater concentration on civics and citizenship education in our schools—a call also supported by the judges we met with. Providing young people with the knowledge they need to become informed and engaged citizens continues to need greater emphasis.

82 We have reached the view that it may be desirable for the Government to consider establishing a new and independent institute, with a specific function of fostering public understanding of constitutional issues. That is not a task that a select committee can undertake. Nor is it something that is easily or naturally undertaken by a government organisation. It should include independence from the political process (although not disconnection from it). It requires a solid grounding in constitutional expertise.

83 We have noted above the need for specific processes for facilitating discussion within Māori communities. We recognise that a risk of creating an institute is that it will reflect a monocultural frame of reference. We consider that any such institute should not commence its function of fostering public understanding of constitutional issues before a negotiated engagement model is formulated, appropriate to the needs and expectations of tangata whenua Māori and Pākehā.

Recommendations on fostering public understanding

84 To foster greater understanding of our constitutional arrangements in the long term we recommend that increased effort should be made to improve civics and citizenship education in schools to provide young people with the knowledge needed to become responsible and engaged citizens.

85 We recommend that the Government consider whether an independent institute could foster better public understanding of, and informed debate on, New Zealand's

constitutional arrangements as proposed in this report. (By majority: the ACT New Zealand member is sceptical about

- applying state resources to attempts to promote non-partisan discussions
- favouring Māori alone with separate processes for discussion
- calling for express civics and citizenship education.

He considers that, although all could be helpful, in practice they will be contentious. There are many independent sources of information on such issues readily accessible on the internet. He fears that these recommendations will excuse state-funded campaigns to address elite enthusiasms that the public do not share. He believes that the promoters of such educational campaigns can find it hard to accept that a lack of public engagement is choice not ignorance.)

Appendix A

Committee approach to the inquiry

The committee first met in February 2005 and met fortnightly thereafter when the House of Representatives was sitting. As our inquiry progressed, additional meetings were held.

As determined by our terms of reference, much of our work has been retrospectively focused and scene-setting.

Website (www.constitutional.parliament.govt.nz)

In order to reach as many New Zealanders as possible, we established a website, the first dedicated select committee website. The site was in both English and Te Reo Māori.

On the website we posted the submissions received and our draft documents for discussion. We invited comment on these and on any other matter within our terms of reference. The website statistics showed that there was modest, but sustained, public interest in our work.

Public submissions

We received 66 submissions. Many attached relevant articles that the submitter had published elsewhere or pointed us to other literature. We did not test the submissions through a public hearings process.

Some potential submitters advised that they did not submit because the issues were too complex to address adequately in the time allowed for submissions.

Other evidence

We heard from four of New Zealand's most senior members of the judiciary: Rt Hon Dame Sian Elias, GNZM, Chief Justice of New Zealand; Rt Hon Sir Kenneth Keith, KBE, Judge of the Supreme Court; Hon Justice Anderson, DCNZM, President of the Court of Appeal; and Hon Justice Randerson, Chief High Court Judge.

Specialist adviser

In recognition of the importance and the complexity of the inquiry, we appointed Victoria University of Wellington, acting through the New Zealand Centre for Public Law, as specialist adviser. Professor Matthew Palmer, Director of the New Zealand Centre for Public Law, was our principal adviser. He was assisted by Claudia Geiringer, Deputy Director of the Centre, and Nicola White, Senior Research Fellow in the Institute of Policy Studies in the School of Government at Victoria University.

The Parliamentary Library

The Law and Government subject team in the Parliamentary Library was commissioned to research and prepare two discussion documents for our consideration. The finalised documents are attached as Appendices B and C to this report.

Committee members

Hon Peter Dunne (Chairperson)
David Parker (Deputy Chairperson)
Lianne Dalziel
Russell Fairbrother
Stephen Franks
Hon Mita Rinui
Nándor Tánzos

Office of the Clerk staff who assisted the committee**Committee staff**

Beth Watson (Clerk of the Committee)
Paul Weakley (Parliamentary Officer, Report Writer)
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Wiremu Haunui (Senior Parliamentary Officer, Te Kaiwhakamārama Reo)
Perraine Bradley (Parliamentary Officer, Quality Assurance and Web)

Appendix B

New Zealand's Constitutional Milestones since 1835

This paper outlines some of the events that represent significant developments in New Zealand's constitution since 1835.

It is in two parts. The first part is a timeline along which are ranged events or milestones. The second part comprises commentaries of varying lengths for the events.

Important notes to consider when reading this discussion document

This paper was researched and drafted by staff from the Parliamentary Library as a discussion document to be posted on the committee website for public comment. It has since been revised to reflect the input received.

Although we have taken an inclusive approach to the events recorded, the following notes should be considered when reading this document:

- A constitution, some consider, is made up of “the structures, processes, principles, rules, conventions and even culture that *constitute* the way in which government power is exercised”. It is about “public power and how it is exercised”.¹ The focus of this document is on significant events that have shaped the ways in which power is exercised; the structure of government, especially central government, in New Zealand; and the rules governing its exercise of power.
- Many of the constitutional milestones included also represent significant moments in New Zealand's political and general history. It is tempting, therefore, to include many other events in New Zealand's history that would not look out of place among those listed. The demarcation between significant constitutional, as opposed to historical, events is itself contentious. Too legalistic an approach can lead to an overly simplified view of what remains contested constitutional ground, while too inclusive a list can dilute the importance of what is most significant. For that reason some events of significance regarding the way the political worlds of Māori and Pākehā have interacted have been included, while some other events, such as the economic and public works reforms of the 1870s and the Education Act 1877, which confirmed the right to secular education, have not.
- Constitutional significance, according to a recently published text on the New Zealand Bill of Rights, “arises from an amalgam of considerations, including the importance of the enactment to transcending constitutional questions, the consensus of commentators, and public opinion”.² The significance of each milestone is therefore a matter of debate in which public opinion plays an important role.

¹ Matthew Palmer, What is New Zealand's Constitution and Who Interprets It?: Constitutional Realism and the Importance of Public Office-holders, p. 2 (Paper yet to be published).

² Paul Rishworth and others, *The New Zealand Bill of Rights*, Oxford University Press, South Melbourne, 2003, p. 2, fn 11.

- This summary of New Zealand's constitutional milestones has been constructed largely from a survey of established texts and other writing on New Zealand's history and its constitutional development. It therefore provides a reasonably orthodox and legal perspective on the significant points in our history. Others may have quite different perspectives on the events that have been significant in shaping New Zealand's current constitutional arrangements.

Constitutional Milestones

1835	Declaration of Independence
1840	Treaty of Waitangi British sovereignty asserted Colonial government established
1841	New Zealand separated from the Colony of New South Wales and proclaimed a separate colony First courts of law established
1846	First Resident Magistrates' Courts established Constitution Act 1846 enacted by UK Parliament then suspended
1852	Representative government established
1856	Responsible government established
1858	First Māori King appointed
1860	Taranaki war begins Kohimārama conference
1862	The Court of Appeal of New Zealand established
1863	Waikato war begins
1867	Separate Māori representation established by creating Māori seats in Parliament
1875	Provincial government abolished

1876	Hui at Te Waiōhiki, Hawkes Bay
1877	Treaty of Waitangi dismissed as a “simple nullity”
1879	Adult male franchise for elections to the House of Representatives introduced
1882	Northern chiefs petition Queen Victoria to investigate colonial government and establish a Māori parliament
1892	Governor instructed to act on the advice of his responsible Ministers when Imperial interests not affected Opening of Kotahitanga parliament
1893	Universal adult franchise introduced, extending vote to women
1894	Constitution of Kīngitanga Great Council (Te Kauhanganui) published
1900	Maori Councils Act 1900 and Maori Land Administration Act 1900 enacted
1901	New Zealand refuses to join Australia as its seventh state
1907	Dominion status acquired
1912	Political neutrality of the public service established
1917	New Letters Patent issued re-designating the Governor the Governor-General of New Zealand to recognise New Zealand’s self-governing status
1926	Balfour Declaration adopted at the Imperial Conference
1932	Public Safety Conservation Act enacted

- 1941 Privy Council declares that the Treaty of Waitangi is enforceable in the courts only to the extent it is incorporated into legislation
- 1945 New Zealand admitted to the United Nations
- 1947 Full constituent powers acquired
Magistrates' Courts reconstituted
- 1948 Universal Declaration of Human Rights adopted by the United Nations General Assembly
- 1950 Legislative Council abolished
- 1962 Office of the Ombudsman established
- 1971 Office of Race Relations Conciliator established by the Race Relations Act 1971
- 1972 Judicature Amendment Act 1972 liberalises the procedures for seeking judicial review of administrative actions
- 1973 New Zealand's original powers of legislation replaced, giving Parliament additional extraterritorial competence
- 1974 Queen Elizabeth's title changed to reflect the Sovereign's constitutional status as Head of State of New Zealand
- 1975 Waitangi Tribunal established
- 1976 *Fitzgerald v Muldoon and Others* decided
- 1977 Human Rights Commission established by Human Rights Act 1977
- 1978 New Zealand ratifies the International Covenant on Civil and Political Rights

	New Zealand ratifies the International Covenant on Economic, Social and Cultural Rights
1982	Citizens' access to official information promoted in Official Information Act 1982
1983	Office of the Governor-General of New Zealand patriated New Zealand Australia Closer Economic Relations Trade Agreement signed
1985	Waitangi Tribunal given retrospective power to consider alleged past breaches of the Treaty of Waitangi since 1840
1986	Some of New Zealand's statutory constitutional law consolidated and reformed Reform of the public sector to promote accountability and efficiency Provision in State-Owned Enterprises Act 1986 gives statutory force to the principles of the Treaty of Waitangi
1987	In the <i>Lands</i> case, the Court of Appeal interprets the expression "principles of the Treaty of Waitangi" in the State-Owned Enterprises Act 1986 Maori Language Act 1987 enacted
1990	New Zealand Bill of Rights Act 1990 enacted
1993	Citizens Initiated Referenda Act 1993 enacted Binding referendum on proportional representation brings into effect the MMP electoral system Privacy Act 1993 enacted Grounds of discrimination prohibited under the Human Rights Act 1993 extended Mātaatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples
1995	Hīrangī hui rejects fiscal envelope proposals and promotes constitutional change reflecting Te Tiriti o Waitangi

- 1996** Proportional representation under MMP introduced
- 2001** Public Audit Act 2001 reforms Office of the Auditor-General
- 2003** Supreme Court established as the court of final appeal
- 2004** Crown Entities Act 2004 reforms accountability regime for Crown entities

1835: Declaration of Independence

James Busby, having been appointed the British Government's official Resident in New Zealand, called a meeting of northern chiefs at Waitangi on 28 October 1835 to sign a Declaration of the Independence of New Zealand.³

Under the designation of "The United Tribes of New Zealand", thirty-four chiefs signed the Declaration entreating King William IV "to continue to be the parent of their infant State, and ... become its Protector from all attempts upon its independence".⁴ The Declaration was acknowledged by the British Government, and is regarded by some as an early expression of Māori nationhood.⁵

The Declaration also thanked His Majesty "for his acknowledgment of their flag". In 1834, Busby had invited 25 northern chiefs to choose a national flag⁶ in order that New Zealand ships could be registered and freely enter foreign ports.⁷ The flag was flown by ships, and recognised by the British Admiralty.

1840: The Treaty of Waitangi

On 6 February 1840, Lieutenant-Governor William Hobson representing the British Crown and chiefs representing Māori tribes of the northern parts of New Zealand signed the "Long Roll of Parchment" known as the Treaty of Waitangi.⁸ Subsequently, copies of the Treaty were taken to various parts of New Zealand. By the time the Treaty was remitted to London in October 1840, over 500 chiefs had signed it.⁹

The Treaty comprises a preamble and three articles. Textual differences between Māori and English versions of the Treaty have given rise to much debate about the Treaty's meaning. Hobson and the overwhelming majority of the rangatira who signed the treaty signed only the Māori version.

In the first article, Māori ceded according to the English version "all the rights and powers of Sovereignty" to the British Crown while the Māori version specified "Kawanatanga", which may be interpreted more narrowly as "governance", passed to the Crown.¹⁰

In the second article, the British Crown guaranteed to Māori "full exclusive and undisturbed possession" of their lands, estates, forests, fisheries and other properties in the English version, while the Māori version reaffirmed "te tino rangatiratanga" of hapū over their lands, homes and "taonga" (treasures). "Te tino rangatiratanga" has been interpreted

³ Claudia Orange, *An Illustrated History of the Treaty of Waitangi*, Wellington, Bridget Williams Books, 2004, p. 16. See also The Treaty of Waitangi <http://www.treatyofwaitangi.govt.nz/timeline/treaty1800.php>.

⁴ Claudia Orange, p. 16.

⁵ See: The Treaty of Waitangi <http://www.treatyofwaitangi.govt.nz/timeline/treaty1800.php>.

⁶ Claudia Orange, p. 13.

⁷ Michael King, *The Penguin History of New Zealand*, Penguin, Auckland, 2003, p.153.

⁸ Philip A Joseph, *Constitutional and Administrative Law in New Zealand*, 2nd ed, Wellington, Brookers, 2001, p. 37.

⁹ Philip A Joseph, p. 37.

¹⁰ *New Zealand Maori Council v Attorney-General*, [1987] 1 NZLR 641, 663 per Cooke, (HC & CA).

as the “unqualified exercise of chieftainship”,¹¹ and some contend that this is a concept closer to sovereignty than “kawanatanga”.¹²

The English version of the second article also gave to the Crown the exclusive right of pre-emption, meaning that the Crown had first right of purchase of land.¹³

The third article extended the rights and privileges of British subjects to Māori, effectively providing that Māori had all the same rights as other citizens before the law.¹⁴

Most debates arise out of the ambiguities in the first and second articles. One of the central questions is, “How is the balance to be struck between the sovereignty/kāwanatanga of the Crown and te tino rangatiratanga/chieftainship of Maori?”¹⁵ Some have argued that the Māori version of the treaty “cedes less to the Crown and reserves much more to the chiefs, than does the English version”.¹⁶

Chief Judge Durie of the Waitangi Tribunal has stated that the Treaty “can mean different things to different people. It lacks the precision of a legal contract and is more in the nature of an agreement to seek arrangements along broad guidelines.”¹⁷

Another source of debate is the status of the Treaty at international law. For a treaty of cession to have legal effect, parties to the treaty must exhibit “international legal personality” or statehood.¹⁸

Whatever the status of the Treaty under international law, it has been described as “as a key source of the New Zealand Government’s moral and political claim to legitimacy in governing the country.”¹⁹ In 1990, the former President of the Court of Appeal, Sir Robin Cooke, described the Treaty as “simply the most important document in New Zealand’s history”. It was, he declared, “a foundation document”.²⁰

In *New Zealand Maori Council v Attorney-General*, (the *Lands Case* 1987),²¹ the Court of Appeal deliberated on the meaning of “the principles of the Treaty of Waitangi” as that phrase appeared in the State-Owned Enterprises Act 1986. The Court eschewed a “strict or literal interpretation”²² of the Treaty in favour of a “generosity of spirit”.²³ The principle of “partnership” was seen to be a key factor in determining the responsibilities and duties of

¹¹ English translation of Māori text by Professor Sir Hugh Kawharu in *New Zealand Maori Council v Attorney-General*, pp. 641, 663 per Cooke P.

¹² Morag McDowell and Duncan Webb, *The New Zealand Legal System*, 3rd edition, Wellington, LexisNexis Butterworths, 2002, p. 201.

¹³ Morag McDowell and Duncan Webb, p. 201.

¹⁴ Morag McDowell and Duncan Webb, p. 201.

¹⁵ Geoffrey Palmer and Matthew Palmer, *Bridled Power*, 4th ed, Melbourne, Oxford University Press, 2004, p. 334.

¹⁶ F M Brookfield, *The Treaty, the 1840 Revolution and Responsible Government*, (1992) 5 CantLR p. 60.

¹⁷ Noted in *NZ Maori Council v Attorney-General* [1987] 1 NZLR 641, 672 per Richardson J(HC & CA).

¹⁸ Philip A Joseph, *Constitutional and Administrative Law in New Zealand*, pp. 48–49.

¹⁹ Geoffrey Palmer and Matthew Palmer, p. 346.

²⁰ Sir Robin Cooke, Introduction, (1990) 14 NZULR 1,1.

²¹ *New Zealand Maori Council v Attorney-General*, [1987] 1 NZLR 641 (HC & CA).

²² *New Zealand Maori Council v Attorney-General*, 714 per Bisson J.

²³ *New Zealand Maori Council v Attorney-General*, 673 per Richardson J.

parties to the Treaty.²⁴ Parties must act reasonably and in the utmost good faith towards one another. It was the duty of the Crown to actively protect Māori in the use of their lands and other interests.²⁵

However the formal legal status of the Treaty of Waitangi has not evolved significantly since the Privy Council decision in *Hoani Te Heuheu Tukino v Aotea District Maori Land Board*²⁶ which found that “the Treaty cannot be enforced in the Courts except in so far as a statutory recognition of the rights can be found” (as described by Cooke P in the *New Zealand Maori Council v Attorney-General*, or the *Lands* case).²⁷ Even the *Lands* case, regarded as seminal in clarifying the meaning of the Treaty of Waitangi, rested on the fact that Parliament had decided to give force to the Treaty in enacting a particular provision in the State-Owned Enterprises Act 1986.

This point has been affirmed by courts subsequently, including in the High Court in 1996 in *New Zealand Maori Council v Attorney-General*.²⁸ In that case, Justice McGechan stated:

The decision of the Privy Council in Tukino’s case, and in Court of Appeal decisions which have followed it, are binding. The attitude which the Court of Appeal might take in view of the vintage of the case, and the current position of the Privy Council, is a matter for that Court itself. Least, however, this seem intellectually lazy, I record a view that a matter of such fundamental constitutional importance, with serious implications, should be decided only by legislation, and arguably by a referendum and legislation.

1840: British sovereignty asserted

On 21 May 1840, Lieutenant-Governor William Hobson issued two proclamations declaring the sovereignty of the British Crown over the islands of New Zealand. The first proclaimed “all rights and powers of Sovereignty” over the North Island as ceded by the Treaty of Waitangi. The second asserted British sovereignty over the South and Stewart Islands on the ground of Captain James Cook’s discovery in 1769.²⁹

These proclamations, ratified by the British Government and published in the *London Gazette* of 2 October 1840, authoritatively established British sovereignty over New Zealand.³⁰

Three bases for Britain’s assertion of sovereignty can be discerned from Hobson’s proclamations: cession by treaty, assertion and discovery.

In terms of colonial law, however, Britain regarded New Zealand as a colony acquired by settlement.³¹ Accordingly, English statute and common law, as far as it was applicable to

²⁴ Philip A Joseph, p. 67.

²⁵ *New Zealand Maori Council v Attorney-General*, 664 per Cooke P.

²⁶ *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] 60 NZLR 590.

²⁷ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 655.

²⁸ *New Zealand Maori Council v Attorney-General* (29 March 1996) High Court Wellington, CP 40/96, p. 19.

²⁹ Philip A Joseph, pp. 37–38.

³⁰ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 671 per Richardson J (HC & CA).

³¹ Philip A Joseph, pp. 38–39.

the local circumstances, was deemed to have been imported to the colony by English settlers. In 1858, the English Laws Act recognised the inheritance of English laws as from 14 January 1840, before the signing of the Treaty of Waitangi.³²

In acquiring sovereignty, Britain acquired both the right to govern (*imperium*) and ultimate ownership of its territory (*dominium*).³³ However, the Crown's radical or ultimate title to its land was subject to the extinguishment of Māori customary title. Under the second article of the Treaty of Waitangi, the Crown guaranteed Māori continued possession of their lands, forests and fisheries but claimed the pre-emptive right to extinguish Māori customary title. The Crown was the sole source of title to land, and refused to recognise land purchases by private treaty with Māori.

Until 1839, Britain had been reluctant to intervene in New Zealand affairs. In 1817, 1823 and 1828, the British Parliament had passed three statutes stating explicitly that New Zealand was not within His Majesty's dominions.³⁴ In response to requests from merchants, missionaries and individuals,³⁵ the Colonial Office had appointed James Busby as British Resident in 1833 to apprehend criminals and prevent acts of violence and revenge perpetrated on Māori and British subjects.³⁶ However, Busby was also advised that he could not "be clothed with any legal power or jurisdiction" to achieve these aims.³⁷

In 1835, Busby brought together over 30 chiefs of the northern tribes to sign "A Declaration of the Independence of New Zealand".³⁸ The second article of the Declaration proclaims "All sovereign power and authority within the territories of the United Tribes of New Zealand is hereby declared to reside entirely and exclusively in the hereditary chiefs and heads of tribes in their collective capacity".³⁹

A number of events induced Britain to abandon its non-interventionist policy. The European population in New Zealand was rapidly expanding, and escalating lawlessness threatened both Māori and British subjects. The New Zealand Company was seeking to acquire large tracts of land to establish new settlements.⁴⁰ It appeared, too, that the French were planning to acquire and settle territory.⁴¹

Britain resolved to acquire sovereignty in January 1839.⁴² In June of that year, the Crown issued Letters Patent extending the boundaries of New South Wales to include "any territory which is or may be acquired in sovereignty by Her Majesty ... within that group of Islands ... known as New Zealand". In August 1839, Captain William Hobson RN was

³² Philip A Joseph, pp. 38–39.

³³ Philip A Joseph, p. 32.

³⁴ Philip A Joseph, pp. 35–36.

³⁵ Claudia Orange, p. 13.

³⁶ Philip A Joseph, p. 35.

³⁷ Instructions from Governor Bourke to James Busby dated 13 April, 1833, quoted in J Hight and H D Bamford, *The Constitutional History and Law of New Zealand*, Christchurch, Whitcombe and Tombs, 1914, p. 56.

³⁸ Claudia Orange, p. 16.

³⁹ Reproduced in Claudia Orange, *An Illustrated History of the Treaty of Waitangi*, p. 15.

⁴⁰ Claudia Orange, p. 18.

⁴¹ J Hight and H D Bamford, p. 102.

⁴² Philip A Joseph, p. 36.

appointed Her Majesty's Consul in New Zealand and instructed to "treat with the Aborigines of New Zealand for the recognition of Her Majesty's sovereign authority over the whole or any parts of those islands which they may be willing to place under Her Majesty's dominion".⁴³ He was authorised to proclaim sovereignty over the South Island on the ground of discovery should he find it "uninhabited, except by a very small number of persons in a savage state, incapable from their ignorance of entering intelligently into any treaties with the Crown".⁴⁴

On 6 February 1840, the Treaty of Waitangi was signed by chiefs representing Māori tribes of the northern parts of New Zealand and by Lieutenant-Governor William Hobson representing the British Crown. Eight months later, over 500 Māori from various parts of the country had signed copies of the Treaty.⁴⁵ On 21 May 1840, by proclamation, Hobson declared British sovereignty over the islands of New Zealand.

1840: Colonial government established

The New South Wales Continuance Act 1840 (UK) authorised New Zealand to be "erected" into a separate colony.⁴⁶ Letters Patent issued on 16 November 1840 (the "Charter of 1840") and Royal Instructions to William Hobson dated 5 December 1840 instituted an Executive Council and a Legislative Council as the primary organs of colonial government.

The Executive Council was charged with assisting the Governor in the administration of government. The Governor was to exercise his powers with the concurrence and advice of the Executive Council, unless it was not practical for him to consult or he dissented. The Colonial Secretary, the Attorney-General, and the Public Treasurer for New Zealand were appointed to the Executive Council by the 1840 Royal Instructions.

The Legislative Council was authorised to make "Laws and Ordinances as may be required for the Peace, Order, and good Government" of the colony, provided they were consistent with Imperial legislation and complied with instructions issued by the Queen in Council.⁴⁷ All laws and ordinances were to be laid before the British Parliament, and were subject to confirmation or disallowance by the Queen.⁴⁸

The Legislative Council was to comprise no fewer than seven appointees including the Governor or Lieutenant-Governor. The Royal Instructions of 5 December 1840 named the Colonial Secretary, the Attorney-General, and the Public Treasurer for New Zealand, and three Justices of the Peace as members of the Legislative Council.

The 1840 Charter also empowered the Governor to appoint judges and other officers and ministers for the "due and impartial administration of Justice".

⁴³ Philip A Joseph, p. 36.

⁴⁴ Philip A Joseph, p. 36.

⁴⁵ James Belich, *Making Peoples: A History of the New Zealanders From Polynesian Settlement to the End of the Nineteenth Century*, Auckland, Penguin, 1996, p. 193.

⁴⁶ New South Wales Continuance Act 1840 (UK), 3 & 4 Vict, c 62.

⁴⁷ Philip A Joseph, p. 96.

⁴⁸ Jeremy Finn, *Colonial Government, Colonial Courts and the New Zealand Experience* in Peter Spiller and others, *A New Zealand Legal History*, 2nd ed, Wellington, Brookers, 2001, p. 61.

On 24 November 1840, Hobson was declared Governor of New Zealand. As governor of a separate colony, his instructions were received directly from the Secretary of State for the Colonies in London.⁴⁹ The opening of the first session of the Legislative Council took place on 24 May 1841. Six ordinances were passed in this session, among them one declaring that the laws of New South Wales were in force from the date of the Charter.⁵⁰ During the period of Hobson's governorship, and that of his successors, neither the Executive Council nor the Legislative Council met with any frequency. The Governor, in the name of the Crown, controlled most of the executive and legislative functions of government.⁵¹

1841: New Zealand separated from the Colony of New South Wales and proclaimed a separate colony

The Colonial Office finally made the decision in January 1839 to acquire New Zealand as a British territory. In June 1839, the Crown issued Letters Patent that extended the territory of New South Wales to include any part of New Zealand over which British sovereignty might be acquired. These Letters Patent were intended only as a transitional measure in the setting up of the new colony.

In August 1840, the British Parliament enacted the New South Wales Continuance Act (UK) which authorised the separation of New Zealand from the colony of New South Wales and its constitution as a separate colony. Letters Patent constituting the colony were issued on 16 November 1840.⁵² The new colony was officially proclaimed to exist on 3 May 1841.

1841: First courts of law established

The Supreme Court Ordinance Act 1841 established the Supreme Court of New Zealand. The Supreme Court (which was reconstituted as the High Court of New Zealand under the Judicature Amendment Act 1979) was a superior court of record that exercised the general jurisdiction of the common law and equity courts in England.

1846: First Resident Magistrates' Courts established

These courts were set up under the Resident Magistrates' Courts Ordinance 1846 "for the more simple and speedy administration of Justice in the Colony of New Zealand".⁵³ They were reconstituted as Magistrates' Courts in 1893, and reconstituted again in 1947.

1846: Constitution Act 1846 enacted by UK Parliament then suspended

In August 1846, the British Parliament passed the Constitution Act (UK) "to make further provision for the Government of the New Zealand Islands"⁵⁴ in response to settlers' demands for representative institutions. The Charter of 1846—the second constitution for

⁴⁹ Paul Moon, *Hobson: Governor of New Zealand 1840-1842*, David Ling Publishing, Auckland, 1998, p. 150.

⁵⁰ Philip A Joseph, p. 97.

⁵¹ Colin Campbell Aikman, Constitutional History in *Encyclopaedia of New Zealand*, ed A H McLintock, Wellington, Government Printer, 1966, p. 68.

⁵² Philip A Joseph, p. 38.

⁵³ Resident Magistrates' Courts Ordinance 1846, 10 Vict 16.

⁵⁴ Constitution Act 1846 (UK), 9 & 10 Vict, c 103.

the colony—was contained in Letters Patent. This constitution was never fully proclaimed in force.

The Charter of 1846 was a most intricate plan of government. It proposed a hierarchy of representative institutions, with direct and indirect elections to the national and provincial legislative assemblies.⁵⁵ In 1848, those parts dealing with the national and provincial assemblies were suspended and the appointed Legislative Council, established under the earlier Charter of 1840, was revived in their stead.⁵⁶

1852: Representative government established

Representative government was established by the New Zealand Constitution Act 1852 (UK) in response to pressure from settlers anxious to exert some control over local affairs.⁵⁷

The 1852 Act was New Zealand’s third constitution. The first was granted by the Letters Patent dated 16 November 1840, and the second by the Constitution Act 1846 (UK). The constitution envisaged by the 1846 Act was an attempt at establishing representative institutions but it was “ill-conceived in its complexity”.⁵⁸ Governor Grey (later Sir George Grey) was slow to bring the Charter into force and successfully petitioned the British Government to suspend parts of the 1846 Act dealing with the establishment of provincial and central assemblies.⁵⁹ Grey believed that the 1846 Act would “give to a minority made up of one race power over a majority made up of another”⁶⁰ as settlers legislated to the detriment of Māori.

The New Zealand Constitution Act 1852 (UK)⁶¹ came into effect by proclamation on 17 January 1853. It divided the colony into six provinces representing the main areas of settlement—Auckland, New Plymouth, Wellington, Nelson, Canterbury and Otago⁶²—each with an elected Superintendent and Provincial Council.⁶³ It established a central legislature: a General Assembly comprising a Governor, a Legislative Council and a House of Representatives.⁶⁴ Members of the Legislative Council were appointed for life; members of the House of Representatives were elected and served a term of five years.⁶⁵

The House of Representatives was an elected chamber, with the franchise restricted to adult men owning property of a certain value.⁶⁶ Since most Māori land was held communally, most Māori were excluded.

⁵⁵ Philip A Joseph, p. 98.

⁵⁶ Philip A Joseph, p. 98.

⁵⁷ Philip A Joseph, pp. 97–98.

⁵⁸ *Encyclopaedia of New Zealand*, p. 68.

⁵⁹ Philip A Joseph, p. 98.

⁶⁰ Quoted by Michael King, p. 199.

⁶¹ New Zealand Constitution Act 1852 (UK), 15 & 16 Vict, c 72.

⁶² New Zealand Constitution Act 1852 (UK), s 2.

⁶³ New Zealand Constitution Act 1852 (UK), s 3.

⁶⁴ New Zealand Constitution Act 1852 (UK), s 32.

⁶⁵ Philip A Joseph, p. 99.

⁶⁶ New Zealand Constitution Act 1852 (UK), s 7.

The General Assembly was empowered by the 1852 Act to “make laws for the peace, order, and good government of New Zealand, provided that no such laws be repugnant to the law of England”.⁶⁷ Enactments of the General Assembly prevailed over provincial enactments in areas of concurrent jurisdiction.⁶⁸

Limitations were placed on the legislative powers of the General Assembly. The Governor could refuse his assent to a bill or reserve it for the Queen’s assent and signature.⁶⁹ Furthermore, the Queen in Council could disallow bills assented to by the Governor, within two years of receiving them.⁷⁰

Power to amend the constitution was provided by section 68 of the 1852 Act which made it lawful for the General Assembly “by any Act or Acts, to alter from time to time any provisions of this Act”, but every amending bill had to be reserved for the Queen’s consent. In effect, “New Zealand’s original powers of constitutional amendment were shared—the General Assembly possessed the power of initiation and the Colonial Office the power of veto”.⁷¹ The Colonial Office, therefore, retained ultimate control over New Zealand’s constitution.⁷²

In 1857, the General Assembly was given further powers of constitutional amendment. Section 68 of the 1852 Act was repealed by the Constitutional Amendment Act 1857 (UK). Except for some 21 sections relating primarily to the establishment of the General Assembly and provincial government, the General Assembly could “alter, suspend, or repeal all or any of the provisions”⁷³ of the 1852 Act. The Governor retained a discretionary power to reserve amendment bills under section 56 and the Crown could disallow them under section 58.⁷⁴ After 1876, when the provinces were abolished, only 15 provisions were beyond the local assembly’s power to amend.

The 1852 Act was silent on the relationship between the Governor and the two Houses of the General Assembly, beyond providing that the Governor could summon, prorogue or dissolve the General Assembly and appoint the times and places at which it would meet.⁷⁵ “In short,” it has been observed, “the Act established a representative legislature, but not a responsible executive”.⁷⁶

Section 71 of the 1852 Act suggested some form of temporary local self-government for Māori:⁷⁷ “... it may be expedient that the laws, customs, and usages of the aboriginal or native inhabitants of New Zealand ... should for the present be maintained for the government of themselves, ... and that particular districts should be set apart within which

⁶⁷ New Zealand Constitution Act 1852 (UK), s 53.

⁶⁸ New Zealand Constitution Act 1852 (UK), s 53.

⁶⁹ New Zealand Constitution Act 1852 (UK), s 56.

⁷⁰ New Zealand Constitution Act 1852 (UK), s 58.

⁷¹ Philip A Joseph, p. 107.

⁷² Philip A Joseph, p. 107.

⁷³ New Zealand Constitution Amendment Act 1857 (UK), 20 & 21 Vict c 53, s 2.

⁷⁴ Philip A Joseph, p. 107.

⁷⁵ New Zealand Constitution Act 1852 (UK), 15 & 16 Vict c 72, ss 40 and 44.

⁷⁶ J L Robson *New Zealand: The Development of its Laws and Constitution*, London, Stevens, 1967, p. 8.

⁷⁷ See: The Treaty of Waitangi <http://www.treatyofwaitangi.govt.nz/timeline/treaty1800.php>.

such laws, customs, or usages should be so observed". These districts, however, were never established.

1856: Responsible government established

The New Zealand Constitution Act 1852 (UK)⁷⁸ established representative government in New Zealand, but the Governor remained responsible only to the British Crown.⁷⁹ Without responsible government, the elected legislature's power to influence the executive was nominal.

Responsible government required that the Executive Council be appointed from the House of Representatives; that the Governor act on the advice of the Executive Council; and that the Executive Council retain the confidence and support of the House.⁸⁰

The House first met on 24 May 1854. Of immediate concern to members was the lack of responsible government. A motion was passed for the "establishment of ministerial responsibility in the conduct of legislative and executive proceedings by the Governor".⁸¹

The demand for responsible government was granted in December 1854, by means of an instruction from the Permanent Under-Secretary to the Secretary of State to the Acting-Governor. A new Parliament assembled on 15 April 1856. The permanently appointed members of the Executive Council resigned and the new Governor, Sir Thomas Gore Browne, invited Henry Sewell to form New Zealand's first responsible ministry, which was sworn in on 7 May 1856.⁸²

Certain matters, however, were excluded from ministerial control, specifically those "affecting the Queen's prerogative and Imperial interests generally".⁸³ They were specified as internal defence and Māori affairs, bills reserved for the Queen's assent, and international trade and foreign affairs.⁸⁴

Over time, the New Zealand Government gained full responsibility over even the Queen's prerogative and Imperial interests, as New Zealand progressed from Crown colony to independent member of the Commonwealth. At the 1923 and 1926 Imperial Conferences it was recognised that members of the Commonwealth were entitled to conclude international commercial and political treaties,⁸⁵ to exchange diplomatic representatives, to participate in international organisations, and to make separate declarations of war and treaties of peace.⁸⁶ New Zealand was initially reluctant to exploit this freedom but after

⁷⁸ New Zealand Constitution Act 1852 (UK), 15 & 16 Vict c 72.

⁷⁹ J L Robson, p. 7.

⁸⁰ Philip A Joseph, *The Legal History and Framework of the Constitution in Building the Constitution*, ed Colin James, Institute of Policy Studies, Wellington, 2000, p. 179.

⁸¹ Quoted by Philip A Joseph, *The Legal History and Framework of the Constitution in Building the Constitution*, ed Colin James, Institute of Policy Studies, Wellington, 2000, p. 179.

⁸² Philip A Joseph, *Constitutional and Administrative Law in New Zealand*, 2nd ed, Brookers, Wellington, 2001, p. 103.

⁸³ Minute by Governor Browne, 15 April 1856, on his relations with his responsible Ministers.

⁸⁴ Philip A Joseph, p. 103.

⁸⁵ Colin Campbell Aikman, *Constitutional History in Encyclopaedia of New Zealand*, ed A H McLintock, Government Printer, Wellington, 1966, p. 73.

⁸⁶ Philip A Joseph, p. 106.

World War II it developed an independent foreign policy, which it initiated as a separate signatory to the Treaties of Peace.⁸⁷

1858: First Māori King appointed

A series of inter-tribal meetings culminated in the inauguration of the high-ranking Waikato chief Te Wherowhero as the first Māori King in 1858. The King movement, or Kīngitanga, had its origins in a perception on the part of many Māori of a need to counter challenges to Māori autonomy, to oppose land sales to the Government, and to stem the perceived decay in traditional Māori society.⁸⁸ The Kīngitanga was not universally welcomed among Māori, though, with many chiefs refusing to subordinate their mana to that of someone else. The northern tribes of Te Tai Tokerau did not become involved because they were strongly associated with the Treaty (which was viewed by some as opposed to the King movement); and the Arawa tribes claimed they could not take part because of their allegiance to the Crown. Some Māori reacted against the strongly Tainui tribal connections of the Kīngitanga's leadership.⁸⁹ The Kīngitanga regarded the Queen as complementary to the Māori King, not as a competitor, but the colonial Government regarded the Kīngitanga as a challenge to its authority.⁹⁰

1860: Taranaki war begins

The Government's purchase of the Waitara block in Taranaki, through dealings with a minor tribal chief, was disputed by senior tribal chief Wiremu Kīngi, and most of the Māori inhabitants of the block. Troops were sent to enforce the purchase, and a land dispute became open warfare lasting a year.⁹¹ The Government believed that Kīngi was in rebellion against the authority of the Governor.⁹² Wiremu Kīngi took his stand as a matter of rangatiratanga.⁹³

1860: Kohimārama conference

In 1860, Governor Thomas Gore Browne convened a meeting of chiefs at Mission Bay, Auckland, to seek their views and opinions on the Māori King movement and recent fighting over land in Taranaki.⁹⁴ The Governor also asked the chiefs to consider "Rules for the proper Administration of Justice".⁹⁵ About 200 chiefs attended. Discussion centred on

⁸⁷ Philip A Joseph, p. 106.

⁸⁸ See: 1858: First Māori King, <http://www.treatyofwaitangi.govt.nz/timeline/treaty1850.php>; Claudia Orange, *The Treaty of Waitangi*, Allen & Unwin, Wellington 1987, pp.142–143.

⁸⁹ See: 1858: First Māori King, <http://www.treatyofwaitangi.govt.nz/timeline/treaty1850.php>; Claudia Orange, p. 142.

⁹⁰ See: 1858: First Māori King, <http://www.treatyofwaitangi.govt.nz/timeline/treaty1850.php>; Claudia Orange p. 143.

⁹¹ "1860: War in Taranaki", <http://www.treatyofwaitangi.govt.nz/timeline/treaty1850.php>; Claudia Orange, p. 144.

⁹² Claudia Orange, p. 144.

⁹³ Ann Parsonson, Te Rangitake, Wiremu Kingi, *Dictionary of New Zealand Biography*, <http://www.dnzb.govt.nz/dnzb/>.

⁹⁴ *Minutes of Proceedings of the Kohimarama Conference of Native Chiefs*, AJHR E 9, Auckland, p. 4.

⁹⁵ *Minutes of ... Kohimarama Conference*, AJHR E 9, Auckland, p. 9.

the Treaty of Waitangi and Māori concerns over their land.⁹⁶ Māori leaders were “left with an assurance that Māori mana had been guaranteed”.⁹⁷

At the final session, the chiefs “pledged to each other, to do nothing inconsistent with their declared recognition of the Queen’s Sovereignty, and of the union of the two races”.⁹⁸ This pledge became known as the Kohimārama covenant.⁹⁹

1862: The Court of Appeal of New Zealand established

The Court of Appeal Act 1862 provided for a formally constituted Court of Appeal, although it was not until the Judicature Amendment Act 1957 that permanent Court of Appeal judges were appointed. Before 1957, Supreme Court judges were seconded to hear appeals, sitting as Court of Appeal judges.

1863: Waikato war begins

During the early 1860s relations between the King movement and the Government broke down over the insistence by King movement leaders that they should be allowed autonomy, and the Government’s insistence on absolute sovereignty.¹⁰⁰ In 1863 British troops crossed into the Waikato, precipitating fighting between British forces and the King movement.¹⁰¹ Major military operations in the Waikato ended in 1864, but fighting, which had spread to other parts of the North Island, did not end until 1872. The Government gained control of the Waikato and established its military dominance, but the King movement was not destroyed and the confiscation of more than 1.5 million acres of Māori land would create a source of grievance for many Māori.¹⁰² From 1864 the Weld Government, under its “self-reliant” policy, assumed full responsibility for Māori affairs from the Governor.¹⁰³

1867: Separate Māori representation established by creating Māori seats in Parliament

The Maori Representation Act 1867 established four separate electorates—three in the North Island and one taking in the South Island and Stewart Island—to promote Māori representation in Parliament. The four Māori electorates were intended as a temporary expedient, but within ten years they had become a permanent feature of New Zealand’s electoral legislation. Elections to the Māori seats were on an adult male franchise. Adult male Māori or “half-caste” Māori were exempt from the property qualification that circumscribed the right to vote in the general seats. The four dedicated Māori seats

⁹⁶ See: The Treaty of Waitangi <http://www.treatyofwaitangi.govt.nz/timeline/treaty1800.php>.

⁹⁷ Claudia Orange, p. 67.

⁹⁸ *Minutes of ... Kohimarama Conference*, AJHR E 9, Auckland.

⁹⁹ Claudia Orange, p. 66.

¹⁰⁰ Claudia Orange, pp. 159–165.

¹⁰¹ James Belich, *Making Peoples*, pp.236–239; James Belich, *The New Zealand Wars*, *Oxford Companion to New Zealand Military History*, Oxford University Press 2000, pp. 375–379.

¹⁰² M P K Sorrenson, Maori and Pakeha in *The Oxford History of New Zealand*, 2nd ed, ed Geoffrey W Rice, Auckland, Oxford University Press, 1992, pp. 158–160.

¹⁰³ Alan Ward, *A Show of Justice: Racial “Amalgamation” in Nineteenth Century New Zealand*, Auckland University Press 1995, p.177; 1864: Colonial Self-Reliance, <http://www.treatyofwaitangi.govt.nz/timeline/treaty1850.php>; W. David McIntyre, Self-reliant policy, *Oxford Companion to New Zealand Military History*, pp. 485–486.

remained until the introduction of Mixed-Member Proportional (MMP) voting. The MMP statute introduced a formula for increasing their number in accordance with the Māori electoral option. The number of Māori seats increased to five in 1996, and then to seven in 2002.

See also commentary below for 1893: Universal adult suffrage introduced, extending vote to women.

1875: Provincial government abolished

The Abolition of the Provinces Act 1875 came into force on 1 November 1876. It repealed section 2 of the New Zealand Constitution Act 1852 (UK) which had established the provinces and rendered obsolete some 30 sections establishing the provincial system of government.¹⁰⁴

At first, provincial governments had exercised wide powers, taking on public work projects such as the construction of roads, bridges and ferries. Often, too, they took on responsibility for the provision of education and health services. The enactments of provincial legislatures, replicating the legislation of other colonies, provided a model for some national legislation.¹⁰⁵

The provincial system suited a colony composed of widely scattered settlements¹⁰⁶ but improvements in transport and communications allowed a more effective centralised administration.¹⁰⁷ Financial difficulties meant that provinces became increasingly dependent on grants from colonial revenue,¹⁰⁸ and it became politically feasible for control to shift to central government.¹⁰⁹

1876: Hui at Te Waiōhiki, Hawkes Bay

Some 1,200 Māori attended a hui at Te Waiōhiki, Hawkes Bay in early 1876. The meeting resolved that the Government of the time was unworthy of support and that no real redress of grievances was possible as long as it remained in office. Those present at the meeting also resolved to look to Sir George Grey as their leader and director to the future. Other matters discussed included the abolition of the Native Land Court, the stopping of land sales and mortgages and the taking of lands for public works, and increasing the representation of Māori in Parliament.¹¹⁰

1877: Treaty of Waitangi dismissed as a “simple nullity”

In *Wi Parata v Bishop of Wellington*,¹¹¹ a case involving ownership of land in the Wellington region, Chief Justice Prendergast dismissed the Treaty of Waitangi as “a simple nullity”. The Treaty, he believed, promised more than it could deliver, in so far as it purported to

¹⁰⁴ Philip A Joseph, p. 100.

¹⁰⁵ Jeremy Finn, Colonial Government, Colonial Courts and the New Zealand Experience, in Peter Spiller, Jeremy Finn and Richard Boast, *A New Zealand Legal History*, 2nd ed, Wellington, Brookers, 2001, p. 66.

¹⁰⁶ J L Robson, *New Zealand The Development of its Laws and Constitution*, Stevens, London, 1967, p. 6.

¹⁰⁷ Michael King, pp. 231–232.

¹⁰⁸ Philip A Joseph, p. 100.

¹⁰⁹ J L Robson, p. 7.

¹¹⁰ *Te Wananga*, 1 April 1876.

¹¹¹ *Wi Parata v Bishop of Wellington* (1977) 3 NZ Jur (NS) 72.

cede sovereignty of New Zealand to the British Crown. Māori tribes, he believed, did not constitute a state capable of exercising rights of sovereignty and of entering into international treaties.¹¹²

This judicial attitude of mind contrasts with that prevailing in the courts today, where the Treaty is referred to as a founding document, which gave legitimacy to the British Crown in New Zealand.

1879: Adult male franchise for elections to the House of Representatives introduced

The Qualification of Electors Act 1879 extended the vote to all adult males aged 21 years or over, after 12 months' residence in New Zealand or six months' ownership of freehold property.

See also commentary below for 1893: Universal adult franchise introduced, extending of vote to women.

1882: Northern chiefs petition Queen Victoria to investigate colonial Government and establish a Māori parliament

Faced with the apparent unwillingness of the colonial Government to respond to Māori grievances, in the early 1880s many Māori leaders considered the possibility of a personal appeal to the Queen. Māori felt they had a special, personal relationship with their Treaty partner, Queen Victoria, and in 1882 a delegation of northern Māori, and in 1883 a delegation led by Tāwhiao, the Māori King, went to Britain to petition the Queen directly over breaches of the Treaty of Waitangi. The British Government responded that it no longer had responsibility for such matters, and that Māori affairs were now the responsibility of the New Zealand Government.¹¹³

1892: Governor instructed to act on the advice of his responsible Ministers when Imperial interests not affected

In 1892, it was established that the Crown was bound (with a few exceptions) to act on ministerial advice. That year, the Secretary of State's instruction to the Governor, the Earl of Glasgow, established a precedent that, in matters of local self-government, the Crown was bound to act on the advice of Ministers who were responsible to Parliament. The same year, the Royal Instructions revoked the Governor's power to act independently, without consulting the Executive Council.¹¹⁴

1892: Opening of Kotahitanga parliament

During the 1890s the political aspirations of many Māori crystallised into the formation of a Māori parliament.¹¹⁵ The Kotahitanga (or union) movement came into focus with a hui at Te Tiriti o Waitangi meeting house at the Bay of Islands in April 1892. The hui agreed to

¹¹² *Wi Parata v Bishop of Wellington*, 78.

¹¹³ Claudia Orange, pp.205–218; R.T. Mahuta, Tukaroto Matutaera Potatau Te Wherowhero Tawhiao, *Dictionary of New Zealand Biography*, <http://www.dnz.govt.nz/dnzb/>; 1882: Māori Deputations to the Queen, <http://www.treatyofwaitangi.govt.nz/timeline/treaty1850.php>

¹¹⁴ Philip A Joseph, p. 110.

¹¹⁵ Ranginui Walker, *Ka Whawhai Tonu Matou: Struggle Without End*, Auckland, Penguin Books, 1990, p. 165.

form a kotahitanga movement, which could present tribal and general intertribal grievances to the Government and protect Māori rights under the Treaty of Waitangi. The hui led to the establishment of a Kotahitanga parliament a few months later at Waipatu in Hawkes Bay.¹¹⁶

The Māori parliament consisted of 96 members representing eight districts, six in the North Island and two in the South Island. The establishment of the parliament was said to be justified by the Declaration of Independence, the Treaty of Waitangi and the New Zealand Constitution Act 1852 (in section 71, the recognition of Native Districts).

Prominent politicians, including James Carroll, visited the Māori parliament, but Premier Richard Seddon asserted that the Māori parliament was really only a rūnanga. He stated that there was “only one parliament in New Zealand, and it would never give up control of the Maoris or their lands”.¹¹⁷

By the mid-1890s the Kotahitanga movement had attempted to organise a boycott of the Native Land Court. One wing of it supported a demand for a separate law-making assembly for Māori under section 71 of the 1852 Constitution Act. After Hone Heke was elected to Parliament in 1883, he introduced into the House a Native Rights Bill seeking devolution of power to the Māori parliament. The bill was defeated in 1884 and again in 1896.

1893: Universal adult franchise introduced, extending vote to women

The passing of the Electoral Bill 1893 extended the right to vote in parliamentary elections to women, and gave New Zealand fully representative government.¹¹⁸ New Zealand became the first self-governing nation to enfranchise all adult women.

Granting the vote to women was the last step in a gradual process towards universal suffrage. This development was motivated by two concerns: equal rights for women and the moral reform of society. The concern for equality grew from the progressive ideals of writers such as John Stuart Mill, who presented a petition for women's suffrage to the British Parliament in 1866. Movements focussing on the reform of specific social evils, including drunkenness and crime, emerged internationally in the late eighteenth and early nineteenth century. They influenced the New Zealand suffrage campaign, particularly through the American-based Women's Christian Temperance Union, which set up local branches in 1885.¹¹⁹

Kate Sheppard was the founder of an organised campaign for women's suffrage. She headed the franchise and legislation department of the Women's Christian Temperance Union in New Zealand. Together with other suffragists, she drew support from the Tailoresses' Union in Dunedin and from non-temperance Women's Franchise leagues

¹¹⁶ John A Williams, *Politics of the New Zealand Maori: Protest and Cooperation, 1891–1909*, University of Auckland, Auckland 1969, pp. 52–53; Angela Ballara, Hamiora Mangakahia, *Dictionary of New Zealand Biography*, <http://www.dnzb.govt.nz/dnzb/>; Claudia Orange, *The Treaty of Waitangi*, p. 225.

¹¹⁷ In “Paremata Maori” section at <http://www.nzhistory.net.nz/Gallery/parlt-hist/mps-Maori.html>.

¹¹⁸ Philip A Joseph, p. 100.

¹¹⁹ Neill Atkinson, *Adventures in Democracy: A History of the Vote in New Zealand*, Dunedin, University of Otago Press, 2003, pp. 84–85.

throughout the country, creating a mass movement that gained political traction.¹²⁰ From 1887, five bills to enfranchise women were introduced into the General Assembly but all foundered. Finally, in 1893, the Government introduced an amendment to the electoral legislation to enfranchise women, including Māori, and this measure passed both Houses of the General Assembly.¹²¹ The first election held under the Electoral Act 1893 took place on 28 November 1893.

The first general election in New Zealand took place on 14 July 1853.¹²² As defined by section 7 of the New Zealand Constitution Act 1852 (UK),¹²³ the franchise encompassed all male British subjects aged 21 years or over, who owned freehold property worth at least £50, or who paid at least £10 a year to lease property, or who were householders occupying a dwelling with an annual rental value of at least £10 in town or £5 outside town.¹²⁴ Men who owned or leased property in more than one electoral district could register and vote in each district for which they qualified.¹²⁵ The property qualification effectively excluded almost all Māori who, for the most part, held land communally.¹²⁶

Non-British subjects and persons convicted of “any treason, felony, or infamous offence”, were specifically disqualified from voting unless they had been pardoned or served their sentence.¹²⁷

In 1860, the Miners’ Franchise Act extended the vote to men aged 21 years or over who held a miner’s licence (at an annual cost of one pound).

In 1867, the Maori Representation Act established four Māori seats. All Māori men and “half-castes” aged 21 years or over could vote for a Māori member in one of the four large districts that reflected tribal groupings. Māori men who were eligible to vote in general seats exercised a dual vote.¹²⁸

In 1879, the Qualification of Electors Act introduced universal male suffrage. This Act extended the vote to all adult males aged 21 years or over, after 12 months’ residence or six months’ ownership of freehold property.¹²⁹

In 1889, the Representation Act Amendment Act abolished plural voting so that, except for Māori property owners, each elector could vote in only one electorate.¹³⁰ Māori property owners were exempt and could continue to vote in more than one electorate (Māori and General).

¹²⁰ Neill Atkinson, pp. 89–90.

¹²¹ Neill Atkinson, p. 93.

¹²² Neill Atkinson, p. 23.

¹²³ New Zealand Constitution Act 1852 (UK), 15 & 16 Vict, c 72.

¹²⁴ Elections New Zealand <http://www.elections.org.nz/study/history/right-to-vote.html>

¹²⁵ Neill Atkinson, p. 27.

¹²⁶ Neill Atkinson, p. 24.

¹²⁷ New Zealand Constitution Act 1852 (UK), s 8.

¹²⁸ Neill Atkinson, p. 50.

¹²⁹ Qualification of Electors Act 1879, s 2.

¹³⁰ Neill Atkinson, p. 77.

1894: Constitution of Kīngitanga Great Council (Te Kauhanganui) published

A constitution of the Kauhanganui (Great Council) of the Kīngitanga was published in 1894, which provided for the kingdom's own government. The setting up of courts for land, civil and criminal cases was announced, magistrates, police and a registrar for the kingdom's land court were appointed, and taxes levied. There was also a plan to set up King movement schools. However, the Government did not recognise the authority of the Kauhanganui.¹³¹

1900: Maori Councils Act 1900 and Maori Land Administration Act 1900 enacted

The Maori Councils Act 1900, and the Maori Land Administration Act 1900, were the product of lengthy discussions involving Māori members of Parliament and the Kotahitanga and Kīngitanga movements.¹³²

The Maori Councils Act was intended to provide for a form of local self-government for Māori villages. District Māori Councils could be elected to make by-laws providing for health measures, regulate behaviour such as smoking and gambling, and undertake various tasks of local government for Māori.¹³³

The Maori Land Administration Act created Māori Land Councils (which took over many of the powers of the Native Land Court) and allowed Māori landowners to form committees to administer their land.¹³⁴

In practice, both the District Māori Councils and the Māori Land Councils lacked funding and fell into disuse.¹³⁵ Māori landowners were unwilling to entrust their land to the Māori Land Councils, and the stemming of the alienation of Māori land frustrated many Pākehā.¹³⁶

1901: New Zealand refused to join Australia as its seventh state

In 1890 the representatives of seven British colonies (New South Wales, Victoria, South Australia, Tasmania, Queensland, Western Australia and New Zealand) met for the Australasian Federation Conference in Melbourne and agreed in principle to establish a federation. Federation was considered partly because of a rising nationalism in the colonies,

¹³¹ J. A. Williams., *Politics of the New Zealand Maori: Protest and Cooperation, 1891–1909*, University of Auckland, 1969, pp. 44–47; Angela Ballara, Mahuta Tawhiao Potatau Te Wherowhero, *Dictionary of New Zealand Biography*, <http://www.dnzb.govt.nz/dnzb/>; Angela Ballara, Te Waharoa, Tupu Atanatiu Taingakawa, *Dictionary of New Zealand Biography*, <http://www.dnzb.govt.nz/dnzb/>.

¹³² Alan Ward, James Carroll, *Dictionary of New Zealand Biography*, <http://www.dnzb.govt.nz/dnzb/>; Waitangi Tribunal, Executive Summary Rangahaua Whanui Research Programme, pp.29-30, <http://www.waitangi-tribunal.govt.nz/research/rangatooverview/vol1/>.

¹³³ Maori Councils Act, 1900.

¹³⁴ Maori Lands Administration Act, 1900.

¹³⁵ Alan Ward, James Carroll, *Dictionary of New Zealand Biography*, <http://www.dnzb.govt.nz/dnzb/>.

¹³⁶ Donald M Loveridge, Maori Land Councils and Maori Land Boards: A Historical Overview 1900–1952, chapter 4, Waitangi Tribunal Rangahaua Whanui National Theme Series, <http://www.waitangi-tribunal.govt.nz/research/researchwhanui/whatheme/k/>; Alan Ward, James Carroll, *Dictionary of New Zealand Biography*, <http://www.dnzb.govt.nz/dnzb/>.

partly because of increasing economic integration, and also because of fears that the separate colonies were too weak to defend themselves.¹³⁷ Two conventions to draft a constitution were held in 1891 and 1897, but New Zealand delegates to the 1891 convention were forbidden to commit New Zealand to joining a federation, and no New Zealand delegates were sent to the 1897 convention. Between 1898 and 1900, referenda were held in the Australian colonies on the Australian constitution, contained in the Commonwealth of Australia Bill.¹³⁸ In 1900 as the constitution was presented to the British Parliament to enact, New Zealand tried to secure the right to join the Commonwealth at a later date on the same terms as the original states incorporated into the constitution. However, the Australians rejected the “open door” amendment proposed by New Zealand.¹³⁹ In 1900 the British Parliament passed the Commonwealth of Australia Constitution Act, and the Commonwealth of Australia was inaugurated on 1 January 1901 in a ceremony at Sydney.¹⁴⁰

The New Zealand attitude to Australian federation was generally one of indifference.¹⁴¹ A Royal Commission on Federation, established in 1900 to inquire into the issue, concluded that there were few benefits for New Zealand in joining the Commonwealth of Australia, and advised: “New Zealand should not sacrifice her independence as a separate colony, but that she should maintain it under the Political Constitution she at present enjoys.”¹⁴²

1907: Dominion status acquired

Following the 1907 Imperial Conference,¹⁴³ the New Zealand House of Representatives passed a motion respectfully requesting that His Majesty the King “take such steps as he may consider necessary” to change the designation of New Zealand from the “Colony of New Zealand” to the “Dominion of New Zealand”.¹⁴⁴

Adoption of the designation of Dominion would, Prime Minister Joseph Ward declared, “raise the status of New Zealand” and “have no other effect than that of doing the country good”.¹⁴⁵

A Royal Proclamation granting New Zealand Dominion status was issued on 9 September 1907 and took effect on 26 September 1907.

¹³⁷ <http://www.abs.gov.au/Ausstats/abs@.nsf/0/96ae89d0a4310741ca2569de001fb2d8?OpenDocument>.

¹³⁸ See: Records of Australian Federal Conventions of the 1890s, <http://www.aph.gov.au/senate/pubs/records.htm>.

¹³⁹ Keith Sinclair, Why New Zealanders Are Not Australians, in Keith Sinclair (ed), *Tasman Relations*, Auckland University Press, 1988, p. 97.

¹⁴⁰ <http://www.abs.gov.au/Ausstats/abs@.nsf/0/96ae89d0a4310741ca2569de001fb2d8?OpenDocument>; Commonwealth of Australia Constitution Act 1900 (UK), 63 & 64 Vict, c 12.

¹⁴¹ Keith Sinclair "Why New Zealanders Are Not Australians", pp. 92–96; W P Reeves, The Attitude of New Zealand, <http://setis.library.usyd.edu.au/ozlit/pdf/fed0051.pdf>.

¹⁴² Report of the Royal Commission on Federation, *AJHR*, 1901, A-4, p. xxiv.

¹⁴³ W. David McIntyre, Imperialism and Nationalism, in *The Oxford History of New Zealand*, 2nd ed, ed Geoffrey W Rice, Oxford University Press, Auckland, 1992, p. 343.

¹⁴⁴ New Zealand Parliament 1907, Parliamentary Debates (Hansard), vol. 139, p. 371.

¹⁴⁵ New Zealand Parliament 1907, Parliamentary Debates (Hansard), vol. 139, p. 389.

1912: Political neutrality of the public service established

The Public Service Act 1912 provided for the appointment of a Public Service Commissioner and two Assistant Commissioners, who were responsible to Parliament for the appointment and promotion of employees. Political interference was prohibited by section 6(1) of the Act:

No person shall, directly or indirectly, solicit or endeavour to influence the Commissioner or an Assistant Commissioner with respect to the appointment of any other person to the Public Service, or with respect to the promotion of, or an increase of salary to, any officer in the Public Service.

The Public Service Commissioner had power under the Act to investigate the work of any officer and to inspect any department to ensure that the public service was operating efficiently and economically.¹⁴⁶

The political neutrality of the public service has been a constitutional convention in New Zealand since 1912.¹⁴⁷ This convention requires that public servants “act in such a way that their department maintains the confidence of its current Minister and also of future Ministers”. Advice given to Ministers “must be honest, impartial and comprehensive”.¹⁴⁸

1917: New Letters Patent issued re-designating the Governor as the Governor-General of New Zealand to recognise New Zealand's self-governing status

The 1917 Letters Patent constituted the office “Governor-General and Commander-in-Chief in and over Our Dominion of New Zealand”.¹⁴⁹ By contrast, the 1907 Letters Patent had declared: “there shall be a Governor and Commander-in-Chief in and over Our Dominion of New Zealand”.¹⁵⁰ The 1907 Letters Patent had been issued to mark New Zealand's change in status from Crown Colony to Dominion. The change in the Governor-General's title in 1917 was intended to reflect more fully New Zealand's self-governing status.

1926: Balfour Declaration adopted at the Imperial Conference

In its Report to the Imperial Conference of 1926, the Inter-Imperial Relations Committee chaired by Lord Balfour declared that Great Britain and the self-governing Dominions were “autonomous Communities within the British Empire” and “equal in status” in domestic and external affairs. “Equality of status” was the “root principle” governing the British Commonwealth of Nations.¹⁵¹

¹⁴⁶ Public Service Act 1912, s 12.

¹⁴⁷ Philip A Joseph, p. 298.

¹⁴⁸ Cabinet Office, *Cabinet Manual 2001*, Department of Prime Minister and Cabinet, Wellington, para. 2.147.

¹⁴⁹ Philip A Joseph, p. 162.

¹⁵⁰ Letters Patent Constituting the Office of Governor and Commander-in-Chief of the Dominion of New Zealand of November 18, 1907.

¹⁵¹ *Report of the Inter-Imperial Relations Committee*, London, 1926 (Cmd 2768), section II.

In considering the position of Governors-General in the Dominions, the Balfour Report resolved that they occupied “the same position in relation to the administration of public affairs in the Dominion” as was held by the Monarch in the United Kingdom.¹⁵² The only advisers to the Governor-General in New Zealand were his New Zealand Ministers.¹⁵³

The report was adopted unanimously by the Imperial Conference on 19 November 1926.

1932: Public Safety Conservation Act enacted

The Public Safety Conservation Act 1932 gave the Governor-General power to proclaim a state of emergency¹⁵⁴ and then, by Order in Council, to make any regulations necessary “for the prohibition of any acts which in his opinion would be injurious to the public safety”. The Governor-General could also make regulations for “the conservation of public safety and order and for securing the essentials of life to the community”.¹⁵⁵

The 1932 Act was passed in response to riots that took place during the Depression.¹⁵⁶ It was used twice, once at the outbreak of the Second World War in 1939 and once during the waterfront dispute in 1951.¹⁵⁷

Speaking in 1987 during the third reading of a bill to repeal the Public Safety Conservation Act, the Rt Hon Geoffrey Palmer said that its repeal together with the repeal of the Economic Stabilisation Act 1948 and the National Development Act 1979¹⁵⁸

remove[d] from the statute book Acts of the widest possible scope, under which it was possible to make regulations of the widest possible character to govern the country by executive fiat without reference to Parliament.

1941: Privy Council declares that the Treaty of Waitangi is enforceable in the courts only to the extent it is incorporated into legislation

Te Heuheu Tūkino v Aotea District Māori Land Board related to a commercial agreement, which, after one party to the agreement had defaulted, resulted in the liability for debts being transferred to the Aotea District Māori Land Board. Under section 14 of the Native Purposes Act, 1935, the amount was charged to the Māori landowners. *Te Heuheu Tūkino* argued that section 14, by imposing a charge on native lands, conflicted with the rights conferred by the second article of the Treaty of Waitangi. The Privy Council found:

It is well settled that any rights purporting to be conferred by such a treaty of cession cannot be enforced in the Courts, except in so far as they have been incorporated in the municipal law.¹⁵⁹

¹⁵² *Report of the Inter-Imperial Relations Committee*, London, 1926 (Cmd 2768), section IV (b).

¹⁵³ Philip A Joseph, p. 111.

¹⁵⁴ Public Safety Conservation Act 1932, s 2(1).

¹⁵⁵ Public Safety Conservation Act 1932, s 3(1).

¹⁵⁶ “Public Safety Conservation Act 1932” in Ian McGibbon (ed), *The Oxford Companion to New Zealand Military History*, Oxford University Press, Auckland, 2000, p. 434.

¹⁵⁷ Geoffrey Palmer and Matthew Palmer, p. 210.

¹⁵⁸ New Zealand Parliamentary Debates (Hansard), vol. 482, p.10515.

¹⁵⁹ *Te Heuheu Tūkino v Aotea District Māori Land Board* [1941] NZLR 590.

1945: New Zealand admitted to the United Nations

The United Nations aims to maintain international peace and security, to take collective measures against threats to peace, to develop friendly relations among nations, and to achieve international cooperation.¹⁶⁰ Members accept the sovereign equality of other members. They agree to settle their international disputes by peaceful means in such a manner that international peace and security are not endangered, and that nothing in the charter should authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.¹⁶¹ New Zealand was a foundation member when the United Nations was formally established at San Francisco in 1945.¹⁶² It has been said that “From New Zealand’s point of view, the whole conference was something like a climax in the development of her international status.”¹⁶³

1947: Full constituent powers acquired

In 1947 New Zealand acquired full constituent powers—the power to amend, suspend and repeal its own constitution.¹⁶⁴ The General Assembly adopted the Statute of Westminster 1931 (UK)¹⁶⁵ into New Zealand law and invoked the request and consent procedures in that statute to obtain a grant of power “to alter, suspend, or repeal, at any time, all or any of the provisions”¹⁶⁶ of the New Zealand Constitution Act 1852.

The Statute of Westminster 1931 gave legal expression to the resolutions adopted by the Imperial Conferences of 1926 and 1930. The Balfour Report presented at the 1926 Conference had defined Great Britain and the Dominions as “autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown ...”¹⁶⁷

Section 2 of the Statute of Westminster 1931 revoked the operation of the Colonial Laws Validity Act 1865 and declared that no law made by the Parliament of a Dominion “shall be void or inoperative” on the ground that it was repugnant to the law of England. Section 3 “declared and enacted” that Dominions had full power to make laws having extraterritorial effect. Section 4 gave legal force to the existing convention that no statute of the United Kingdom would extend to a Dominion unless the Dominion requested and consented to its enactment.¹⁶⁸

¹⁶⁰ Charter of the United Nations, Article 1, <http://www.un.org/aboutun/charter/>.

¹⁶¹ Charter of the United Nations, Article 2, <http://www.un.org/aboutun/charter/>.

¹⁶² <http://www.mfat.govt.nz/foreign/unc/general/unandnz.html#Introduction>.

¹⁶³ F.L.W. Wood, *The Official History of New Zealand in the Second World War: Wellington, Political and External Affairs*, Historical Publications Branch, 1958, p. 380, or <http://www.nzetc.org/tm/scholarly/tei-WH2Poli-c26.html>.

¹⁶⁴ Morag McDowell and Duncan Webb *The New Zealand Legal System*, 3rd edition, LexisNexis Butterworths, Wellington 2002, pp. 110–111.

¹⁶⁵ Statute of Westminster 1931 (UK), 22 Geo V, c 4.

¹⁶⁶ New Zealand Constitution (Amendment) Act 1947 (UK), 11 Geo VI, ch 4, s 1.

¹⁶⁷ *Report of the Inter-Imperial Relations Committee*, London, 1926 (Cmd 2768), section II.

¹⁶⁸ Philip A Joseph p. 446.

The General Assembly enacted the Statute of Westminster Adoption Act 1947 to adopt (and give legal force to) the United Kingdom statute under New Zealand law.¹⁶⁹ Section 10 of the Statute of Westminster had specifically excluded the extension of sections 2 to 6 to New Zealand, Australia and Newfoundland unless adopted by the Parliaments of the Dominions. However, this enactment alone did not give New Zealand full powers to amend its constitution. Section 8 of the Statute of Westminster provided: “Nothing in this Act shall be deemed to confer any power to repeal or alter ... the Constitution Act of the Dominion of New Zealand otherwise than in accordance with the law existing before the commencement of this Act.”

New Zealand adopted the Statute of Westminster in order to access the “request and consent” procedures provided by section 4 of the statute. Having adopted the United Kingdom statute, the General Assembly then passed legislation requesting the grant of full constituent powers. The Constitution Amendment (Request and Consent) Act 1947 requested, and consented to, the United Kingdom Parliament’s enacting legislation “in the form or to the effect of” the draft bill set out in the schedule to the Act.¹⁷⁰ The New Zealand Constitution (Amendment) Act 1947 (UK) provides:¹⁷¹

It shall be lawful for the Parliament of New Zealand by any Act or Acts of that Parliament to alter, suspend, or repeal, at any time, all or any of the provisions of the New Zealand Constitution Act, 1852; and the New Zealand Constitution (Amendment) Act, 1857, is hereby repealed.

1947: Magistrates’ Courts reconstituted

The Magistrates’ Courts Act 1947 reconstituted the Magistrates’ Courts which had been established by the Magistrates’ Courts Act 1893. (In 1980, the Magistrates’ Courts Act 1947 was re-titled the District Courts Act 1947 and Stipendiary Magistrates became District Court Judges.)

The jurisdiction of the Magistrates’ Courts in 1893 was divided into three classes—ordinary, extended and special—depending on the type of claim or sum of money claimed.¹⁷² Those “fit and proper persons” appointed as “stipendiary magistrates”¹⁷³ sat at “the pleasure of the Governor”.¹⁷⁴

The Magistrates’ Courts Act 1947 increased the monetary limit of civil claims to £500 and provided for unlimited jurisdiction by consent of the parties.¹⁷⁵ Magistrates were given security of tenure, but could be removed by the Governor-General for inability or misbehaviour.¹⁷⁶

¹⁶⁹ Statute of Westminster Adoption Act 1947, s 2.

¹⁷⁰ New Zealand Constitution Amendment (Request and Consent) Act 1947, s 2.

¹⁷¹ New Zealand Constitution (Amendment) Act 1947 (UK), 11 Geo VI, ch 4, s 1.

¹⁷² Magistrates’ Courts Act 1893, s 28.

¹⁷³ Magistrates’ Courts Act 1893, s 13.

¹⁷⁴ Magistrates’ Courts Act 1893, ss 14 and 15.

¹⁷⁵ Peter Spiller, p. 196.

¹⁷⁶ Peter Spiller “The courts and the judiciary” in Peter Spiller, Jeremy Finn and Richard Boast, *A New Zealand Legal History* (2nd ed, Wellington, Brookers, 2001) p. 196, Magistrates’ Courts Act 1947, s 7.

The jurisdiction and status of District Courts have evolved steadily since their inception.¹⁷⁷ District Courts can hear civil claims in contract, tort, statute or equity up to a monetary limit of \$200,000, and they have extensive criminal jurisdiction over indictable offences that can be tried summarily, summary offences that can be tried on indictment, and indictable offences within their own jurisdiction or on referral by the High Court.¹⁷⁸ Within the current District Court system there exist courts of specialist jurisdiction which include the Family Court, the Youth Court, and the Disputes Tribunal.

1948: Universal Declaration of Human Rights adopted by the United Nations General Assembly

The Universal Declaration of Human Rights, 1948, enshrines basic human rights and sets “a common standard of achievement for all peoples and all nations”. Among its 30 articles are assertions that all human beings are born free and equal in dignity and rights; that everyone is entitled to all the rights and freedoms set out in the Declaration, without distinction of any kind; that everyone has the right to life, liberty and security of person; that no one should be subjected to torture or to cruel, inhuman or degrading treatment or punishment; and all are equal before the law and are entitled without any discrimination to equal protection of the law.¹⁷⁹ The Universal Declaration of Human Rights is not directly binding, but has led to more specific covenants which New Zealand has ratified.

See below 1978: New Zealand ratified the International Covenant on Civil and Political Rights and 1978: New Zealand ratified the International Covenant on Economic, Social and Cultural Rights.

1950: Legislative Council abolished

With the adoption of the Statute of Westminster 1931 (UK) and the conferral of full constituent powers by the United Kingdom Parliament, the New Zealand Parliament could amend section 32 of the New Zealand Constitution Act 1852 (UK) and reconstitute itself as a unicameral legislature comprising the Governor-General and the House of Representatives.¹⁸⁰

The Legislative Council Abolition Act 1950 created little public debate.¹⁸¹ Although the Legislative Council had performed adequately during the first decades of its existence, changes in the early 1890s to the way in which councillors were appointed diminished its effectiveness as a check on legislation passed in the Lower House.¹⁸²

1962: Office of the Ombudsman established

In 1962, New Zealand became the first English-speaking common law country to institute an office of Ombudsman to scrutinise executive government and hold it to account.¹⁸³

¹⁷⁷ Peter Spiller, The courts and the judiciary, in Peter Spiller and others, *A New Zealand Legal History*, 2nd ed, Wellington, Brookers, 2001, p. 195.

¹⁷⁸ District Courts Act 1947, ss 28A, 29–30 and 34.

¹⁷⁹ Universal Declaration of Human Rights, <http://www.un.org/Overview/rights.html>.

¹⁸⁰ Philip A Joseph, p. 129.

¹⁸¹ Morag McDowell and Duncan Webb, p. 112.

¹⁸² Morag McDowell and Duncan Webb, p. 112.

¹⁸³ Philip A Joseph, p. 139.

Currently, the functions of the New Zealand Ombudsmen are prescribed by four statutes: the Ombudsmen Act 1975, the Official Information Act 1982, the Local Government Official Information and Meetings Act 1987, and the Protected Disclosures Act 2000.

Under the Ombudsmen Act, the role of the Ombudsmen is to investigate, on their own initiative or in response to complaints from the public, “any decision or recommendation made, or any act done or omitted . . . relating to a matter of administration”.¹⁸⁴ Sir Guy Powles, New Zealand’s first ombudsman, defined “administration” as “almost everything that is done by an organ of government, be it central or local”.¹⁸⁵ The jurisdiction of the Ombudsmen under the 1975 Act extends to over 160 central government departments and organisations and over 50 local authorities and organisations.¹⁸⁶ Although Ombudsmen have no power to force compliance, they exert considerable influence in righting administrative wrongs by means of their reports and recommendations.¹⁸⁷

Under the Official Information Act, the jurisdiction of the Ombudsmen was extended to enable them to review decisions by public authorities to decline to release official information. The Local Government Official Information and Meetings Act extended that regime to official information held by local authorities.¹⁸⁸

Under the Protected Disclosures Act, the Ombudsmen provide guidance to Government employees seeking to expose wrongdoing or incompetence in the governmental institutions that employ them—the “whistleblowing” provisions of the Act.¹⁸⁹

Ombudsmen are appointed as officers of Parliament by the Governor-General on the recommendation of the House of Representatives.¹⁹⁰ The Ombudsmen are independent of the executive branch of government, whose activities they are primarily involved in investigating.¹⁹¹

1971: Office of Race Relations Conciliator established by Race Relations Act 1971

The Race Relations Act 1971 was primarily intended to ensure that the necessary statutory and administrative measures were in place to allow the Government to ratify the International Convention for the Elimination of All Forms of Racial Discrimination. The Act made it unlawful to discriminate against people in employment, in access to public places, in the provision of goods and services and accommodation, because of their colour, race, or ethnic or national origin. Discrimination in these areas was to be resolved by conciliation if possible. In extreme cases the Conciliator could recommend to the Attorney-

¹⁸⁴ Ombudsmen Act 1975, s 13(1).

¹⁸⁵ Sir Guy Powles, “Speech to New Zealand Institute of County Clerks”, 17 November 1975.

¹⁸⁶ Ombudsmen Act 1975, Schedule 1.

¹⁸⁷ Geoffrey Palmer and Matthew Palmer, p. 268.

¹⁸⁸ Philip A Joseph, p.148.

¹⁸⁹ Geoffrey Palmer and Matthew Palmer, p. 266.

¹⁹⁰ Ombudsmen Act 1975, ss 3(1) and (2).

¹⁹¹ Geoffrey Palmer and Matthew Palmer, p. 266.

General that proceedings be taken against an offender. The Act also made it a criminal offence to incite racial disharmony.¹⁹²

The Human Rights Amendment Act 2001 amalgamated the Race Relations Office and the Human Rights Commission. The Act provided for the appointment of a Race Relations Commissioner to provide strategic leadership to the Commission on race relations matters, and of an Equal Employment Opportunities Commissioner to provide strategic leadership on equal employment opportunities.¹⁹³

See commentary below for 1977: Human Rights Commission established by Human Rights Act 1977.

1972: Judicature Amendment Act 1972 liberalised the procedures for seeking judicial review of administrative actions

The Judicature Amendment Act 1972 created a new procedure for the judicial review of administrative action.¹⁹⁴ It aimed to establish a simplified set of rules and procedures for judicial review by replacing historical common-law procedures that had become fraught with complex and technical requirements.¹⁹⁵ Additionally, the Act released applicants from having to specify the precise remedy sought, allowing them to simply state the nature of relief sought,¹⁹⁶ and leaving the court to decide the appropriate remedy.¹⁹⁷

Prerogative writs under Part VII of the High Court Rules and the common law continue to exist alongside the Act as grounds for judicial review.¹⁹⁸ Initially restricted to statutory bodies, definitions of “statutory power” and “statutory power of decision” in the Act have been amended to include organisations that have no public law element, including incorporated voluntary associations.¹⁹⁹ The judicial approach has been coherent with that of the legislation, focusing upon individuals rather than the strict source of power.²⁰⁰

The Law Commission released a proposal in 2001 for a review of the procedural rules.²⁰¹

1973: New Zealand's original powers of legislation replaced, giving Parliament additional extraterritorial competence

Section 53 of the New Zealand Constitution Act 1852 (UK) provided New Zealand with its primary grant of law-making powers. The General Assembly was authorised to “make laws for the peace, order, and good government of New Zealand”, subject to certain colonial restrictions. However, the adoption of the Statute of Westminster 1931 (UK) and

¹⁹² The History of Race Relations Legislation in New Zealand, <http://www.hrc.co.nz/index.php?p=13819>.

¹⁹³ The History of Race Relations Legislation in New Zealand, <http://www.hrc.co.nz/index.php?p=13819>.

¹⁹⁴ J A Smillie, The Judicature Amendment Act 1977, *New Zealand Law Journal*, 4 July 1978, no.12, pp. 232–233.

¹⁹⁵ David Mullan, Judicial review of administrative action, *New Zealand Law Journal*, 15 April 1975, no.7, p. 154.

¹⁹⁶ New Zealand Law Society Seminar: Update on Judicial review, November 2003, p. 3.

¹⁹⁷ Philip A Joseph, p. 983.

¹⁹⁸ Judicial review, New Zealand Law Society Workshop, July 1995, p. 5.

¹⁹⁹ J A Smillie, The Judicature Amendment Act 1977, *New Zealand Law Journal*, 4 July 1978, no.12, pp. 232–234.

²⁰⁰ Judicial review, New Zealand Law Society Workshop, July 1995, p. 3.

²⁰¹ *Mandatory Orders Against the Crown and Tidying Judicial Review: Study Paper 10* Wellington, Law Commission, March 2001, <http://www.lawcom.govt.nz/documents/publications/SP10jr.pdf>; Justice Baragwanath, Judicial Review: Tidying the Procedures, *New Zealand Law Journal*, April 1999, pp. 127–131.

the enactment of the New Zealand Constitution (Amendment) Act 1947 (UK) conferred full constituent powers and removed the last remaining colonial restrictions.²⁰²

In 1968, however, the High Court called into question Parliament's powers to make laws with effect beyond New Zealand's territory.²⁰³ Following that decision, a Law Reform Committee on Admiralty Jurisdiction reported in 1972 that the words "peace, order, and good government of *New Zealand*" in section 53 imposed "a legislative restraint in the absence of clear language to the contrary elsewhere."²⁰⁴ These events prompted the enactment of the New Zealand Constitution Amendment Act 1973 "to make clear that Parliament has sovereign powers to make laws."²⁰⁵

The 1973 Act declared the validity of all statutes passed since 1947 and replaced section 53 of the 1852 Act with a new provision which read:

The General Assembly shall have full power to make laws having effect in, or in respect of, New Zealand or any part thereof and laws having effect outside New Zealand.

The legality of enacting the New Zealand Constitution Amendment Act 1973 has been the subject of debate. It has been questioned whether Parliament was acting within its legally-conferred powers in amending section 53 of the 1852 Act, as this section defined the scope of Parliament's law-making powers. The issue was whether Parliament could, while acting within its powers, give itself powers that it lacked. The official view taken in 1973 was that full powers of constitutional amendment conferred in 1947 authorised the enactment of the new section 53.²⁰⁶

1974: Queen Elizabeth's title changed to reflect the Sovereign's constitutional status as Head of State of New Zealand

In 1953, the New Zealand Parliament assented to the adoption by the Queen of the style and titles in right of New Zealand as

Elizabeth the Second, by the Grace of God of the United Kingdom, New Zealand and Her Other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith²⁰⁷

The Royal Titles Act 1974 recast the Queen's royal style and titles "to reflect more clearly Her Majesty's present constitutional status in New Zealand".²⁰⁸ The royal style and titles now omit reference to "Queen of the United Kingdom". Instead they read:

²⁰² The Crown's powers of disallowance and reservation could still be invoked under the 1852 Act, but constitutional convention had long negated these powers: Philip A Joseph, p. 447.

²⁰³ *R v Fineberg* [1968] NZLR 119.

²⁰⁴ New Zealand Constitution Amendment Bill 1973, Explanatory note.

²⁰⁵ The New Zealand Constitution Amendment Bill 1973, Explanatory note.

²⁰⁶ Philip A Joseph, pp. 448–453.

²⁰⁷ Royal Titles Act 1953, s 2.

²⁰⁸ New Zealand Parliament 1974, Parliamentary Debates (Hansard), vol. 389, p. 1.

Elizabeth the Second, by the Grace of God Queen of New Zealand and Her Other Realms and Territories, Head of the Commonwealth, Defender of the Faith. ²⁰⁹

1975: Waitangi Tribunal established

The Treaty of Waitangi Act 1975 established the Waitangi Tribunal to entertain claims by Māori relating to the practical application of the Treaty of Waitangi.²¹⁰ The Tribunal is authorised to determine whether actions of the Crown are inconsistent with the principles of the Treaty²¹¹ and, where a claim is upheld, to recommend that the Crown make reparations or take action to remedy the inconsistency.

The Tribunal was established as a response to social and political change in an attempt by the Government to “defuse protest activity”.²¹² Lack of action by the Crown on outstanding grievances led to increased calls during the 1960s and early 1970s for a forum where Treaty-based claims by Māori could be heard.²¹³ In few cases was legal action available; the Treaty cannot be enforced in the courts unless it has been expressly incorporated into legislation.²¹⁴

After two years of examination by a Government committee the bill was introduced in fulfilment of the Government’s election promise.²¹⁵ The Government saw the bill as “a major document of social and political progress”²¹⁶ and an “important measure in the constitutional history of New Zealand”.²¹⁷ Nevertheless, the bill attracted widespread criticism because of the Tribunal’s limited functions. The Tribunal was given power to review the subsequent actions or omissions of the Government but was given no power to review actions or omissions pre-dating the legislation. This deficiency was removed in 1985 when the Tribunal was empowered to investigate and report on historical Māori grievances dating to 1840.

The size and jurisdiction of the Tribunal were progressively expanded in response to Māori discontent at the Tribunal’s limitations²¹⁸ and a substantial backlog of claims.²¹⁹ Significant amendments in 1985²²⁰ expanded the Tribunal’s jurisdiction to allow it to hear claims dating from the signing of the Treaty on 6 February 1840.²²¹ The Tribunal was also given exclusive authority to determine the meaning and effect of the Treaty in discharging its

²⁰⁹ Royal Titles Act 1974, s 2.

²¹⁰ Treaty of Waitangi Act 1975, ss 5, 6, and 8.

²¹¹ Treaty of Waitangi Act 1975, Preamble.

²¹² Ranginui Walker, 12 March 1988 New Sounds at Waitangi, *New Zealand Listener*, p. 74.

²¹³ The Treaty of Waitangi Act 1975, Paragraph 14.

²¹⁴ See *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590 (PC). See also Office of Treaty Settlements, *Healing the past, building a future: a guide to Treaty of Waitangi claims and direct negotiations with the Crown*, Oct 1999, p. 17.

²¹⁵ New Zealand Parliament, 1974, Parliamentary Debates, (Hansard), vol. 395, pp. 5725–5726.

²¹⁶ New Zealand Parliament, 1974, Parliamentary Debates, (Hansard), vol. 401, p. 4343.

²¹⁷ New Zealand Parliament, 1974, Parliamentary Debates, (Hansard) vol. 402, p. 5408.

²¹⁸ See for example Ranginui Walker, 12 March 1988, New Sounds at Waitangi, *Listener*, p. 75.

²¹⁹ Reportedly 145 at the time.

²²⁰ Treaty of Waitangi Amendment Act 1985.

²²¹ Treaty of Waitangi Act 1975, s 6(1).

functions under the Act. Membership of the Tribunal was increased from three to seventeen by a further amendment in 1985.²²²

1976: *Fitzgerald v Muldoon and Others* decided

The case of *Fitzgerald v Muldoon and Others*²²³ demonstrates the division of governmental powers between the three pillars of New Zealand's constitution: Parliament, the executive and the judiciary.²²⁴

On 15 December 1975, newly-elected Prime Minister Robert Muldoon issued a press statement purporting to abolish a superannuation scheme established by the New Zealand Superannuation Act 1974. A further press statement on 23 December 1975 said

Mr Muldoon said the government had already made it clear that the superannuation scheme finished on December 15 and the compulsory requirement for employee deductions and employer contributions ceased for pay periods ending after that date. Empowering legislation, with retrospective effect, would be introduced early in the 1976 Parliamentary session.²²⁵

In *Fitzgerald v Muldoon and Others* Chief Justice Wild concluded that the Prime Minister's announcement of 15 December was illegal, being in breach of article 1 of the Bill of Rights 1688 which states: "That the pretended power of suspending of laws or the execution of laws by regal authority without consent of Parlyament is illegal".²²⁶ In announcing that employee deductions and employer contributions need not be made, the Prime Minister was

purporting to suspend the law without consent of Parliament. Parliament had made the law. Therefore the law could be amended or suspended only by Parliament or with the authority of Parliament.²²⁷

1977: Human Rights Commission established by Human Rights Act 1977

The Human Rights Act 1977 established a Human Rights Commission in order to promote human rights in New Zealand. The newly elected National Government introduced the Human Rights Commission Bill 1976 to honour its election promise to enact legislation prohibiting unlawful discrimination. The bill aimed to preserve and enhance the dignity of the individual in New Zealand.²²⁸

In 1993, The Human Rights Act consolidated and amended the 1977 Act and the Race Relations Act 1971 to provide better protection for human rights in accordance with United Nations human rights conventions. The 1993 Act prohibits discrimination by public and private-sector organisations on specified grounds, in areas such as employment,

²²² Treaty of Waitangi Act 1975, s 4.

²²³ *Fitzgerald v Muldoon and Others*, [1976] 2 NZLR 615.

²²⁴ Geoffrey Palmer and Matthew Palmer, p. 288.

²²⁵ *Fitzgerald v Muldoon and Others*, 617.

²²⁶ *Fitzgerald v Muldoon and Others*, 622.

²²⁷ *Fitzgerald v Muldoon and Others*, 622.

²²⁸ New Zealand Parliament 1977, Parliamentary Debates (Hansard), vol. 411, p. 1474.

access to educational establishments, and the provision of goods and services. The Human Rights Act 1993 empowers the Human Rights Commission to advocate and promote respect for human rights in New Zealand, and to encourage harmonious relations between individuals and groups in society.²²⁹

The Human Rights Amendment Act 2001 made significant changes to the 1993 Act, following an independent ministerial re-evaluation of human rights in New Zealand.²³⁰ The Government's partial exemption from the Human Rights Act was removed, making it liable for any discrimination in the public sector. The amendment gave primacy to the scheme of the New Zealand Bill of Rights Act 1990 in policing public-sector compliance with the law prohibiting discrimination. The Human Rights Commission has a statutory mandate to promote an understanding of, and compliance with, the New Zealand Bill of Rights Act.

1978: New Zealand ratifies the International Covenant on Civil and Political Rights

New Zealand was a signatory to the International Covenant on Civil and Political Rights in 1968, and ratified it in 1978. The first article asserts the right of self-determination of all peoples. The second article requires that parties to the covenant undertake “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. In the third article, parties to the covenant undertake to ensure equal political and civil rights for men and women. Other articles include the right to life; the right to liberty and security; prohibition of slavery; liberty of movement; freedom of thought, conscience and religion; the right to hold opinions without interference; freedom of association; and a recognition that the family is the natural and fundamental unit of society and is entitled to protection.²³¹

1978: New Zealand ratifies the International Covenant on Economic, Social and Cultural Rights

New Zealand signed the International Covenant on Economic, Social and Cultural Rights in 1968 and ratified it in 1978. The first article asserts the right of self-determination of all peoples, and the third article the equal right of men and women to the enjoyment of all economic, social and cultural rights. Other articles include the right to work; the right of everyone to the enjoyment of just and favourable conditions of work (including fair wages and safe and healthy working conditions); the right to form trade unions; the right to social security; that protection and assistance should be afforded to the family; the right of everyone to an adequate standard of living; the right to the highest attainable standard of physical and mental health; and the right to education.²³²

²²⁹ Human Rights Act 1993, s 5(1).

²³⁰ Ministry of Justice, *Re-evaluation of the human rights protections in New Zealand: report for the Associate Minister of Justice and Attorney-General*, Ministry of Justice, Wellington, 2000.

²³¹ International Covenant on Civil and Political Rights, <http://www.ohchr.org/english/law/ccpr.htm>.

²³² International Covenant on Economic, Social and Cultural Rights, <http://www.ohchr.org/english/law/cescr.htm>.

1982: Citizens' access to official information promoted in Official Information Act 1982

The Official Information Act 1982 is a statute of constitutional importance promoting the principle that all official information should be made available to citizens upon request, unless there is good reason to withhold it. Its purpose is to promote participatory government and public accountability.²³³ The Act applies to all government departments, Ministers, and most government and public entities.

The Official Information Act reverses the presumption of secrecy contained in the Official Secrets Act, and the presumption that official information is government property and not to be released without good reason for doing so. The High Court acknowledged that the Act's "radicalism ... reverses the previously existing regime".²³⁴

The Act was drafted in response to the report of the Committee on Official Information, set up in 1978 and chaired by Sir Alan Danks.²³⁵

The Danks Committee said that the case for openness in government "rests on the democratic principles of encouraging participation in public affairs and ensuring the accountability of those in office".²³⁶ The committee felt that the attitudinal changes needed for open government called for measures of such constitutional importance that they needed to be given the force of law. In this way government and parliament would provide an assurance to the public that no administrative directive could give.²³⁷

Complaints about decisions to refuse access to official information can be made to the Ombudsmen under the Official Information Act. The Executive Council can veto an Ombudsman's recommendation for information release by Order in Council. The veto is subject to judicial review, and has never been exercised.

The Local Government Official Information and Meetings Act 1987 extended the regime to official information held by local authorities, but not the veto regime of the Official Information Act.²³⁸

1983: Office of the Governor-General of New Zealand patriated

The Letters Patent Constituting the Office of Governor-General of New Zealand 1983²³⁹ are the most significant recent development affecting the office of Governor-General. This

²³³ Official Information Act 1982, s 4.

²³⁴ *Commissioner of Police v Ombudsmen* [1985] 1 NZLR 578, 585 per Jeffries J (HC).

²³⁵ Committee on Official Information, *Towards open government*, vol. 2, Supplementary Report, Government Printer, Wellington, 1981.

²³⁶ Committee on Official Information, *Towards open government*, vol. 1, General Report, Government Printer, Wellington, 1981, p. 14.

²³⁷ *Towards open government*, vol. 1, p. 6.

²³⁸ Philip A Joseph, *Constitutional and Administrative Law in New Zealand*, Brookers, Wellington, 2001, pp. 148 and 153.

²³⁹ Letters Patent Constituting the Office of Governor-General of New Zealand (SR 1983/225) amended in 1987 by SR 1987/8.

instrument marks the office as a distinctively New Zealand institution.²⁴⁰ It replaced the 1917 Letters Patent and had two objects: to update the office and to patriate it.²⁴¹

The 1983 Letters Patent changed the Governor-General's designation. The 1917 Letters had constituted the office "Governor-General and Commander-in-Chief in and over Our Dominion of New Zealand". The 1983 Letters reconstituted the office "Governor-General and Commander in Chief who shall be Our Representative in Our Realm of New Zealand". The current instrument also omitted reference to the Governor-General dissenting from the Executive Council and the former power to issue the Governor-General instructions by Order in Council or through one of the Queen's Secretaries of State. Clause VIII of the Letters acknowledges responsible government by providing that the Executive Council be appointed from members of Parliament who are, "for the time being, Our responsible advisers". The revised Letters provide for the Executive Council to advise "Us and Our Governor-General", which establishes that the Queen now has a relationship with the Executive Council similar to that which she has with her Privy Council. The Letters also formalise New Zealand's right to conduct its own foreign policy.²⁴²

As representative democracy and responsible government evolved in New Zealand the executive powers of Governors and Governors-General diminished to a few reserve powers—the most important being the dismissal and/or appointment of a Prime Minister.²⁴³ The first New Zealand-born Governor-General, Sir Arthur Porritt, was appointed in 1967 and the first resident New Zealander, Sir Denis Blundell, in 1972. No law change was needed because appointments were governed by constitutional convention.²⁴⁴

1983: New Zealand Australia Closer Economic Relations Trade Agreement signed

The New Zealand Australia Closer Economic Relations Trade Agreement (CER) came into force on 1 January 1983, replacing an earlier free trade agreement between Australia and New Zealand. The objectives of the Agreement are to strengthen the broader relationship between Australia and New Zealand, to develop closer economic relations through a mutually beneficial expansion of free trade between Australia and New Zealand, to gradually eliminate trade barriers between the two countries, and to develop trade between Australia and New Zealand.²⁴⁵ The Agreement provides for free trade in goods between the two countries.

A review in 1988 resulted in additional protocols to the Agreement to bring forward the removal of all remaining trans-Tasman tariffs, to harmonise quarantine procedures, and to

²⁴⁰ Dame Silvia Cartwright, The role of the Governor-General, *Occasional paper no. 6*, New Zealand Centre for Public Law, 2001, pp. 14–15.

²⁴¹ Philip A Joseph, *Constitutional and Administrative Law in New Zealand*, 2nd ed, Wellington, Brookers, 2002, p. 161.

²⁴² Philip A Joseph, pp. 161–163.

²⁴³ Rt Hon Sir Michael Hardie Boys, 'Nodding automaton?' some reflections on the office of the Governor-General, (2002) 8 Can LR, p. 427.

²⁴⁴ Philip A Joseph, p. 147.

²⁴⁵ New Zealand Australia Closer Economic Relations Trade Agreement, Article 1, in *Critical Paths in Trans Tasman Economic Relations Selected Documents*, Ministry of Foreign Affairs and Trade, Wellington 2003, p.14.

extend CER to trade in services. Another review in 1992 resulted in amendments to clarify the rules of origin, a renewed commitment to harmonising business laws, and an agreement to hold annual Trade Ministers' meetings. A third review in 1995 focused on eliminating any remaining regulatory impediments to trade. Annual meetings have resulted in further agreements to bring about harmonisation of regulatory standards. Among these are the Trans Tasman Mutual Recognition Arrangement of 1998 (which provides that goods that may legally be sold in either country may be sold in the other, and a person who is registered to practise an occupation in either country is entitled to practise in the other); an Open Skies Agreement for international air travel; and a Joint Australia New Zealand Food Standards Code, in operation since 2002.²⁴⁶ This process has been underpinned by frequent contact between the Ministers and government agencies of both countries, by the closeness of the two societies, and by the increasing integration of their markets.²⁴⁷

1985: Waitangi Tribunal given retrospective power to consider alleged breaches of the Treaty of Waitangi since 1840

The Treaty of Waitangi Amendment Act 1985 extended the jurisdiction of the Waitangi Tribunal so that any Māori prejudicially affected by any action or omission by the Crown dating back to 6 February 1840 that was inconsistent with the principles of the Treaty could submit a claim to the Waitangi Tribunal.²⁴⁸ In introducing the bill the Minister of Māori Affairs said that it was intended to address “mounting tension in the community that springs from the sense of injustice that is harboured about the grievances that are outstanding”.²⁴⁹

1986: Some of New Zealand's statutory constitutional law consolidated and reformed

The Constitution Act 1986 is New Zealand's premier constitutional statute.²⁵⁰ It defines and declares New Zealand's key institutions of government and their powers. Its enactment terminated any residual rights of the United Kingdom Parliament to legislate for New Zealand. The Constitution Act 1986 confirmed “our status ... as a mature and sovereign nation”.²⁵¹

The impetus for consolidating and reforming New Zealand's constitutional law grew out of events immediately following the 1984 general election. The outgoing Prime Minister Sir Robert Muldoon initially refused to recommend the devaluation of New Zealand's currency to the Governor-General, contrary to advice tendered by the incoming Prime Minister David Lange. A crisis was averted when Sir Robert Muldoon relented and agreed

²⁴⁶ Closer Economic Relations: Background Guide to the Australia New Zealand Economic Relationship, http://www.dfat.gov.au/geo/new_zealand/anz_cer/cer.pdf; A Celebration of Trans-Tasman Relations 20 Years of Closer Economic Relations between Australia and New Zealand, http://www.dfat.gov.au/geo/new_zealand/anz_cer_20years/index.html; CER and beyond: Economic Integration in Depth, http://www.dfat.gov.au/geo/new_zealand/anz_cer_20years/cerbeyond.html.

²⁴⁷ The Australia New Zealand Closer Economic Relations (CER) Trade Agreement: 1983–2003 Backgrounder, <http://www.mfat.govt.nz/foreign/regions/australia/cer2003/cerbackgrounder.html>.

²⁴⁸ Treaty of Waitangi Amendment Act 1985, s 3.

²⁴⁹ New Zealand Parliament, Parliamentary Debates (Hansard), vol.460, p.2702.

²⁵⁰ Philip A Joseph, *Constitutional and Administrative Law in New Zealand*, 2nd ed, Brookers, Wellington, 2001, p. 21.

²⁵¹ New Zealand Parliament, Parliamentary Debates (Hansard), vol. 495, p. 1359.

to recommend the measure, but the impasse highlighted a need to review and clarify the rules for the transfer of power. An Officials Committee on Constitutional Reform was set up to carry out the review, and to bring together provisions of constitutional importance in existing legislation. The committee drafted a Constitution Bill, which was introduced into Parliament and passed with few modifications.

The Constitution Act 1986 comprises five parts as follows:

The Sovereign

Part I declares that the Sovereign in right of New Zealand is the head of State of New Zealand,²⁵² and that the Governor-General is the Sovereign's representative.²⁵³

The executive

Part II deals with the appointment of Ministers of the Crown,²⁵⁴ the power of a member of the Executive Council to exercise a Minister's powers,²⁵⁵ and the appointment and functions of parliamentary Under-Secretaries.²⁵⁶

The legislature

Part III deals with the House of Representatives, Parliament, and Parliament and public finance.

The continuing existence of the House of Representatives is affirmed. The House is declared to be in existence even if Parliament has been dissolved or has expired. Its membership is defined as comprising those people who have been elected in accordance with the provisions of the Electoral Act 1993.²⁵⁷ Section 11 provides that members of Parliament cannot sit or vote in the House until they have taken the Oath of Allegiance, and section 12 states that a Speaker must be chosen from among the members.

Parliament comprises the Sovereign in right of New Zealand and the House of Representatives. Section 15 preserves Parliament's "full power to make laws". It excludes the application to New Zealand of United Kingdom statutes passed after 1986. Bills become law when they receive the Royal Assent.²⁵⁸

The term of Parliament is defined as 3 years (computed from the last day specified for the return of writs for the election of the current Parliament), unless Parliament is dissolved sooner.²⁵⁹

²⁵² Constitution Act 1986, s 2(1).

²⁵³ Constitution Act 1986, s 2(2).

²⁵⁴ Constitution Act 1986, s 6.

²⁵⁵ Constitution Act 1986, s 7.

²⁵⁶ Constitution Act 1986, ss 8 and 9.

²⁵⁷ Constitution Act 1986, s 10.

²⁵⁸ Constitution Act 1986, s 16.

²⁵⁹ Constitution Act 1986, s 17 (1). This subsection is entrenched by section 268 of the Electoral Act 1993.

The remaining sections in this part deal with the summoning, proroguing and dissolution of Parliament, its first meeting after a general election, and the carrying over of parliamentary business.

Sections 21 and 22 consolidate the principles established under the Bill of Rights 1688 relating to parliamentary control over appropriation and expenditure.²⁶⁰

Section 21 provides that the House may pass bills involving the appropriation of public money or the imposition of a charge upon the public revenue only if it is first recommended by the Crown.

Section 22 prohibits the raising or spending of public money by the Crown unless authorised by an Act of Parliament

The judiciary

Part IV re-enacts provisions securing the independence of the judiciary, including the security of tenure of superior court judges and the guarantee that judicial salaries will not be reduced during a judge's commission. Its provisions replace sections 7 to 10 of the Judicature Act 1908.

These provisions give expression to a fundamental constitutional principle dating from the Act of Settlement 1700 (Eng) that the judiciary should be free from interference by the executive branch of government.²⁶¹

Miscellaneous provisions

Provisions in Part V relate to the Parliamentary Library and consequential amendments to other statutes.

Section 26 revokes the application of the New Zealand Constitution Act 1852 (UK), the Statute of Westminster 1931 (UK) and the New Zealand Constitution (Amendment) Act 1947 (UK), thereby revoking all residual power of the United Kingdom Parliament to legislate for New Zealand.

Despite its significance, and unlike most written constitutions, the Constitution Act 1986 does not enjoy the status of "superior law": it is an ordinary Act of Parliament that can be amended or repealed by a simple majority vote in the House of Representatives.²⁶²

1986: Reform of the public sector to promote accountability and efficiency

In 1986 New Zealand initiated reform of the public service in order to promote greater efficiency and executive accountability. The reforms downsized the core public service.

²⁶⁰ Philip A Joseph, p. 169.

²⁶¹ Philip A Joseph, p. 170.

²⁶² Morag McDowell and Duncan Webb, *The New Zealand Legal System*, 3rd edition, LexisNexis Butterworths, Wellington 2002, p. 160.

The role of the State was redefined, limiting its involvement to the exercise of its constitutional and coercive powers and to where it had a comparative advantage.²⁶³

Three key statutes led the reforms: the State-Owned Enterprises Act 1986, the State Sector Act 1988, and the Public Finance Act 1989. The reforms continued under the Fiscal Responsibility Act 1994²⁶⁴ and the Public Audit Act 2001, which enhanced the constitutional status of the Auditor-General and strengthened the law relating to the auditing of public-sector organisations.

The reforms began with the State-Owned Enterprises Act 1986, which transformed five state-owned corporations into nine new State enterprises.²⁶⁵ This Act aimed to “promote improved performance in respect of Government trading activities”: the object was to reconcile the need for public accountability with commercial performance objectives. This diminished shareholding Ministers’ responsibility to Parliament, although they are still subject to questions in the House on the activities of state-owned enterprises.²⁶⁶

The State Sector Act 1988 reconfigured the relationship between Ministers and Departments. The Act made chief executives of public service departments responsible to their Ministers and fully accountable for managing their organisations. The role of the State Services Commission changed from employer and manager of the public service to employer of chief executives and independent advisor to the Government on the management of the state sector.

The Public Finance Act 1989 transformed the framework for the financial management of the public sector and its reporting to Parliament.

The Fiscal Responsibility Act 1994 imposed a medium- and long-term focus on government expenditure and strengthened the reporting requirements of the Crown.

The Public Audit Act 2001 made the Auditor-General and the Deputy Auditor-General officers of Parliament.²⁶⁷ The Auditor-General’s mandate was extended across all public entities.²⁶⁸

1986: Provision in State-Owned Enterprises Act 1986 gives statutory force to the principles of the Treaty of Waitangi

Section 9 of the State-Owned Enterprises Act 1986 accorded statutory recognition to the principles of the Treaty of Waitangi, and remains the strongest formulation of the Treaty

²⁶³ New Zealand country paper *Government reform: of roles and functions of government and public administration*, 1999, OECD, 1999, p. 4.

²⁶⁴ New Zealand country paper, p. 6.

²⁶⁵ Geoffrey Palmer and Matthew Palmer, *Bridled Power*, 4th ed, Oxford University Press, South Melbourne, 2004, p. 110.

²⁶⁶ Philip Joseph, *Constitutional and Administrative Law in New Zealand*, 2nd ed, Brookers, Wellington, 2001, pp. 344–347.

²⁶⁷ This change stems from a 1989 report: Finance and Expenditure Committee 1989, *Report on the Inquiry into Officers of Parliament*, AJHR I.4B.

²⁶⁸ Robert Buchanan and Kevin Simpkins, A new age for public auditing, *Chartered Accountants Journal*, July 2001, pp. 8–12.

principles in New Zealand legislation.²⁶⁹ The State-Owned Enterprises Act 1986 was passed amidst a reorganisation of the public sector, with the object of replacing a number of Government departments with a group of state-owned commercial enterprises.²⁷⁰ Section 9 of the State-Owned Enterprises Act 1986 states: “Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi”.

Inserted by supplementary order paper before the third reading of the bill, section 9 was intended to allay concerns among Māori that the transfer of Crown land would compromise the Crown’s obligations under the Treaty of Waitangi.²⁷¹

1987: In the *Lands* case, the Court of Appeal interprets the expression “principles of the Treaty of Waitangi” in the State-Owned Enterprises Act 1986

In *New Zealand Maori Council v Attorney-General* (the *Lands* case), the Court of Appeal was required to consider section 9 of the State-Owned Enterprises Act 1986 and to interpret the phrase “the principles of the Treaty of Waitangi”.²⁷² The Court determined partnership to be the key concept defining the relationship between the parties to the Treaty. The relationship created “responsibilities analogous to fiduciary duties”;²⁷³ parties to the Treaty were to act towards each other “reasonably and in the utmost good faith”.²⁷⁴ The duty of the Crown was not “merely passive but extends to active protection of Māori people in the use of their lands and waters to the fullest extent practicable”.²⁷⁵

1987: Maori Language Act 1987

The Maori Language Act 1987 followed a 1986 Waitangi Tribunal report which stated that the Treaty of Waitangi imposed an obligation on the Crown to take affirmative action to ensure that Māori people have and retain the full, exclusive and undisturbed possession of their language; and that it was a denial of Māori rights for the Crown to refuse the use of Māori language in courts. The Tribunal recommended that legislation be introduced enabling any person who wished to do so to use the Māori language in any court and in any dealing with public bodies, and for a supervisory body to be established by statute to oversee and foster the use of the Māori language.²⁷⁶

The Act established the Māori language as an official language of New Zealand and allowed anyone the right to speak Māori in any legal proceedings. The Act also established the Māori Language Commission, Te Kōmihana mō te Reo Māori, to promote the use of

²⁶⁹ Update on judicial review, New Zealand Law Society Seminar, November 2003, p.20.

²⁷⁰ Richard P Boast, *New Zealand Maori Council v Attorney-General: the case of the century?*, *New Zealand Law Journal*, August 1987, p. 241.

²⁷¹ Claudia Orange *An Illustrated History of the Treaty of Waitangi*, Bridget Williams Books, Wellington 2004, p. 163.

²⁷² *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, (HC & CA).

²⁷³ *New Zealand Maori Council v Attorney-General*, 644 per Cooke, J.

²⁷⁴ *New Zealand Maori Council v Attorney-General*, 644 per Cooke, J.

²⁷⁵ *New Zealand Maori Council v Attorney-General*, 644 per Cooke, J.

²⁷⁶ *Report of the Waitangi Tribunal on the Te Reo Maori Claim* (Wai 11) (Wellington, Government Printer, 1986), ss. 4.2.7, 4.3.9, 10.1 and 10.2., <http://www.waitangi-tribunal.govt.nz/reports/generic/wai011/wai11.pdf>.

the Māori language.²⁷⁷ (The name of the Commission was changed to Te Taura Whiri i te Reo Māori in 1991.)

1990: New Zealand Bill of Rights Act 1990 enacted

The New Zealand Bill of Rights Act 1990 was enacted to “affirm, protect, and promote human rights and fundamental freedoms in New Zealand”.²⁷⁸ The Act affirms New Zealand’s commitment to the International Covenant on Civil and Political Rights.²⁷⁹

The Act is binding on the legislative, executive and judicial branches of government, and any person or body performing a public function, power or duty imposed by law.²⁸⁰ The Act does not apply to private individuals.²⁸¹ The Act exists as a safeguard against the State’s abuse of power.²⁸²

Civil and political rights affirmed by the New Zealand Bill of Rights Act 1990 are divided into four categories: rights relating to the life and security of the person; rights relating to democratic and civil rights; rights relating to non-discrimination and minority rights; and rights relating to search, arrest and detention.

Section 5 of the Act provides that the rights and freedoms contained in the Bill of Rights “may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. Section 6 enjoins the judiciary to interpret all statutes consistently with the Bill of Rights, where possible; and section 7 imposes a duty on the Attorney-General to report to the House of Representatives whenever a bill appears to be inconsistent with the Bill of Rights.

Although the New Zealand Bill of Rights Act serves a function comparable to those of bills of rights in other jurisdictions,²⁸³ it is not “supreme” law, but an ordinary Act of Parliament: its provisions require no special procedure to be amended or repealed²⁸⁴ and legislation inconsistent with the Bill of Rights is not invalidated.²⁸⁵

The New Zealand Bill of Rights Act 1990 represents “one of the major legal developments of the modern era”.²⁸⁶ However, it was greeted with scepticism by the legal profession and political commentators at the time of its enactment.²⁸⁷ The proposal for a bill of rights originated in the Labour Party’s 1984 election manifesto. Some sections of society believed that the National Government led by Sir Robert Muldoon had been “constitutionally high-

²⁷⁷ Maori Language Act 1987; <http://www.tetaurawhiri.govt.nz/act87/index.shtml>.

²⁷⁸ New Zealand Bill of Rights Act 1990, Long Title.

²⁷⁹ New Zealand Bill of Rights Act 1990, Long Title.

²⁸⁰ New Zealand Bill of Rights Act 1990, s 3.

²⁸¹ Philip A Joseph, p. 1023.

²⁸² Geoffrey Palmer and Matthew Palmer, p. 326.

²⁸³ Paul Rishworth, The New Zealand Bill of Rights in Paul Rishworth and others, *The New Zealand Bill of Rights*, South Melbourne, Oxford University Press, 2003, p. 2.

²⁸⁴ Paul Rishworth, p. 2.

²⁸⁵ New Zealand Bill of Rights Act 1990, s 4.

²⁸⁶ Philip A Joseph, p. 1018.

²⁸⁷ Geoffrey Palmer and Matthew Palmer, *Bridled Power*, 4th ed, Oxford University Press, South Melbourne, 2004, p. 324.

handed and repressive.”²⁸⁸ That the National Government allowed the controversial 1981 Springbok tour to proceed and allowed the authorities to handle the ensuing public protests the way they did prompted some to question “the powers of executive government and the purposes for which they could be exercised.”²⁸⁹

Under the Lange Government in 1985, a White Paper entitled “A Bill of Rights for New Zealand”²⁹⁰ was presented by Minister of Justice Geoffrey Palmer to the House of Representatives. The White Paper contained a draft bill of rights and an extensive commentary explaining the effect and methodology of an entrenched bill. Two elements of this draft provoked opposition: its proposed status as supreme law and the inclusion of the Treaty of Waitangi. The provisions of the draft bill were entrenched and statutes inconsistent with them could be declared invalid by the courts. Clause 28 provided that any amendments would require the support of 75 percent of members of the House of Representatives or a majority of voters in a national referendum.²⁹¹ Furthermore, clause 4(1) of the bill declared: “The rights of the Māori people under the Treaty of Waitangi are hereby recognised and affirmed”. Many Māori believed inclusion of the Treaty would demean the instrument and make it susceptible to amendment.²⁹²

The final shape of the New Zealand Bill of Rights Act as enacted by Parliament accommodated the concerns expressed. It affirmed a similar catalogue of civil and political rights to that in the draft bill; but it was an ordinary Act of Parliament and it omitted reference to the Treaty of Waitangi.²⁹³

1993: Citizens Initiated Referenda Act 1993 enacted

The Citizens Initiated Referenda Act 1993 promotes direct participatory democracy through citizens’ referenda.²⁹⁴ The Act obliges the Government to hold a referendum on an issue if a petition proposing the referendum has gained the support of 10 percent of electors. Unlike those in some countries, citizens-initiated referenda are indicative rather than binding. The results of the referendum are deemed to “indicate the views held by the people of New Zealand on specific questions” but are not “binding on the New Zealand Government”.²⁹⁵

The proposal for a citizens-initiated referendum process was included in the National Party’s 1990 election manifesto. The proposal was a response to public disaffection with the political process. The Citizens Initiated Referendum Bill 1992 and the Electoral Referendum Act 1993 constituted the new Government’s package of electoral reform. Introducing the bill, the Minister of Justice, the Hon Doug Graham, said, “It is desirable for the people to have their voice heard, and the bill provides a mechanism for that to

²⁸⁸ Geoffrey Palmer and Matthew Palmer, p. 320.

²⁸⁹ Geoffrey Palmer and Matthew Palmer, p. 320.

²⁹⁰ Minister of Justice, 1985 *A Bill of Rights for New Zealand: A White Paper*, AJHR A 6.

²⁹¹ Philip A Joseph, p. 1019.

²⁹² Philip A Joseph, p. 1019.

²⁹³ Philip A Joseph, p. 1020.

²⁹⁴ Philip A Joseph, p. 185.

²⁹⁵ Citizens Initiated Referenda Act 1993, Long title.

occur. In New Zealand we are fortunate that major constitutional changes have always been evolutionary rather than revolutionary".²⁹⁶

To date no citizens-initiated referenda have prompted substantive change. Twenty-seven petitions for referenda have been approved, but only three referenda have been held. All three received an overwhelming majority of votes in support, but none prompted the Government to implement the changes advocated. The other 24 petitions lapsed or were withdrawn.

1993: Binding referendum on proportional representation brings into effect the MMP electoral system

In the 1980s electors increasingly questioned the fairness of the first-past-the-post electoral system.²⁹⁷ A Royal Commission on the Electoral System was appointed in 1985 and recommended replacing first-past-the-post with the mixed member proportional (MMP) voting system. The Commission concluded that MMP ensured fairness between political parties and was likely to provide more effective representation of minority and special interest groups. The Commission recommended that a binding referendum should be held on the introduction of MMP.²⁹⁸ In 1988 the Electoral Law Committee in its inquiry into the report of the Royal Commission, recommended that the plurality system be retained. In April 1989 the Government announced that a referendum on MMP would not be carried out.²⁹⁹ However, public pressure for electoral reform continued, and during the 1990 election campaign both the Labour and National Parties promised a referendum on the method of electing the House of Representatives.³⁰⁰

The Electoral Referendum Act 1991 set down an indicative referendum on the electoral system for the forthcoming year. An electoral referendum panel chaired by the Chief Ombudsman was appointed to oversee a public education campaign. The referendum question was in two parts: the first asked voters if they wished to change the existing system; the second asked them to indicate a preference for one of four reform options: MMP, single transferable vote (STV), preferential vote (PV) or supplementary member (SM). A large majority of those who voted (84.7 percent) favoured a change to the voting system. MMP was the most popular option, attracting 70.5 percent of the vote. In response to this referendum, the Electoral Referendum Act 1993 was passed. It provided for a binding referendum to decide between FPP and MMP to be held in conjunction with the 1993 general election. MMP was endorsed by 54 percent of voters.³⁰¹

See commentary for 1996: Proportional representation under MMP introduced.

²⁹⁶ New Zealand Parliament 1992, Parliamentary Debates (Hansard), vol. 522, p. 6703.

²⁹⁷ Philip A Joseph, p. 189; Neill Atkinson, p. 200.

²⁹⁸ Royal Commission on the Electoral System 1986, *Towards a Better Democracy* (J H Wallace, Chair), Report, Government Printer, p. 63.

²⁹⁹ Neill Atkinson, p. 207.

³⁰⁰ Neill Atkinson, p. 209.

³⁰¹ Neill Atkinson, pp. 212–219; Philip A Joseph, pp. 189–190.

1993: Privacy Act 1993 enacted

The Privacy Act 1993 governs the collection, holding, use and disclosure of personal information by most agencies in the public and private sectors.³⁰² Notable exceptions include members of Parliament, courts and tribunals and the media in relation to their news activities; they have no legal obligations under the legislation when acting in their official capacities.³⁰³ The Act establishes mechanisms whereby individuals can access information about themselves, seek the correction of the information, and make complaints to the Office of the Privacy Commissioner.³⁰⁴ The Office of the Privacy Commissioner is an independent Crown entity with various functions including monitoring legislation, making statements on privacy issues, issuing codes of practice, and investigating complaints. It has a right to report to the Prime Minister on matters affecting the privacy of the individual.

The primary aim of the legislation is to modify the behaviour of agencies³⁰⁵ as explained by Hon Doug Graham, the Minister of Justice, at the third reading of the bill:

The legislation aims to encourage those agencies and organisations that are holding personal data to use that data for the purposes for which it was obtained, and to recognise that people's personal information is precious to them ... This legislation is a persuasive type of legislation, rather like the human rights laws.³⁰⁶

The Privacy Act was passed in 1993 with unanimous parliamentary support. The Official Information Act 1982, the Local Government Official Information Meetings Act 1987, and the Privacy Act 1993 form a complementary legislative regime.³⁰⁷ It has been described as "... both a human rights statute and a freedom of information statute".³⁰⁸

National and international concerns regarding information privacy and the relationship between citizens and the State³⁰⁹ had been evident from the 1970s, arising from rapid developments in information technology.³¹⁰ Rules of law and statutory provisions dealing with particular aspects or classes of personal information had existed prior to the Privacy Act 1993.³¹¹ However, at the time, the laws it introduced were more comprehensive than any found outside Europe. It set a precedent in its coverage of the private sector combined with its application to personal information held in computers or in paper files.³¹²

³⁰² *Privacy Law and Practice*, Butterworths, A7.

³⁰³ Privacy Act 1993, s.2.

³⁰⁴ Office of the Privacy Commissioner, Necessary and Desirable: Privacy Act 1993 Review: Report of the Privacy Commissioner on the First Periodic Review of the Operation of the Privacy Act, Auckland, 1998, p. 1.

³⁰⁵ *Privacy Law and Practice* Butterworths, A9.

³⁰⁶ New Zealand Parliament 1993, Parliamentary Debates (Hansard), vol 535, p. 15210.

³⁰⁷ *Privacy Law and Practice*, Butterworths, A11.

³⁰⁸ *Privacy Law and Practice*, Butterworths, A6.

³⁰⁹ *Privacy Law and Practice*, Butterworths, A1-A2.

³¹⁰ <http://www.privacy.org.nz/recept/revintro.html>.

³¹¹ *Privacy Law and Practice*, A3.

³¹² <http://www.privacy.org.nz/recept/revintro.html>.

1993: Grounds of discrimination prohibited under the Human Rights Act 1993 extended

See commentary for 1977: Human Rights Commission established by Human Rights Act 1977.

1993: Mātaatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples

The First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples was held at Whakatane in 1993. Over 150 delegates from 14 countries attended. On the final day of the conference the plenary passed a Declaration.

The Declaration's first article makes recommendations to indigenous peoples, including one that indigenous peoples should define for themselves their own intellectual and cultural property, and another to the effect that existing mechanisms were insufficient for the protection of indigenous peoples' intellectual and cultural property rights.

The second article recommends that states and national and international agencies recognise that indigenous peoples are the guardians of their customary knowledge and have the right to protect and control its dissemination. The second article also recommends that commercialization of any traditional plants and medicines of indigenous peoples must be managed by the indigenous peoples who have inherited such knowledge, and that indigenous cultural objects held by museums and other cultural institutions must be offered back to their traditional owners.

The third article recommends that the United Nations should ensure that the participation of indigenous peoples in United Nations forums is strengthened and that the Mātaatua Declaration be incorporated in its entirety in the United Nations report "Study on Cultural and Intellectual Property of Indigenous Peoples"; and it calls for an immediate halt to the Human Genome Diversity Project.

The fourth article concludes that states and national and international agencies must provide funding to indigenous communities to carry out the recommendations of the declaration.³¹³

While the New Zealand Government has not given formal consideration to the Mātaatua Declaration, it did support the suggestion that it should be included in the United Nations report on Cultural and Intellectual Property of Indigenous Peoples in order to encourage broader debate on the issues surrounding intellectual and cultural property rights.³¹⁴

1995: Hīrangī Hui rejects fiscal envelope proposals and promotes constitutional change reflecting Te Tiriti o Waitangi

In 1995 nearly a thousand Māori from all over the country travelled to Hīrangī marae in Tūrangi, at the invitation of Tūwharetoa Paramount Chief Sir Hepi te Heuheu, to discuss the Government's "Crown Proposals for the Settlement of Treaty of Waitangi Claims", commonly known as the fiscal envelope. Sir Hepi te Heuheu said in his opening address:

³¹³ <http://aotearoa.wellington.net.nz/imp/mata.htm>

³¹⁴ <http://www.tpk.govt.nz/publications/docs/tangata/rights.htm>

Māori are no longer content to react to government proposals which have been unilaterally formulated by Cabinet. Until the country has a constitution that allows Māori to determine policies for Māori, there will be continuing disquiet and an ongoing sense of injustice.³¹⁵

The concerns expressed at the hui included lack of consultation and partnership with Māori, the basis of the proposals, and the place of the Treaty. It was suggested that there was a need to develop an alternative approach and there was a call for a major constitutional review on the basis of the Treaty.

In September 1995 a second hui was held. Sir Hepi te Heuheu declared that its purpose was “to enable iwi and Māori organisations to decide how to progress tino rangatiratanga and implement the Hīrangi resolutions passed in January.”³¹⁶

This time approximately 1,500 Māori (leaders, tribal representatives and others) attended the hui. The participants established a number of priority issues, including achieving constitutional change suitable to Māori and the relationship between Māori and the Crown. A number of working parties were established to prepare material for consideration at future hui.

In April 1996 the final hui in this series was convened and almost 2,000 Māori attended. After the hui Dr Pat Hōhepa described it as a political summit looking specifically at political options for Māori. As there were different views on what self government would mean for Māori, working parties were to do further research and foster wider discussion amongst Māoridom.³¹⁷

1996: Proportional representation under MMP introduced

The Electoral Act 1993 introduced the mixed member proportional (MMP) voting system. The first general election under MMP was held on 12 October 1996.

MMP entitles voters enrolled in a General or a Māori electorate each to cast two votes: one for an electorate member of Parliament and the other for a political party. The candidate in each General or Māori electorate that gains most votes is declared the member of Parliament for that electorate.

The proportion of votes cast nationally for a particular party decides that party's share of the 120 seats in Parliament. However, to qualify for a seat a party must gain at least five percent of all party votes cast in an election, or win at least one General or one Māori electorate seat. The threshold is designed to prevent minor parties proliferating in Parliament. Every party that satisfies the threshold is allocated a top-up of “list” seats in proportion to its overall share of the party vote. List seats are filled by candidates nominated by the parties before the election.³¹⁸

³¹⁵ Hirangi Hui, *Alternative Vision*, 1996, <http://www.casi.org.nz/publications/altvision.html>.

³¹⁶ Hirangi Hui, *Alternative Vision*, 1996, <http://www.casi.org.nz/publications/altvision.html>.

³¹⁷ Hirangi Hui, *Alternative Vision*, 1996, <http://www.casi.org.nz/publications/altvision.html>.

³¹⁸ Electoral Commission, *The New Zealand Electoral Compendium*, 3rd ed, Electoral Commission, Wellington, 2001, p. 14.

Until 1996, parliamentary representation was determined by the first-past-the-post system, or FPP. Under FPP, all members of Parliament were electorate members who had each gained more votes than any other single candidate in their particular electorates. FPP tended to foster two main parties³¹⁹—from 1935 the Labour and National parties—and to deliver single-party majority governments.³²⁰ FPP discriminated against third parties,³²¹ even when they had achieved a significant level of support.

2001: Public Audit Act 2001 reformed Office of the Auditor-General

The Public Audit Act 2001 established the Auditor-General as an Officer of Parliament, and reformed and restated the law relating to the audit of public sector organisations.³²²

As an Officer of Parliament, the Auditor-General is appointed by the Governor-General on the recommendation of the House of Representatives.³²³ In 1989, the Finance and Expenditure Committee specified the primary function of an Officer of Parliament as “a check on the Executive, as part of Parliament’s constitutional role of ensuring accountability of the Executive”.³²⁴

The 2001 Act provides that the Auditor-General is the auditor of every public entity.³²⁵

Public entities include the Crown, Crown entities, local authorities, state-owned enterprises, departments of the public service and miscellaneous entities such as the Carter Observatory and the Nursing Council of New Zealand.³²⁶

The Auditor-General must audit the financial reports of public entities,³²⁷ and may scrutinise their performance to determine their effectiveness, efficiency, and compliance with statutory obligations.³²⁸ Acts or omissions resulting in waste or indicating a lack of probity or financial prudence may also be examined.³²⁹

Either on request or on the Auditor-General’s own initiative, the Auditor-General may inquire into “any matter concerning a public entity’s use of its resources”.³³⁰ The only constraint is that the inquiry must be limited to the extent to which a public entity is using its resources in a manner consistent with applicable government or local authority policy, where there is such a policy.³³¹

³¹⁹ Geoffrey Palmer and Matthew Palmer, p. 24.

³²⁰ Philip A Joseph, p. 190.

³²¹ Geoffrey Palmer and Matthew Palmer, p. 25.

³²² Public Audit Act 2001, s 3.

³²³ Public Audit Act 2001, s 7(2).

³²⁴ Report of the Finance and Expenditure Committee on the Inquiry into Officers of Parliament, *AJHR*, 1989, I.4B, p 5.

³²⁵ Public Audit Act 2001, s 14 (1).

³²⁶ Public Audit Act 2001, s 5.

³²⁷ Public Audit Act 2001, s 15.

³²⁸ Public Audit Act 2001, s 16 (1) (a) and (b).

³²⁹ Public Audit Act 2001, s 16 (1) (c) and (d).

³³⁰ Public Audit Act 2001, s 18(1).

³³¹ Public Audit Act 2001, s 18(3).

2003: Supreme Court established as the court of final appeal

The Supreme Court Act 2003 established the Supreme Court of New Zealand as the final appellate court, and discontinued appeals from New Zealand to the Judicial Committee of the Privy Council.³³²

The Judicial Committee Act 1833 (UK) regulated the jurisdiction and functioning of the Judicial Committee of the Privy Council in order to hear appeals from British territories and possessions. The right of appeal to the Judicial Committee was established in New Zealand upon its establishment as a British colony.³³³ The right of appeal was later confirmed by statute.³³⁴ When hearing appeals from New Zealand, the Judicial Committee was considered to be a court of the New Zealand judicial system. The Judicial Committee comprises the Lords of Appeal in Ordinary and leading Commonwealth judges, with New Zealand judges sitting since 1913.³³⁵

Calls for the abolition of appeal to the Privy Council from New Zealand have been heard since early last century,³³⁶ and the passing of the Supreme Court Act 2003 prompted robust political and legal debate on the topic.³³⁷

The abolition of the right of appeal first became a matter of Government policy in 1986, when the Labour Government said it would abolish the right.³³⁸ The National Government revisited the proposal in 1995 and in 1996 introduced the New Zealand Courts Structure Bill.³³⁹ This bill proposed replacing the right of appeal to the Privy Council with a right of final appeal to a restructured Court of Appeal.³⁴⁰ The bill did not proceed because of opposition from Māori and a lack of agreement about the structure of the final appellate court.³⁴¹

A discussion document³⁴² issued in 2000 led to 2 years of public consultation and policy development, and culminated in the introduction of the Supreme Court Bill in 2003.³⁴³ A Supreme Court was established with the intention of making second-tier appeal more accessible,³⁴⁴ and to promote a judicial system representative of New Zealand as an

³³² New Zealand's link with the Privy Council and the proposed Supreme Court, New Zealand Parliamentary Library, 2003, Wellington, p. 1.

³³³ Peter Spiller and others, p. 229.

³³⁴ Most recently by Orders in Council (UK) 1910 and 1972 as discussed in Peter Spiller p. 229.

³³⁵ Peter Spiller and others, p. 230.

³³⁶ Peter Spiller and others, p. 231.

³³⁷ Noel Cox, 2002, The Abolition or Retention of the Privy Council as the Final Court of Appeal for New Zealand: Conflict Between National Identity and Legal Pragmatism, *New Zealand University Law Review*, vol. 20, p. 220.

³³⁸ Philip A. Joseph, 2003, Constitutional Law, *New Zealand Law Review* p. 401.

³³⁹ Philip A. Joseph, p. 401.

³⁴⁰ New Zealand Courts Structure Bill 1996, New Zealand Parliamentary Library, 1996, Wellington.

³⁴¹ Noel Cox, 2002, The Abolition or Retention of the Privy Council as the Final Court of Appeal for New Zealand: Conflict Between National Identity and Legal Pragmatism, *New Zealand University Law Review*, vol. 20, p. 226.

³⁴² Attorney-General, 2000, *Reshaping New Zealand's Appeal Structure: Discussion Paper*, Office of the Attorney-General, Wellington.

³⁴³ Advisory Group, 2002, *Replacing the Privy Council: a New Supreme Court: Report*, Office of the Attorney-General, Wellington.

³⁴⁴ Philip A. Joseph, 2003, Constitutional Law, *New Zealand Law Review*, p. 397.

independent nation.³⁴⁵ The Supreme Court Act 2003 provides that no appeal may be brought to the Judicial Committee of the Privy Council in respect of any civil or criminal decision of a New Zealand Court after the commencement of the Act.³⁴⁶ It also brings New Zealand into line with comparable Commonwealth nations that have abolished the Privy Council appeal. Countries retaining the appeal are mostly small island-states that lack the institutional infrastructure to provide second-tier appeal.³⁴⁷ The right of appeal from the Court of Appeal and the High Court³⁴⁸ to the Supreme Court provides New Zealand with a locally operated two-tier appellate system, such as exists in most other common law countries.³⁴⁹

2004: Crown Entities Act 2004 reforms accountability regime for Crown entities

Crown entities are typically set up under legislation, and nearly all are controlled by statutory boards of directors appointed by the Crown. Each board employs a chief executive, who has operational control over the entity. Crown entities have various forms, including statutory entities (such as the Accident Compensation Corporation and the New Zealand Film Commission), and Crown entity companies (such as Radio New Zealand Limited and the nine Crown Research Institutes).³⁵⁰ By the late 1990s there were concerns that too much fragmentation of the government sector was making coordination difficult; and there was a desire to improve coordination and consistency of objectives across the State sector, allowing Ministers to direct entire classes of Crown entities on whole-of-government matters.³⁵¹

The Crown Entities Act 2004 reforms the law relating to Crown entities to provide a consistent framework for the establishment, governance, and operation of Crown entities,

³⁴⁵ Supreme Court Act 2003, s 3. Discussed in Philip A. Joseph, 2003, Constitutional Law, *New Zealand Law Review*, p. 406.

³⁴⁶ Supreme Court Act 2003, s 42.

³⁴⁷ Philip A. Joseph, 2003, Constitutional Law, *New Zealand Law Review*, p. 404.

³⁴⁸ A restricted course of appeal from the High Court exists in some circumstances. See: Philip A. Joseph, p. 397.

³⁴⁹ Noel Cox, 2002, The Abolition or Retention of the Privy Council as the Final Court of Appeal for New Zealand: Conflict Between National Identity and Legal Pragmatism, *New Zealand University Law Review*, vol. 20, p. 223.

³⁵⁰ New Zealand's State Sector Reform: A Decade of Change: The Shape of the State, http://www.ssc.govt.nz/display/document.asp?docid=2384&pageno=8#P536_75715.

³⁵¹ Review of the Centre – Paper Three – Improving Alignment: Crown Entities, <http://www.ssc.govt.nz/display/document.asp?docid=2761>.

and to clarify the accountability relationships between Crown entities, their board members, and their responsible Ministers on behalf of the Crown and House of Representatives. The Act provides for different categories of Crown entities and for each category to have its own framework of governance (including variation in the degree to which Crown entities are required to give effect to, or be independent of, government policy). The Act clarifies the powers and duties of board members in respect of the governance and operation of Crown entities, and sets out reporting and accountability requirements.³⁵²

³⁵² Crown Entities Act 2004 s 3.

Appendix C

The processes other countries have followed in undertaking a range of constitutional reforms

The Parliamentary Library was asked by the Constitutional Arrangements Committee to identify and describe the processes other countries have followed in undertaking a range of constitutional reforms. In particular, the main focus was to be on why particular processes were chosen or felt appropriate.

The first section discusses some background issues crucial to these requests. The various phases of the process of constitutional reform are described in section two. A particular focus here is discussion of the general reasons why particular processes may be chosen. The third section illustrates these processes by using a number of country-level examples.

Section 1

Background issues

Overview

Process has become equally as important as the content of the final document for the legitimacy of a new constitution.³⁵³

Today there are about 200 national constitutions in place, of which about half have been written or re-written in the last 25 years.³⁵⁴ Nearly 60 percent of United Nations members have made “major” amendments to their constitutions in the decade 1989–1999.³⁵⁵ This activity suggests a renewed faith in the political and legal constitution-making process as a structured, stable, and peaceful method of arriving at legitimate and consensual political settlements.

In making cross-national comparisons of the processes of constitutional reform, however, it is immediately apparent that three issues need to be addressed. First, the vast majority of democracies have “codified” constitutions that legally mandate the amendment procedures to be followed when they embark upon a process of constitutional reform. Only three democratic countries—Britain, Israel, and New Zealand—do not have codified constitutions. Consequently, these three countries enjoy a degree of latitude and flexibility not available to most democracies in choosing: what to reform; the reform process to be followed as constitutional issues arise; the mechanisms to enact such reforms.

A second background issue discusses the distinction between the mechanisms that give effect to constitutional amendments and the deliberative and formal processes of reform leading up to such amendments. A final issue addressed in this section distinguishes between the deliberative and formal processes of constitutional reform and the other ways constitutions are reformed—namely, evolutionary and judicial methods of reform.

Codified and uncoded constitutions

The term “constitution” refers to both the institutions, practices, and principles that define and structure a political system; and the written document that establishes, codifies, and articulates such a system.³⁵⁶

Every state has a constitution in the first sense, and nearly all have a constitution in the second sense as well. The exceptions include Britain, New Zealand, Bhutan, Oman, Saudi

³⁵³ Vivien Hart, *Democratic Constitution Making*, Special Report 107, July 2003, United States Institute of Peace, p. 1.

³⁵⁴ Vivien Hart, p. 2.

³⁵⁵ J. Ford, *The Age of Constitutions?: Reflecting on the New Faith in Federal Constitutions*, National Europe Centre Paper no. 132, Australian National University, 5 May, 2004, p. 1.

³⁵⁶ S. Hemberger, *Constitution*, in *Oxford Companion to Politics of the World*, ed. J. Krieger, Oxford University Press, Oxford, 2001, p. 172.

Arabia, and Israel. The important distinction is not between written and unwritten constitutions, however, but between codified and uncoded constitutions.

Clearly, New Zealand and Britain do have constitutions. It is true that many parts of the constitutions of both countries are not written—they exist as unwritten constitutional conventions,³⁵⁷ precedents, royal prerogatives³⁵⁸ and custom.

But parts of New Zealand's and Britain's constitutions are written—constitutional status is invariably ascribed to such documents as the Magna Carta (1297), the Habeas Corpus Act (1641), the Bill of Rights (1688), the Act of Settlement (1701), and the Act of Union (1707). The written parts of New Zealand's constitution include: the Treaty of Waitangi Act 1975, the Constitution Act 1986, the New Zealand Bill of Rights Act 1990, and the Electoral Act 1993.³⁵⁹

Therefore, while the British and New Zealand constitutions are often described as “unwritten constitutions”, they are more accurately described as “partly written and wholly uncoded”.³⁶⁰ A coded constitution is one that

- reflects and enshrines a society-wide consensus about what is to count as part of the constitution
- is usually centred around a single document that incorporates this consensus as well as specifying the key constitutional provisions that are binding on all political institutions
- is fully legally enforceable and enjoys the protection of a higher or supreme court
- is usually “entrenched”—it can only be reformed or amended by special provisions, beyond the ordinary legislative process
- contains within itself the mandatory reform procedures to be followed to amend or reform the constitution.

These differences between coded and uncoded constitutions become significant when comparing processes of constitutional reform. One of the most famous constitutional scholars, A. V. Dicey, stated that if a national constitution was written so as to be changeable by amendment, then it should be “capable of being changed only by some authority above and beyond the ordinary legislative bodies”.³⁶¹

For the vast majority of democracies this is in fact the case—the processes and mechanisms of constitutional reform can only be conducted according to strict rules and

³⁵⁷ Conventions are the established customs, practices, and understandings of constitutional behaviour which are considered to be binding by those who participate in public life, but which—unlike laws—are unable to be enforced by the courts. Whatever enforceability they have comes from history, tradition, symbolism and their cross-party support. All countries have constitutional conventions, whether they have coded constitutions or not.

³⁵⁸ John McSoriley, *The New Zealand Constitution, Background Note*, 2000/1, 15 February 2000, Parliamentary Library, p. 3. Available at <http://www.clerk.parliament.govt.nz//content/plib/00-1NZConstitution.pdf>

³⁵⁹ John McSoriley, p. 2.

³⁶⁰ I. Budge, I. Crewe, D. McKay and K. Newton, *The New British Politics*, Pearson, Harlow, 2001.

³⁶¹ Scott Bennett and Sean Brennan, *Constitutional Referenda in Australia*, Research Paper 2, Parliamentary Library of Australia, 1999, pp. 22–23.

procedures as set out in their constitutions (are codified). For most democracies, the process of constitutional reform has been specifically designed to be constraining so as to avoid constitutional guarantees being readily overturned. Reform is therefore designed to be difficult to achieve in principle—and this has usually been the case in practice.

By comparison, New Zealand and Britain have relatively few constraints when choosing to effect constitutional change. This is, firstly, because their constitutions do not codify or specify all of the legislative arrangements which are constitutional. Secondly, their constitutions provide no special protection for most of the legislative arrangements that could be considered constitutional. Thirdly, there is no mandatory or codified process by which Britain and New Zealand reform their constitutions. In other words, while New Zealand and Britain may accept the principle—“that basic changes to the constitutional framework of government should be matters of broad agreement, and should not be decided by a Government itself constituted in accordance with that framework”³⁶²—the principle itself is not codified. This means that for New Zealand:

Parliament enjoys sovereign powers of legislation and may legislate on any topic affecting Sovereign or subject. There are no fundamental or supreme laws and any law may be altered by simple majority of Parliament (except certain reserved provisions under s268 of the Electoral Act 1993).³⁶³

In New Zealand, for example, the 1973 Constitutional Amendment Act, the 1986 Constitution Act, and the establishment of the Supreme Court in 2004 were all passed by legislation that required only a simple majority in Parliament. These examples of constitutional change in New Zealand illustrate that “only ordinary legislative efforts are required to supplement, modify, or repeal the Constitution.”³⁶⁴ New Zealand, like Britain, is therefore largely “constitutionally unconstrained” when it comes to reforming its constitution.³⁶⁵

In a comparative survey of the processes of constitutional reform, it is therefore important to note that the uncodified constitutions of Britain and New Zealand allow much more flexibility or discretion as to how the constitutional reform process is to progress—and the mechanisms chosen to effect those reforms—than those countries with codified constitutions.

³⁶² Royal Commission on the Electoral System, *Towards a Better Democracy*, (J. H. Wallace, Chair), Government Printer, 1986, p. 176.

³⁶³ Philip Joseph, *The Legal History and Framework of the Constitution*, Paper Presented to the “Building the Constitution Conference”, Wellington, April 7-8, 2000, p. 1.

³⁶⁴ Cited in Jon Elster, *Forces and Mechanisms in the Constitution Process*, *Duke Law Journal*, vol. 45, 1995, p. 366. There of course remain moral and political restraints on altering such statutes, and certain parts of some constitutional statutes are entrenched. Technically, however, even the entrenched sections — requiring a 75 percent majority of all MPs, or by a simple majority of electors voting in a referendum — could be overturned by repealing the entrenching provision itself by “legislation passed in the ordinary way”. See: Royal Commission on the Electoral System, p. 290.

³⁶⁵ Richard Mulgan, *Politics in New Zealand*, Auckland University Press, Wellington, 2004, p. 64.

Defining constitutional reform – processes and mechanisms ³⁶⁶

Mechanisms can be defined as the formal, legally binding methods, which must be used if a constitution is to be amended. Such mechanisms are invariably set out in the text of a codified constitution and can include referenda, a super majority vote in parliament, legislation passed in both upper and lower houses, or amendments adopted only after an intervening general election is held. (Annex A lists the amendment mechanisms used in other countries.)

Processes, on the other hand, are usually the non-legal, non-binding steps which *can be* taken before the compulsory amendment mechanisms are triggered. Examples set out below include the extent to which the public is consulted, whether negotiations are held with other parties or with state governments, whether a Royal Commission is established, or whether a referendum is held.

The general reasons why particular processes are chosen is the focus of discussion in section two, while section three illustrates these processes by using a number of country-level examples. The difficulty is that a simple demarcation between the mechanisms and the processes of constitutional reform is not always possible. For example, although the referendum is clearly one of two mechanisms Australia uses for constitutional reform, it also involves a process—a referenda taskforce, wording over the referenda question, and an advertising campaign. Within any referenda process, therefore, there are choices available to governments concerning the conduct of the referenda *process* itself.

Other methods of constitutional reform

Although this paper is concerned with the formal processes of constitutional reform, it is important to note that constitutions change—are effectively reformed—by other methods as well. Common to almost all democracies are evolutionary processes and the effects of judicial interpretation.

Constitutional reform—especially those concerning constitutional conventions—can occur by evolutionary means rather than through the formal amendment process. Over time, for example, a fundamental change in the convention concerning the birthplace of the New Zealand Governor-General occurred. Until 1967, the constitutional convention was that New Zealand Governors-General were not New Zealand citizens. The first New Zealand-born Governor-General, Sir Arthur Porritt, was appointed in 1967, while the first resident New Zealander, Sir Dennis Blundell was appointed in 1972. No law change occurred, however, because appointments were governed by constitutional convention.³⁶⁷

³⁶⁶ A further phase in the constitutional reform process to note is the formal review sometimes undertaken of both the process and outcomes of constitutional reform. In New Zealand, for example, following the adoption of the MMP electoral system, a post-referendum assessment and review was undertaken. This paper does not discuss review processes any further. For a discussion of the desirability of formalising the review of constitutional issues see: House of Lords, *Constitution – Fourth Report*, Select Committee on Constitution, 23 January 2002. Available at: <http://www.publications.parliament.uk/pa/ld200102/ldselect/ldconst/69/6904.htm - a9>

³⁶⁷ Philip A. Joseph, *Constitutional and Administrative Law in New Zealand*, 2nd ed., Brookers, Wellington, 2002, p. 147.

This is clearly a significant constitutional change since it has important symbolic resonance for New Zealanders' sense of their national identity.³⁶⁸ Clearly, an evolutionary shift occurred in the perception of the appropriate birthplace of the Governor-General. However, there is no sense in which this evolutionary shift itself can be said to be chosen. Evolutionary processes are therefore an important source of constitutional reform—they are not, however, further considered in this paper.

A second important source of constitutional reform is that which occurs as a result of “judicial interpretation” or “review”. This is in fact the primary method by which the constitution of the United States has changed, but it has also been an effective method in Australia. For example, the Australian High Court in 1951 struck down a law banning the Communist Party on the basis that such arbitrary power undermined the rule of law that undergirded the constitution. In other areas, especially with regard to economic powers, the High Court has interpreted the constitution in ways favourable to the Commonwealth, sometimes in ways that have allowed the Commonwealth to do things that had earlier been rejected by the people in a referendum.

In New Zealand, the Bill Of Rights Act 1990 allows some judicial review of executive action. However, in general New Zealand citizens “do not have recourse to the courts to have acts of Parliament declared unconstitutional and therefore invalid.”³⁶⁹ Judicial review is also not further discussed in this paper.

Although the focus of this paper is on the formal and deliberative processes of constitutional reform, in reality constitutional reform is best considered as a progression that includes evolutionary shifts in the perceptions and interpretation of constitutional practice, the initiation of constitutional reform, public debate and consultation on the proposed reforms, the legislative and amendment mechanisms necessary to enact the reforms, and the review (judicial or formal) of the amendments that may follow.

³⁶⁸ Dame Silvia Cartwright, *The Role of the Governor-General*, Occasional Paper No. 6, October 2001, New Zealand Centre for Public Law, Wellington, pp. 14-15. However, this constitutional understanding was later formally recognised by Letters Patent when the patriation of the Office of the Governor-General occurred in 1983.

³⁶⁹ Richard Mulgan, *Politics in New Zealand*, Auckland University Press, Wellington, 2004, p. 51.

Section 2

The general stages of constitutional reform

Overview

The plan now to be formed will certainly be defective ... Amendments therefore will be necessary, and it will be better to provide for them, in an easy, regular and Constitutional way than to trust to chance and Violence.

[George Mason, June 11, 1787]³⁷⁰

This section provides an outline of the elements of the constitutional reform process. Using examples drawn from the country studies in section three, it provides general discussion of the reasons why a particular process may be chosen.

Constitutional reform in a democracy is a process that generally involves a number of steps: the emergence of constitutional reform on the political agenda; a period of intense political debate and mobilization; attempts at consensus building by seeking express support from a broad range of political institutions; passage of a series of time-consuming institutional tests in order to assure that popular support for constitutional amendment is sufficiently deliberate and well-considered.³⁷¹ In this section, these steps are described as “initiating constitutional reform”, “public consultation and consensus building”, “government and legislative actions”, and “referenda processes”.

Initiating constitutional reform

The first phase in the constitutional reform process is the way in which it emerges on the political agenda. There appear to be three main avenues. The first is through activism by a political party or parties at election time—such as indicated in an election manifesto or by a party leader taking a position on a constitutional issue. Constitutional issues have generally not been a regular feature in party manifestos. It is thought that a general election is usually an unsatisfactory mechanism to test the mandate for constitutional change because it requires the electorate to vote as if the election were about a single issue.³⁷² Rarely is this the case. Nevertheless, British and New Zealand political parties have raised constitutional issues at election time.

A second avenue of initiation is parliamentary activism. Either governments of the day or other political parties can put particular constitutional issues on the political agenda by convening a parliamentary inquiry during a parliamentary term. There are some difficulties that have been noted with this choice of initiating constitutional change, if the parliamentary committee does not have representatives from all parliamentary parties.³⁷³

³⁷⁰ Sanford Levinson, The Political Implications of Amending Clauses, *Constitutional Commentary*, vol. 13, no. 1, Spring 1996, pp. 107–123.

³⁷¹ William E. Scheuerman, Constitutionalism in an Age of Speed, *Constitutional Commentary*, vol. 19, no. 2, Summer 2002, pp. 353–381.

³⁷² Rodney Brazier, *Constitutional Reform: Re-shaping the British Political System*, Clarendon Press, Oxford, 1991, p. 26.

³⁷³ Rodney Brazier, *Constitutional Reform: Re-shaping the British Political System*, Clarendon Press, Oxford, 1991,

Issues such as the terms of reference, the working methods of the inquiry, and the opportunities made available for public participation can prove to become areas of contention. Subsequently, it may be difficult to achieve the cross-party consensus and the degree of public confidence necessary for the legitimacy of the constitutional reform process.

A third way of putting constitutional change on the political agenda can be through public demands or popular activism. Public petitions, protest, media campaigns, citizen initiated referenda, or interest group activism can all initiate the process of constitutional reform. Switzerland's constitution, for example, allows constitutional reform to be initiated by binding citizen-initiated referenda.

Public consultation and consensus building

Some public participation in the process of constitutional reform is usually seen as desirable because it helps to reveal the preferences people hold about reform, build a consensus, and legitimates the changes adopted. Participation can occur at several stages of the constitutional reform process—at initiation, through submissions to inquiries (governmental, parliamentary, specialist commissions), through submissions to a bill proposing constitutional reform, and by confirming or rejecting proposed constitutional amendments in referenda.

In most countries with codified constitutions, amendment procedures usually mandate that public consultation occur. This, and recent developments in international law, are helping to move the debate about public participation in constitutional reform from whether it is desirable to whether it is a right. The United Nations Committee on Human Rights has also interpreted the right granted in the United Nations International Covenant on Civil and Political Rights of public participation in public affairs as extending to constitution making.³⁷⁴

Because public participation is increasingly regarded as such a necessary and important component of the constitutional reform process, a number of new practices aimed at public engagement are being attempted. Examples include: prior agreement on broad principles as a first phase of constitution making; civic education and media campaigns, the creation and guarantee of channels of communication; local discussion forums; and open drafting committees. Some refer to these new practices of public engagement as evidence of a “new constitutionalism”.³⁷⁵

During the constitutional reform process of 1992, the Canadian Government established a Citizens' Forum on the Future of Canada involving 400,000 people; established provincial-level select committees to hold public hearings; published a 1991 Cabinet Committee report—*Shaping Canada's Future Together: Proposals*—to focus public discussion; held public hearings across Canada on these proposals; and televised a series of six public conferences

pp. 26–27.

³⁷⁴ A 1991 ruling of the UNHCR (*Marshall v. Canada*, Human Rights Committee, CCPR/C/43/D/205/1986), authorised a specific right to participate in constitution making as an undoubted part of public affairs. See V. Hart, p. 6.

³⁷⁵ V. Hart, p. 2.

attended by a wide variety of representatives. These public forums and discussion helped to change the political climate in Canada to one of accommodation and reconciliation.

Sometimes efforts to engage and consult with the public are reasonably informal and government-controlled. Sometimes deliberative and more formal efforts are used—such as a royal commission, a commission of inquiry, or a constitutional assembly (convention). These may be required when the gravity of a constitutional problem demands it; when more informal efforts have failed; when the issue has polarised political stakeholders; when the implications of constitutional change require clarification; when they would help de-politicise a constitutional issue of deep public concern; or when they are demanded in return for continued political support. Royal commissions are sometimes chosen because:

- they are usually highly resourced in terms of expertise and funding and therefore likely to provide much more comprehensive levels of research and analysis.
- they are ostensibly non-partisan—while the terms of reference and commissioners are usually chosen by the government, they nevertheless have the status of independent national inquiries with much better chances of achieving cross-party and public support for constitutional initiatives.
- they attempt to be even-handed in their treatment of the various positions adopted by the political parties and offer generous opportunities for public consultation.
- they enjoy a high degree of legitimacy among parties and public alike.
- their recommendations are non-binding and they therefore provide some leeway and benefits to governments of the day.
- the royal commission process can be lengthy, thereby allowing the government to form a response to possible recommendations, to manage the “issue-attention” cycle, and to re-frame the issue as non-partisan.

In some countries, a constitutional assembly or convention is convened. These may involve a mix of elected and appointed delegates drawn from federal and state government representatives, opposition members of parliament and experts and people’s representatives, among others. Although these could be convened in New Zealand and Britain, they are generally convened by countries with codified constitutions—sometimes by constitutional mandate—or by countries drafting a new constitution.³⁷⁶

Constitutional assemblies have been used in a number of countries including Australia, Indonesia, Philippines, Ethiopia, Kenya, and Brazil. Constitutional assemblies have a similar status to that of a standing royal commission. They usually have a declaratory role to consider and report on any constitutional provisions that require clarification or reformulation or they may consider any constitutional aspect referred to them by governments of the day. Their recommendations or proposals are generally not binding on governments, but do usually carry significant weight. Where they are not mandated by the constitution, assemblies may be chosen for a number of reasons.

³⁷⁶ Brazier argues that they should be used in Britain.

- They act as a forum for government and opposition delegates from commonwealth (federal) and state (provincial) level governments which is seen as essential to the process of building a bi-partisan consensus.
- Such a forum may allow more deliberative and rational assessment of the pros and cons of constitutional change without the imposition of party discipline on the constitutional issue(s) at hand.
- They act as a clearing house for constitutional ideas, and over time can build up expertise, research, and analysis on constitutional issues.
- Since they engage in wide public consultation, they may be able to achieve a political and public consensus on an issue, or at least help to legitimate the constitutional positions finally adopted.
- They can offer a more systematic and deliberative approach to issues of constitutional change than dealing with issues on an ad hoc basis as they emerge on the political agenda.

Governmental and legislative actions

Elected legislatures often serve as the institutional focus for constitutional change, either by dominating the process of formal constitutional amendment, or by discarding the formal distinction between ordinary and constitutional legislation altogether.³⁷⁷

The third step in the process of constitutional reform is the legislative arena where the mechanisms of constitutional reform are triggered and amendments enacted. Significant differences can be noted between the majority of countries—who have codified constitutions—and Britain and New Zealand.

In Britain and New Zealand, a proposal for constitutional reform generally proceeds by the normal legislative process—the proposal is announced by government, discussion is led and managed through departmental or ministerial processes, and opportunities for public consultation are no more than those available for the passage of any other piece of legislation.

In general, governments in New Zealand and Britain have preferred to unilaterally announce constitutional changes more or less in their final form, subject to the normal legislative process. There may be several reasons why governments choose this process: as an internal government proposal, the reform process is reasonably private; it may be an issue with high political content with little prospect for party or public consensus; the departmental or ministerial proposals are likely to be politically acceptable (to government); limited public consultation speeds the constitutional reform process; costs (economic and political) may be limited.

In countries with codified constitutions, the legislative process is usually prescribed as part of the mechanisms of constitutional reform. Nevertheless, even countries with codified

³⁷⁷ William E. Scheuerman, p. 355.

processes of reform enjoy considerable flexibility with regards to the processes surrounding the legislative requirements. Examples of these are given in section three.

Referenda processes

The final stage of the constitutional reform process reviewed here is the referendum process. As Annex A illustrates, direct appeals to voters by using referenda are now an established part of the process of constitutional reform. In the 17 major democracies of Western Europe, only three—Belgium, the Netherlands, and Norway—make no provision for referenda in their constitution. Only six democracies—the Netherlands, the United States, Japan, India, Israel, and the Federal Republic of Germany—have never held a nationwide referendum.³⁷⁸ While the Canadian constitution does not stipulate that reforms must be subjected to a referendum, Canada did use a referendum for such purposes in 1992. The 1986 Royal Commission in New Zealand recommended that referenda ought to be held on major constitutional issues.³⁷⁹

While referenda may be thought of as one of the central mechanisms of constitutional change, they also involve a number of processes over which governments may have some discretion—the control over the framing and wording of the referendum question, referendum funding, public education on the issue, and regulation of the advertising campaign for both sides of the issue.

In Australia, for example, it is mandatory for a government referenda taskforce to be established before referenda are put to the electorate. Such a taskforce is responsible for the public education and information campaigns, as well as framing the referenda questions.

This, and the Canadian example set out below, show that the effectiveness of constitutional referenda depends in part on the control of the referenda process by government just as much as the alleged conservatism of the voters.

There are reasons both for choosing and rejecting a referendum as a way of deciding constitutional issues. Referenda are sometimes chosen for the following reasons.

- Using referenda to consult citizens directly on constitutional issues is beneficial because it acknowledges the fact that a nation's democracy and its constitution ultimately rest on support from the people.
- Referenda put the stamp of legitimacy on the important political questions of the day and constitutional questions are the most important of these.
- Referenda encourage participation by citizens in the governing of their own societies, promote education and understanding about important constitutional issues, and can help build consensus.
- They are an accepted, if not mandatory requirement, for achieving constitutional reform.

³⁷⁸ The People's Voice, *The Economist* (US), vol. 353, issue 8132, August 14, 1999, p. 45.

³⁷⁹ Royal Commission on the Electoral System, p. 180.

- People are much more literate, educated, and can access much more unmediated and authoritative information than was possible previously.
- Referenda are likely to be required in those states that have a federal structure or a non-homogenous population. To ensure a wide geographic consensus, Switzerland and Australia require a “double majority”, of individual voters and of cantons or states, for constitutional amendments.

Referenda are sometimes *not* chosen for the following reasons.

- Because referenda usually require a yes/no answer, complex and inter-related constitutional questions tend to be framed as simple, and seemingly isolated, propositions.
- Deciding complex and inter-related questions by referenda is a limitation on the role of representative government—a role that allows decision-makers to weigh conflicting priorities and negotiate compromises on behalf of the people.
- Referenda cede undue power to the popular majority of the moment and can override the rights and aspirations of minority groups.
- Referenda can be divisive if they lead to extreme views setting the terms of the constitutional debate or frame issues in terms of “winners” and “losers”.
- Referenda campaigns can be expensive and the outcomes may be unduly determined by those that have the most money to spend on advertising.³⁸⁰
- Small, unitary states with homogenous populations (limited ethnic, linguistic or historical differences) do not need to use referenda in processes of constitutional reform.
- Referenda are not an effective means of achieving constitutional change. In Australia, 34 of 42 proposals to amend the constitution have been rejected by voters. Canadian voters unexpectedly rejected a painstakingly negotiated constitutional accord designed to placate Quebec. In 1978 Britain’s government was forced to abandon plans to set up a Scottish parliament when a referendum victory in Scotland failed to clear a 40 percent hurdle of eligible voters.

³⁸⁰ Concerning the role of money in referenda campaigns in the United States, for example, numerous studies have been conducted but not all have reached the same conclusions. Some argue that while money does not always prevail in referenda campaigns, it is almost always a major, and sometimes, dominant factor. Others studies suggest there is some evidence that it may be possible to “buy” a “No” vote, but little evidence that it may be possible to “buy” a “Yes” vote. See League of Women Voters, *Direct Democracy: The Initiative And Referendum Process In Washington State*, October 2002. Available at: [http://www.iandrinstitute.org/New_IRI_Website_Info/I&R_Research_and_History/I&R_Studies/WA_LOWV - 2002 I&R Report IRI.pdf](http://www.iandrinstitute.org/New_IRI_Website_Info/I&R_Research_and_History/I&R_Studies/WA_LOWV_-_2002_I&R_Report_IRI.pdf)

Section 3

The process of constitutional reform in Canada

Overview

Until 1982, Canada dealt with constitutional issues through the institutions of executive federalism—regular meetings between the premiers of the provincial and federal governments. This system of constitutional reform required unanimous agreement of all the governments, but privileged the reform process as one of negotiated compromises among elites.³⁸¹

Following the adoption of the Constitution Act 1982, the normal process for constitutional reform (amendment) in Canada is now the passage of a resolution in Parliament and in the legislatures of seven provinces representing at least 50 percent of the population.³⁸² The Canadian Constitution does not require a referendum for ratification of constitutional amendments and therefore Canadians do not ordinarily have any direct say over changes to their federal constitution.

However, during the constitutional reform process undertaken between 1990 and 1992, the conviction developed that a favourable referendum on the proposed reforms would provide political legitimacy and thereby help ratification by the federal and state legislatures.³⁸³ The referendum that was held in October 1992 resulted in 54 percent of voters rejecting the proposed constitutional changes. The constitutional reform process of 1990–1992 that led up to this rejection is outlined below.

Initiating constitutional reform

The most recent round of constitutional politics in Canada occurred over 1990–1992. Reform proposals arose as a consequence of the 1990 failure to ratify the Meech Lake Accord of 1987. This was an attempt to secure Quebec's consent to Canada's Constitution Act of 1982. It was also recognised that the process of constitutional reform could not now be negotiated entirely behind closed doors between the premiers of the provincial and the federal governments. The immediate catalyst, however, was the proposal by the Quebec National Assembly to hold a referendum on sovereignty no later than October 1992. This forced the federal government to present an ambitious package of constitutional reform to the House of Commons in September 1991.

³⁸¹ Dominique Leydet, *Compromise and Public Debate in Processes of Constitutional Reform: The Canadian Case*, *Social Science Information*, vol. 43, no. 2, p. 236.

³⁸² A restricted range of constitutional amendments requires the consent of all ten provinces—those relating to the monarchy, minimum provincial representation in the House of Commons, the use of official languages, the composition of the Supreme Court, and changes to the amendment process itself.

³⁸³ Ronald L. Watts, *Processes of Constitutional Restructuring: The Canadian Experience in Comparative Context*, Working Paper (1), 1999, Institute of Intergovernmental Relations, Queen's University, Ontario, p. 5.

Public consultation and consensus building

Every Canadian will have the right – and the responsibility – to participate.
[Prime Minister Brian Mulroney, 1991]

After decades of limited opportunities, the Canadian public was encouraged to participate in the constitutional reform process that gave rise to the Charlottetown Agreement. Indeed, the level of public consultation was regarded as by far the most open and inclusive of attempts to reform the Canadian constitution.³⁸⁴ For the first time, intergovernmental negotiations were preceded by extensive and innovative forms of public consultation.

The first stage was that of public discussion in order to ascertain the nature and extent of constitutional revision that the public would likely support. This was seen as necessary after the failure of the 1987 Meech Lake Accord was attributed to a lack of public discussion. Public discussion in 1990 involved a Citizens' Forum on the Future of Canada involving 400,000 people that served to air some of the public frustrations following the failure of the Meech Lake Accord and the establishment of provincial-level select committees to hold public hearings.

This was followed by: a 1991 Cabinet Committee report—*Shaping Canada's Future Together: Proposals*—which served to focus public discussion; public hearings across Canada on these proposals; a series of six televised public conferences attended by a wide variety of representatives that served almost as mini-constituent assemblies and helped to change the political climate to one of accommodation and reconciliation.

The public consultation stage was concluded by the release of the Report of the Joint Parliamentary Committee on a Renewed Canada (Beaudoin-Dobbie) in February 1992. The report generally represented an all-party agreement of the three national parties.

Executive and governmental actions

Because Canada's constitution requires amendments to be ratified by the state legislatures, the constitutional debate must involve at some point formal negotiations between the elected representatives of the provincial and federal governments. By comparison to the first phase, this part of the reform process was closed to the public and media access was restricted. Of necessity, it involved reaching agreement on the shape of the reforms through compromise, "logrolling" and careful balancing of competing interests.

This second stage of constitutional reform, which occurred between March and August 1992, involved intergovernmental negotiations between federal, provincial, and territorial governments. Two ministers or leaders from each met as the Ministerial Meeting on the Constitution (MMC) with the exception of Quebec which abstained from the process in an attempt to extract a satisfactory "offer" from the federal government. The purpose of the MMC was to prepare draft legal texts on specific constitutional aspects including: a Canada Clause; a distinct society clause; items relating to the Charter; the role and powers of the Senate, the House of Commons, the Supreme Court, and First Ministers' Conferences; Aboriginal issues and concerns; proposals relating to the economic and social union.

³⁸⁴ Leydet, p. 238.

Following deadlock in the MMC over the composition and powers of the Senate, provincial Premiers met with the federal Minister of Constitutional Affairs in July and then again in August at Charlottetown where final agreement on constitutional reform—the Charlottetown Agreement—was reached. The Charlottetown Agreement included: a reform of Canada's federal institutions (creating an elected Senate, stronger provincial representation, guaranteed representation for Quebec, entrenching the Supreme Court as an independent interpreter of the Constitution); a rebalancing of the federal-provincial distribution of powers; a constitutional articulation in a Canada Clause of shared values and uniting beliefs (parliamentary democracy, federalism, the rule of law; racial and ethnic equality, human rights and freedoms, gender equality, provincial equality).

In order to secure an agreement however, a number of proposals that had never been part of the original federal proposals or raised at the public consultation phase were accepted. These included a reduction in the powers of the new Senate and a guarantee for Quebec of 25 percent of the seats in a combined parliament (House plus Senate). These concessions would prove to be both a “deal-maker and a referendum-breaker”.³⁸⁵

What emerged at Charlottetown was an agreement that tried to be as inclusive as possible without resolving the fundamental tensions of who gained and who lost. The result was an agreement that was no agreement at all—a collection of generalities that was open to wide interpretation and which did not rest on a solid, principled justification.³⁸⁶

The referendum process

At Charlottetown, it was also agreed to hold a nation-wide referendum on the proposed constitutional changes—in part because British Columbia and Alberta required referenda to be held prior to their legislatures ratifying any constitutional amendment. Since it would have appeared inconsistent to have some provinces and not others seeking the consensus of their electorates, a nation-wide referendum was thought necessary to give political legitimacy to the proposed constitutional reforms.

The referendum may also have been preferred to alternative mechanisms such as legislative hearings because it was perceived to be a quick and decisive method of ratifying the agreement that had been rather tortuously worked out at Charlottetown. By limiting the referendum campaign to little more than a month, it was hoped that public discussion would be limited.³⁸⁷

It was also hoped that the referendum would result in a positive “yes” vote for the constitutional reforms. Public opinion polling had been favourable, and the “yes” campaign was supported by the three main federal parties, all of the provincial governments, the four main Aboriginal organisations, the main labour organisations, and the business sector.

In October 1992, Canadians voted on the constitutional proposals set out in the Charlottetown Agreement. Nationally, 54 percent rejected those proposals and six out of the ten provinces voted “no”. Since the ratification of the legislatures of seven provinces

³⁸⁵ P. H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, Toronto University Press, Toronto, 1993, p. 213.

³⁸⁶ Leydet, p. 244.

³⁸⁷ Leydet, p. 250.

would then be required, the negative result of the referendum meant the rejection of the constitutional reform proposals. A number of reasons are suggested for the negative referendum result.

First, the Charlottetown Agreement was a complicated document in which careful compromises were achieved by balancing controversial provisions with the larger vision and context of a unified Canada. During the referendum campaign the media and the public became preoccupied with which partisan interests stood to lose the most from the proposals at the expense of sufficient attention to the overall gains. One example was that a majority of voters in Quebec voted no because the reform proposals did not give Quebec enough control over its own affairs. At the same time, voters in the west of Canada voted no because it provided Quebec with too many special arrangements.

Second, many voters appeared to vote no as a conservative and less risky response to what was a quite wide ranging set of constitutional reforms. A national consensus may well have existed on individual aspects of the reforms, but requiring voters to choose between two alternatives by way of a referendum when far more than two alternatives existed—for example, “yes” to constitutional reform of the Senate, but “no” to constitutional reform of the Supreme Court—may well have run into the problem of cyclic majorities.³⁸⁸

While holding a referendum as a way of legitimising major constitutional change holds much appeal from a democratic perspective, the Canadian experience is said to illustrate the difficulties of achieving consensus when complex and comprehensive (mega-constitutional) issues are being decided.³⁸⁹

Third, while a bipartisan as well as a federal and provincial consensus existed, the referendum campaign was too short to build a public consensus. It was too short to act as a:

learning process through which the different sections of a divided society might come to better understand and appreciate the claims made by others and the delicate compromises needed in order to acknowledge and, to some extent, satisfy these claims.³⁹⁰

The failure of the 1990–1992 constitutional review process in Canada is thought to imply that Canadians now need to consider what process, if any, can be developed for dealing effectively with the structural problems of Canada.³⁹¹ A number of suggestions arising out of the Canadian experience of constitutional reform have been made.³⁹²

- If there is to be a process of ratification by referendum, that process should be determined in advance and not added part-way through.

³⁸⁸ Arrow, for example, demonstrated that where a democratic choice has to be made between more than two alternatives—as in more than one constitutional reform—the outcome is likely to be arbitrarily affected by the procedure used to make the choice. See D. Miller, *The Blackwell Encyclopaedia of Political Thought*, Blackwell Reference, Cambridge, 1987, p. 385.

³⁸⁹ James Hurley, *Amending Canada's Constitution: History, Processes, Problems and Prospects*, Minister of Supply and Services Canada, 1996, p. 162.

³⁹⁰ Leydet, p. 253.

³⁹¹ Ronald L. Watts, p. 15.

³⁹² Leydet, pp. 257–258; James Hurley, pp. 164–165.

- To build a consensus it may be desirable to convince the public of the desirability of prioritising one issue or a limited set of issues.
- Public support should be enlisted to proceed on separate tracks with different timetables for separate issues.
- Public involvement in an examination of the proposed constitutional reforms should be made before the ratification (referendum) phase—perhaps through national parliamentary hearings.
- Public ratification by referendum needs to proceed in a timely fashion (within 6 months to a year) while the consensus holds.
- Governments should not attempt to reach agreement prematurely before a consensus has been built or where the public is strongly divided.
- Governments should avoid overloading the constitutional agenda by including several discrete elements in the one package.

The process of constitutional reform in Australia

Overview

No amendment of the Constitution can be made without the concurrence of that double majority – a majority within a majority. These are safeguards necessary not only for the protection of the federal system, but in order to secure maturity of thought in the consideration and settlement of proposals leading to organic changes. These safeguards have been provided, not in order to prevent or indefinitely resist change in any direction, but in order to prevent change being made in haste or by stealth, to encourage public discussion and to delay change until there is strong evidence that it is desirable, irresistible, and inevitable.³⁹³

In 1901, Australia codified and entrenched its constitution—principally an instrument of federation, specifying the make-up of the federal parliament and demarcating the boundaries between the powers of federal government and those of the States.

Section 128 of the Australian Constitution codifies the formal method by which the constitution is to be reformed (amended).³⁹⁴ A proposed constitutional amendment must first be passed by an absolute majority in each (federal) house of the Parliament and then, secondly, passed by way of referendum—not only by a majority of the electors nationally but also by a majority of electors in a majority of the states (four out of the six states). This means that while the Commonwealth Parliament has a monopoly on initiating referenda, the results rest in the hands of the people.

One of the most significant constitutional amendment proposals that progressed to the referendum stage was the republic referendum held in November 1999. The amendment (previously passed in both houses of the Parliament) proposed:

To alter the Constitution to establish the Commonwealth of Australia as a republic with the Queen and the Governor-General being replaced by a President appointed by a two-thirds majority of the members of the Commonwealth Parliament.³⁹⁵

The proposal was rejected by a majority of voters in all six states and nationally by 55 percent to 45 percent. The following reviews the processes of constitutional reform used in Australia for the republic referendum proposal.

Initiating constitutional reform

In 1993, Prime Minister Paul Keating announced his intention to investigate the constitutional reforms necessary for Australia to become a republic. He established a Republic Advisory Committee (RAC) of seven “eminent” Australians to advise on the minimum constitutional changes necessary (not on whether a republic was desirable). Following the advice of the RAC that it was “both legally and practically possible to amend

³⁹³ John Quick and Robert Garran, cited in Michael Kirby, A Centenary Reflection on the Australian Constitution: the Republic Referendum 1999, *The Round Table*, vol. 361, 2001, p. 591.

³⁹⁴ Judicial review and federal-state intergovernmental negotiations are also possible mechanisms of change, but are not discussed here. For a discussion see: Scott Bennett and Sean Brennan, *Constitutional Referenda in Australia*, Research Paper 2, 24 August 1999, Parliamentary Library of Australia, pp. 22–23.

³⁹⁵ *Constitution Alteration (Establishment of Republic) 1999 Act*

the Constitution to achieve a republic”, Mr Keating indicated a republic referendum was likely by 1998 or 1999.³⁹⁶

During the 1996 election campaign, and responding to perceived popular interest in the republic issue, the opposition Liberal and National parties promised, if elected, to establish a People’s Convention to debate the issue.

Public consultation and consensus building

[Former Chief Justice of the High Court, Sir Anthony Mason]

I think the Convention served us well because it provided a great deal of public focus on the critical issue of moving to a Republic, and I think the end result of the Convention will be to some extent at any rate, to make people feel a little more comfortable with a notion of moving to a Republic, and also to feel that the matter was given close attention by the considerable number of delegates who expended time and thought on what is a very important issue.

[Former Chief Justice of the High Court, Sir Harry Gibbs]

One of the most disquieting features about the recent Convention was the talk about having the numbers and doing deals. That’s no way to change the basis of the Constitution. It should be done by procuring general agreement, and when there is general agreement in all the States that they want a Republic, well then, so be it. But until that agreement exists, no-one should try to force it on them.³⁹⁷

Because of the difficulty in passing constitutional referenda in Australia, constitutional conventions are seen as an approach that helps to depoliticise constitutional change and build an effective consensus.

Following the election victory of the Liberal-National Coalition, the Coalition in 1997 enacted legislation to establish and facilitate the functions of a People’s Convention (Constitutional Assembly).³⁹⁸ Of the 152 delegates to the 1998 People’s Convention, 50 percent were directly elected, and 50 percent appointed by Prime Minister Howard. Of the 76 appointed delegates, 40 were federal and state parliamentary representatives including party and opposition leaders. The remaining 36 non-parliamentary delegates included youth, indigenous, women, and church representatives.

The Convention was televised and attracted considerable media and public attention. It was charged with considering three questions: whether Australia should become a republic; which republic model should be put to the voters; what time frame was appropriate.

Although a majority (89 to 52) of the delegates favoured some sort of republic, they were divided over the republican model to be used. Some favoured a “minimalist” model

³⁹⁶ Cited in Michael Kirby, p. 594.

³⁹⁷ Radio National Transcripts: *The Law Report*, Tuesday, 17 February, 1998. Available at: <http://www.abc.net.au/rn/talks/8.30/lawrpt/1stories/lr980217.htm>

³⁹⁸ Australia has previously used constitutional conventions for an elected assembly in 1897-98 where it was instrumental in achieving Federation after decades of debate, and for appointed parliamentary assemblies in 1942, 1973, 1975, 1976, 1978, 1983, and from 1985-1988 where it was used to debate a wide range of reforms (parliamentary terms, fair elections, local government, and rights and freedoms).

whereby the President would be appointed by parliament, similar to the way Australia and New Zealand currently appoint their Governors-General. Others favoured a model whereby the President would be directly elected by the voters. Through negotiation and compromise over 10 working days the Convention recommended by 73 votes to 57 the “Bipartisan Parliamentary Appointment of the President” model by which the President would be elected by a two-thirds majority of parliament.

However, public opinion polls taken over 1998 and 1999 repeatedly showed that support for a parliamentary appointed President was well under 50 percent. An Age/AC Nielsen poll, for example, taken in January 1999, showed support for a republic with an appointed president at 41 percent, although general support for a republic was around 56 percent.³⁹⁹

Undoubtedly, as Chief Justice Mason observed, the Convention served the reform process well by providing a good forum by which to focus public attention on the republic issue. At the same time, the compromise recommendation of the 1998 Convention—the minimalist republic model—appeared to be forged in haste and was not supported by public opinion polls at the time. This may have contributed to cynicism about the motives of the Australian politicians.

Legislative and governmental actions

The Howard Government announced that the recommended proposal of the People’s Convention would be put to the Australian people. The Prime Minister decided in early 1999 that there would be two questions to be decided by referendum—one on the republic and one on a new preamble. Cabinet had final responsibility for the wording of the referendum. This provoked the claim that by failing to mention the Queen the referendum was a “clever selection of words most likely to provoke a negative reaction from people”.⁴⁰⁰

As it was the Howard Government enacted the Constitution Alteration (Establishment of Republic) Bill in 1999. A Premiers Conference was also held in April 1999 to discuss the implications for the states should the referendum succeed. A referendum Taskforce comprising government members and officials was also established.

However, one lesson drawn from the Australian experience appears to be that successful constitutional reform requires affirmative support from the major political parties.⁴⁰¹ Although both the Labor Party and Australian Democrats were formally committed to a republic, the Liberal and National parties were opposed. Further, Prime Minister Howard expressed his own personal preference for the status quo. These partisan positions may have made the public sceptical about the real motives for change—they certainly served to undermine the consensus required at both the national and state levels.

The referendum process

The Australian Constitution requires a referendum to be held on constitutional issues. The Referendum (Machinery Provisions) Act 1984 provides the machinery for conducting referenda in Australia. Normally before a referendum, each elector receives a pamphlet

³⁹⁹ *The Age*, 26 January 1999.

⁴⁰⁰ A. Robb, *An Australian Head of State...a Small, yet Symbolic Step*, National Press Club, 29 March, 1999, p. 4.

⁴⁰¹ Michael Kirby, p. 595.

outlining the arguments for and against the proposal. In the case of the referendum on the republic, the Government appointed two separate publicly funded committees: the Australian Republican Movement (ARM) who championed the YES case; and Australians for a Constitutional Monarchy (ACM) championing the NO case. Each committee received \$7.5 million to fund their media campaigns, while a further \$4.5 million was provided to fund a separate public education campaign. In total, the referendum was estimated to cost \$79 million.

A number of problems have been identified with the referendum process in Australia. Of 42 amendment proposals put to referenda between 1906 and 1999, only eight have been ratified by the Australian people. Such a large proportion of rejections has been variously attributed to the amending mechanism, the reform process, and the “instinctive constitutional conservatism” of the Australian people.⁴⁰² Concerns have been expressed, for example, about the ability of voters to appreciate the complex and sometimes technical issues involved in constitutional issues.

... objective assessment of constitutional problems as such is an abstract, complex, technical business for which the average citizen is usually ill-equipped and disinclined, while the problems may be so complicated as to be ill-suited to a simple and satisfying ‘Yes’ or ‘No’ vote.⁴⁰³

Others dismiss such claims as elitist and observe that the rejection of referenda has more to do with those responsible for the wording and framing of the referenda questions. In the 1994 Australian *Powers* referendum, for example, voters were asked to vote yes or no on just one question that encompassed a vast range of policy areas including laws for Aboriginal people, the granting of family allowances, safeguarding of freedom of speech, expression, and religion. Voters approving of one or two measures but objecting to a third or fourth were therefore forced to reject or accept in total the proposed reforms.

Some of these issues can be seen in the 1999 referendum process. The republic issue as presented in the pamphlet to electors tended to reproduce partisan positions rather than provide a reasonably factual outline of the pros and cons.⁴⁰⁴ Secondly, the advertising campaigns of ARM appeared condescending to many electors with little detailed or even basic information on what the reform would mean. Thirdly, the media bias favouring a republic may have reinforced the perception amongst lower income and rural electors that the push for a republic was in the interests of “intellectual, well-off east coasters”.⁴⁰⁵

Although the process of constitutional reform is codified, there were also opportunities for partisan interests to influence the referenda process in 1999—such as the lack of government support for the republic proposal, governmental control of the referendum wording and campaign funding, the lack of bipartisan support, and limited federal-state consensus seeking.

⁴⁰² See Bennett and Brennan; Kirby.

⁴⁰³ Cited in Scott Bennett and Sean Brennan, p. 15.

⁴⁰⁴ Professor John Warhurst, *From Constitutional Convention to Republic Referendum: A Guide to the Processes, the Issues and the Participants*, Research Paper 25, 1999, Parliamentary Library of Australia. Available at: <http://www.aph.gov.au/library/pubs/rp/1998-99/99rp25.htm>

⁴⁰⁵ Michael Kirby, p. 599.

Although the amendment process took over 5 years, Australians may have seen the process as artificially hastened to coincide with the centenary of federation in 2001, and many did not see the reform as urgent. Constitutional reform appears to be possible only when it is “desirable, irresistible, and inevitable.”⁴⁰⁶

⁴⁰⁶ Cited in Michael Kirby, p. 591.

The process of constitutional reform in the United Kingdom

Overview

The United Kingdom's constitution is similar to New Zealand's in being a number of laws, principles and conventions rather than a single document. Constitutional reform in theory can be executed simply through an Act of Parliament, but in reality there are conventions in place which shape the process of constitutional reform. As a generalised observation, the system for constitutional reform can be said to have three phases:

1. Initiating constitutional change: Public acceptance is gained through the electoral process, with proposals outlined in a political party manifesto.
2. Consultation: Government proposals from the manifesto can be given more definite form through independent inquiries or a royal commission. Since 2000 most government policy proposals are taken through a formal 12-week public consultation process.
3. Legislative process: The government takes the proposals to Parliament to be enacted into legislation. This process can involve negotiation and modification of bills due to the second chamber revising legislation and a desire to achieve consensus on constitutional issues.

Since 1997 the Labour Government has introduced wide ranging constitutional reform. While the push for constitutional reform affects almost every area of the state, it is not uniform. Lord Irvine of Lairg, in introducing the Labour Government's plans for reform has stated:

Intellectually satisfying neatness and tidiness is not the cement which makes new constitutional arrangements stick. What sticks are arrangements to which people can give their continuing consent because they satisfy their democratic desires for themselves.⁴⁰⁷

On the whole, the system is marked by a desire for incremental reform and compromise. The approach is to identify particular elements, and assess how they can be improved. Lord Irvine stated that the Government's approach is that

Pragmatism and compromise, where they promote the smooth evolution of our constitutional arrangements, are in the British tradition.⁴⁰⁸

Initiating constitutional reform

The initial impetus for constitutional change in the United Kingdom can come from a number of sources. The usual impetus for constitutional change is for a political party to acquire a clear mandate from the electorate through approval of its manifesto in a general election. Labour, in its 1997 manifesto, outlined its intention to bring about modernisation of the British constitution. The manifesto clearly notified the public of its intention to implement constitutional reforms, such as to hold referenda on devolution for Scotland and Wales, an enquiry on electoral reform, and to end the right of hereditary peers to sit

⁴⁰⁷ Lord Irvine of Lairg, *Government's Programme of Constitutional Reform: Lecture to the Constitution Unit*, 8 December 1998, <http://www.dca.gov.uk/speeches/1998/lc-const.htm>

⁴⁰⁸ Lord Irvine of Lairg, *Government's Programme of Constitutional Reform: Lecture to the Constitution Unit*, 8 December 1998, <http://www.dca.gov.uk/speeches/1998/lc-const.htm>

and vote in the House of Lords by statute and to undertake a review of further reform of the Lords.⁴⁰⁹

Academia and pressure groups, such as the Scottish Constitutional Convention, the Electoral Reform Society, Charter 88 and the Constitution Unit of University College London play an important role in commenting and advising on constitutional matters.⁴¹⁰ For example, the Commission on the Conduct of Referendums (the Nairne Commission), an independent commission established jointly by the Constitution Unit and the Electoral Reform Society in 1996, was to be influential for later government policy on how to hold referenda.⁴¹¹

The next stage in this process is for government to refine various proposals for change. The role of the Lord Chancellor is important in coordinating the different branches of government in formulating proposals, and he “may well discuss emerging issues with outside bodies” at this point.⁴¹² Informal consultation before the government commences the process of constitutional reform is important. For example, proposals on Scottish devolution were assisted by contributions made by the Scottish Constitutional Convention, or contributions made to government by NGOs on human rights legislation.

In June 2003 wide-ranging proposals to reform the judiciary, including abolishing the office of Lord Chancellor and establishing a Supreme Court, were announced by the Government without any preceding consultation. Announcing substantial constitutional reforms without warning led to criticism, from senior members of the judiciary, of how the Government had begun the process, and opposition to its proposals.⁴¹³ The Lord Chief Justice, Lord Woolf, criticised the manner in which the Government’s proposals were announced without prior consultation.

“The fact that changes of the scale now taking place can be decided upon without legislation by the announcement of a policy decision by a Government with a very large parliamentary majority is disturbing. It does suggest additional constitutional protection may be necessary.”⁴¹⁴

⁴⁰⁹ Labour Party, *New Labour because Britain Deserves Better*, 1997, <http://www.psr.keele.ac.uk/area/uk/man/lab97.htm>

⁴¹⁰ http://www.almac.co.uk/business_park/scc/; <http://www.electoral-reform.org.uk/>; <http://www.charter88.com>; <http://www.ucl.ac.uk/constitution-unit/>

⁴¹¹ *Report of the Commission on the Conduct of Referendums*, 1996, Commission on the Conduct of Referendums, London.

⁴¹² House of Lords Constitution Committee 2002, 4th report, *Changing the Constitution: the Process of Constitutional Change, with Evidence*, HL 69, <http://www.publications.parliament.uk/pa/ld200102/ldselect/ldconst/69/6903.htm>

⁴¹³ Dawn Oliver, Constitutionalism and the Abolition of the Office of Lord Chancellor, *Parliamentary Affairs*, vol. 57, no. 4, October 2004, pp.754–766; Sue Prince, The Law and Politics: Upsetting the Judicial Apple-Cart, *Parliamentary Affairs*, vol. 57, no. 2, April 2004, pp.288–300; Confusion Reigns over Cabinet Shake-up, *BBC news*, 13 June 2003, http://news.bbc.co.uk/1/hi/uk_politics/2985670.stm; Judges’ Fears over Supreme Court Plan, *The Guardian*, 7 November 2003, <http://www.guardian.co.uk/guardianpolitics/story/0,3605,1079547,00.html>; Top Judge Stays to Fight Politicians”, *The Times*, 1 August 2003, <http://www.timesonline.co.uk/article/0,,2-763429,00.html>; How do You Judge Independence, *The Telegraph*, 20 November 2003, <http://www.telegraph.co.uk/news/main.jhtml?xml=%2Fnews%2F2003%2F11%2F20%2Fnlaw20.xml>

⁴¹⁴ Lord Woolf,, *Lionel Cohen Lecture*, 2 December 2003, <http://www.dca.gov.uk/judicial/speeches/lcj021203.htm>

Public consultation and consensus building

Once the government has completed formulation of its proposals, a number of mechanisms are employed to consult the public and provide public input into the process of constitutional change.

Since 2000 the Government has adopted a formalised system of public consultation with the establishment of a system of consultation papers outlining proposed policy and a set period for public responses.⁴¹⁵ The intent of this is to ensure that all stakeholders are consulted and their views incorporated into the policy making process. Policy proposals regarding the constitution are managed by the Department for Constitutional Affairs.⁴¹⁶ This is done through publication of a consultation paper. The Department for Constitutional Affairs produces a wide range of consultation papers. For example, following the announcement of proposals to reform the judiciary in June 2003, four consultation papers were produced on reforming the office of Lord Chancellor, a new way of appointing judges, a Supreme Court for the United Kingdom, and the future of Queen's Counsel.⁴¹⁷ A consultation paper has a section explaining the need for change, the government's proposals, a summary of issues the government would like responses on, and a list of consultee groups.⁴¹⁸ A consultation process of at least 12 weeks is recommended by the Cabinet Office to be available for the public to make submissions.⁴¹⁹ After the consultation process, the government publishes summaries of the consultation and a response outlining the policy. This important change in establishing a formalised public consultation process for constitutional reform (and other important bills) has occurred as a result of changes in government regulation through the Cabinet Office rather than any legislative action.

Another part in the constitutional reform process in the United Kingdom can be the creation of commissions of inquiry or independent reviews. This can provide the government with guidance on potentially difficult or contentious issues and a means of gauging public opinion. A number of working parties and independent inquiries were launched soon after Labour took power in 1997, following from commitments made in the Labour election manifesto, such as to consider holding a referendum on the voting system of the House of Commons and to inquire into further reform of the House of Lords.⁴²⁰ Some of these inquiries led to legislative change, such as the Committee on Standards in

⁴¹⁵ <http://www.cabinetoffice.gov.uk/regulation/consultation-guidance/content/plan/diag2.asp>

⁴¹⁶ <http://www.dca.gov.uk/constitution.htm>

⁴¹⁷ <http://www.dca.gov.uk/constitution/reform/pubs.htm>

⁴¹⁸ For example, *Constitutional Reform: a Supreme Court for the United Kingdom: a Department for Constitutional Affairs Consultation Paper 2003*, Department for Constitutional Affairs, London.

<http://www.dca.gov.uk/consult/supremecourt/index.htm>; Falconer consults on constitutional reform, 14 July 2003, Department for Constitutional Affairs,

<http://www.gnn.gov.uk/content/detail.asp?ReleaseID=59092&NewsAreaID=2&NavigatedFromSearch=True>

⁴¹⁹ <http://www.cabinetoffice.gov.uk/regulation/consultation-guidance/content/plan/index.asp>

⁴²⁰ Independent Commission on the Voting System 1998, *Report* (R Jenkins, Chair), Cm 4090 <http://www.archive.official-documents.co.uk/document/cm40/4090/contents.htm>; Working Party on Electoral Procedures 1999, *Final Report* (G Howarth, Chair), Home Office, http://www.odpm.gov.uk/stellent/groups/odpm_localgov/documents/page/odpm_loggov_605342.hcsp; Committee on Standards for Public Life 1999, *5th Report, Standards in Public Life: the Funding of Political Parties in the United Kingdom*, Cm 4057. http://www.public-standards.gov.uk/reports/5th_report/report5.htm

Public Life's report on *The Funding of Political Parties in the United Kingdom* (the Neill Committee) which led to the Political Parties, Elections and Referendums Act 2000.⁴²¹

Other enquiries have not led to immediate constitutional change. For example, the Royal Commission on the Reform of the House of Lords (the Wakeham Commission) served as the basis of government proposals for the Lords (though with some critical changes).⁴²² However, the Wakeham Commission, to a great extent, represented a cautious approach to Lords reform and something of a compromise between those who wanted an elected Lords and those who wanted an appointed Lords.⁴²³ The Wakeham Commission's proposals met with hostility, especially from those demanding an elected upper chamber, and the Government has been unable to use the Wakeham Commission as a basis to bring about further reform of the Lords.⁴²⁴

The referendum process

Referenda have not been widely used in the United Kingdom. However, the Labour Government was elected in 1997 with a commitment to devolution of Scotland and Wales, and for referenda on the matter in those countries. Initially, the Labour Party was of the view that a mandate provided through winning the general election would be sufficient to introduce devolution, but it changed this view to one of holding a referendum before attempting legislation of devolution.⁴²⁵ In the parliamentary debate on the Referendums (Scotland and Wales) Bill 1997, referenda were argued to be an essential step in testing public opinion and for establishing an unmistakable mandate for a government to take its proposals for devolution through Parliament, and as a means of establishing consent to and legitimacy of the devolved governments. The Government released White Papers on its proposals for devolution, then referenda were held in Wales and Scotland. With majority support in the referenda, the Government in Westminster then enacted legislation to allow for the creation of devolved governments.

Since then, the Government has brought in legislation allowing other local authorities to hold referenda on the structure of their local government.⁴²⁶ Referenda were also planned in each region of England for proposed English regional assemblies. The process planned was for referenda to be first held in regions where there was apparently an interest in

⁴²¹ *The Funding of Political Parties in the United Kingdom: the Government's Proposal for Legislation in Response to the Fifth Report of the Committee on Standards in Public Life*, 1999, Cm 4413. <http://www.archive.official-documents.co.uk/document/cm44/4413/4413-01.htm>

⁴²² *The House of Lords: Completing the Reform. A Government White Paper Presented to Parliament by the Prime Minister By Command of Her Majesty*, 2001, Cm 5291, <http://www.dca.gov.uk/constitution/holref/holreform.htm>

⁴²³ Pat Strickland and Richard Cracknell, *Lords Reform: Major Developments Since the House of Lords Act 1999*, 2000, House of Commons Library, <http://www.parliament.uk/commons/lib/research/rp2000/rp00-060.pdf>; Lords Reform Stage Two: Wakeham or What?, *Monitor: The Constitution Unit Bulletin*, issue 17, December 2001; Elect the Lords, *The Economist*, 22 January 2000.

⁴²⁴ Pat Strickland and Richard Cracknell, *House of Lords Reform: Developments since 1997*, 2001, House of Commons Library, <http://www.parliament.uk/commons/lib/research/rp2001/rp01-077.pdf>; Philip Cowley and Mark Stuart, Parliament: More Revolts, More Reform, *Parliamentary Affairs*, vol. 56, no. 2, April 2003, pp. 188–204; Robert Hazell, Oonagh Gay, Alan Trench, Simon King, Mark Sandford., Roger Masterman. and Lucinda Maer, The Constitution: Consolidation and Cautious Advance, *Parliamentary Affairs*, vol. 56, no. 2, April 2003, pp. 157–169.

⁴²⁵ *Record of Proceedings: Evidence to the Richard Commission by Professor Robert Hazell, 24 October 2002*, <http://www.richardcommission.gov.uk/content/evidence/oral/rhazel/>

⁴²⁶ *Local Government Act 2000*, <http://www.hms.gov.uk/acts/acts2000/20000022.htm>

holding a referendum on a regional assembly.⁴²⁷ The referendum was considered to be necessary to demonstrate public support for a regional assembly. However, this process appears to have been stalled after the first referendum, for a North East regional assembly, was comprehensively rejected in November 2004.⁴²⁸

In 2000 the referendum process was placed on a more formalised basis with the Political Parties, Elections and Referendums Act 2000.⁴²⁹ This Act resulted from the recommendations in the Neill Committee's report and a following government White Paper in 1999.⁴³⁰ An independent body, the Electoral Commission, ensures the referendum question is easily intelligible, monitors expenditure limits of organisations involved in the campaign (to ensure a "level playing field"), and makes available grants to designated organisations (to ensure the case for both sides is properly put to the public). In addition the government of the day is forbidden to publish material relating to the referendum within 28 days leading up to the poll.

However, the decision whether to hold a referendum is due more to political considerations than constitutional principle. A referendum on the euro was promised by the Conservatives in 1996, partly due to a belief that fundamental constitutional change requires the consent of the people and partly because it was a way of managing deep divisions within the Conservative Party. The Labour Party initially took the view that a general election result was a sufficient mandate, but later followed suit as public opinion clearly favoured a referendum.⁴³¹ A referendum is also promised sometime in 2006 to approve the European Union's constitution. The British Government had argued that because the European Union's constitution did not affect parliamentary sovereignty, a referendum was not needed. According to Prime Minister Blair in 2003, "There is a proper place where this constitution can be debated. It is Parliament."⁴³² However, with popular opinion strongly in favour of a referendum, the position was reversed in April 2004, when the Prime Minister announced that a referendum on the European Union's constitution would be held.⁴³³

It has been observed that with referenda promised on the euro, electoral reform and the constitution, "National referendums are becoming a de facto convention in cases of constitutional change", but that the decision whether to go down the path of having a

⁴²⁷ *Your Region, Your Choice: Revitalising the English Regions: a White Paper*, 2002, Cm 511, http://www.odpm.gov.uk/stellent/groups/odpm_control/documents/contentservertemplate/odpm_index.hcst?n=2799&l=1

⁴²⁸ Elected Regions Hit the Buffers, *Monitor: the Constitution Unit Bulletin*, issue 29, January 2005; Regions at the Crossroads, *Monitor: the Constitution Unit Bulletin*, issue 28, September 2004.

⁴²⁹ *Political Parties, Elections and Referendums Act 2000*, <http://www.hms.gov.uk/acts/acts2000/20000041.htm>

⁴³⁰ *Committee on Standards for Public Life 1999, 5th Report, Standards in Public Life: the Funding of Political Parties in the United Kingdom*, Cm 4057, <http://www.archive.official-documents.co.uk/document/cm40/4057/4057.htm>; *The Funding of Political Parties in the United Kingdom: the Government's Proposal for Legislation in Response to the Fifth Report of the Committee on Standards in Public Life*, 1990, Cm 4413, <http://www.archive.official-documents.co.uk/document/cm44/4413/4413-01.htm>

⁴³¹ The UK and referendums, *BBC news*, 3 January 2002, http://news.bbc.co.uk/1/hi/uk_politics/1714318.stm; Major wins battle for referendum, *The Times*, 3 April 1996; Clarke Gives Way to Pressure for Referendum Pledge, *The Times*, 4 April 1996; Labour U-turn Shatters Tory Truce on EMU, *The Times*, 18 November 1996; How to Run a Referendum, *The Economist*, 23 November 1996.

⁴³² Tracking Blair's EU Comments, *BBC news*, 19 April 2004, http://news.bbc.co.uk/1/hi/uk_politics/3638491.stm

⁴³³ Tracking Blair's EU Comments, *BBC news*, 19 April 2004, http://news.bbc.co.uk/1/hi/uk_politics/3638491.stm; I Apologised to Cabinet over EU Poll, Admits PM, *The Times*, 29 April 2004.

referendum was due largely to political expediency rather than any constitutional principle.⁴³⁴

Government and legislative actions

A bill of a constitutional nature passes through Parliament in the same manner as any other bill. However, government may seek cross-party support for a bill involving significant change to the constitution, though some bills of constitutional importance are bitterly contested by the parties.⁴³⁵ Passage of a constitutional bill will also generally take longer to pass through the Houses, especially the Lords, as it will attract considerably more scrutiny than other bills. Passage of a bill can require substantial modification and negotiation. For example, the government's bill to abolish the hereditary Lords completely had to be modified to a compromise position following secret negotiations between Conservative peers and the Government. Opposition from the Lords to aspects of the Constitutional Reform Bill, in particular concerning the role of the Lord Chancellor, forced the Government to incorporate a number of amendments into the eventual Act.⁴³⁶

The Constitutional Affairs Committee in the House of Commons was established in 2003 to examine the expenditure, policy and administration of the Department for Constitutional Affairs and associated public bodies.⁴³⁷ The Constitution Committee in the House of Lords was established in 2001 to examine the constitutional implications of bills coming before the House, and to keep under review the operation of the constitution.⁴³⁸ Extensive scrutiny of constitutional matters by select committees is considered important as the United Kingdom lacks a written constitution. Indeed, Robert Hazell describes the House of Lords Constitution Committee, together with the House of Lords Select Committee on Delegated Powers and Regulatory Reform and the Joint Committee on Human Rights as the “new pillars of the constitution” in their ability to vet all bills for their adherence to constitutional and legal values.⁴³⁹

There is also the option for an ad hoc select committee to examine an issue and attempt to build a consensus on the subject. The recent example of this has been the Joint Select Committee on House of Lords Reform, created in 2002 after it had become apparent that there was an “absence of common ground on which to found proposals for change in the long-term composition of the second chamber.”⁴⁴⁰ Since then, the Joint Select Committee has released two reports on House of Lords reform.⁴⁴¹

⁴³⁴ After Thirty Years, the UK Again Faces a Referendum, *Monitor: the Constitution Unit Bulletin*, issue 27, June 2004; Rules and Referendums, *The Economist*, 24 October 1998.

⁴³⁵ House of Lords Constitution Committee 2002, 4th report, *Changing the Constitution: the Process of Constitutional Change, with Evidence*, HL 69, <http://www.publications.parliament.uk/pa/ld200102/ldselect/ldconst/69/6903.htm>

⁴³⁶ Robert Hazell, Meg Russell, Ben Seyd, and David Sinclair, The British Constitution in 1998–99: the Continuing Revolution, *Parliamentary Affairs*, vol. 53, no. 2, April 2000, pp. 242–261; Peers Defeat Judicial Reform Plan", *BBC news*, 15 March 2005, http://news.bbc.co.uk/1/hi/uk_politics/4352047.stm

⁴³⁷ http://www.parliament.uk/parliamentary_committees/conaffcom.cfm

⁴³⁸ http://www.parliament.uk/parliamentary_committees/lords_constitution_committee.cfm

⁴³⁹ Robert Hazell, Who is the Guardian of Legal Values in the Legislative Process: Parliament or the Executive?, *Public Law*, Autumn 2004.

⁴⁴⁰ Joint Committee on House of Lords Reform 2003, *Second report*, HL 97, <http://www.parliament.the-stationery-office.co.uk/pa/jt200203/jtselect/jtholref/97/9702.htm>; Lucinda Maer, Robert Hazell, Simon King, Meg Russell, Alan Trench, and Mark Sandford. The Constitution: Dragging the Constitution out of the Shadows?, *Parliamentary Affairs*, vol. 57, no. 2, April 2004, pp. 253–268.

⁴⁴¹ http://www.parliament.uk/parliamentary_committees/joint_committee_on_house_of_lords_reform/joint_committee_on_house_of_lords_reform_reports_and_publications.cfm

The process of constitutional reform in Ireland

Overview

Ireland adopted a written constitution in 1937, partly as a conscious attempt to found the Irish republic (as opposed to inheriting the polity from British rule). The constitution was endorsed by plebiscite.⁴⁴² Because the constitution was in a sense created by the will of the people, it can therefore only be changed through a referendum of the people:

In Ireland the referendum is a well established feature of the political landscape. The legitimacy of our Constitution flows from its enactment by people in a referendum. The logical corollary is that if the Constitution is legitimated through enactment by the people, any change in the Constitution must be legitimated in the same manner.⁴⁴³

The constitution sets out the basis of the Irish State, the presidency, the Oireachtas (national parliament), government, international relations, the courts and fundamental rights, as well as specifying the conditions under which the constitution can be changed. There have been 23 amendments to the Irish Constitution since its enactment in 1937. There have been four since 2001.⁴⁴⁴ Other proposed amendments, on abortion or the first referendum on the Nice Treaty, have been rejected in referendum.

Initiating constitutional change

Demands to change the constitution can come from Irish Supreme Court decisions, notably when the Supreme Court in 1992 interpreted the constitutional ban on abortion in such a way as to allow an abortion if the mother was likely to commit suicide. This led to a legal conundrum in that the Court had placed protection of the life of the mother over the constitutional ban on abortion. This also led to demand from anti-abortion campaigners to change the constitution to tighten the provisions banning abortion. A referendum was agreed to after political negotiations between the minority ruling Fianna Fail Party and conservative independent MPs in 2002 (which failed in a referendum for the 25th amendment of the Constitution).⁴⁴⁵

Since 1987, all treaties impinging upon Irish sovereignty have to be submitted to a referendum. This arose from a Supreme Court decision, *Crotty v An Taoiseach* (1987) in which the Court found that any restriction on sovereignty was outside the constitution and required a referendum.⁴⁴⁶ Since then, all major EU treaties have required an amendment to the constitution—the Single European Act (1987), Maastricht Treaty (1992), Amsterdam Treaty (1998) and the Nice Treaty (2001 and 2002). Irish accession to the International Criminal Court has also required an amendment to the constitution (2001).

⁴⁴² John A. Murphy, The 1937 Constitution: Some Historical Reflections, in *Ireland's Evolving Constitution*, eds Tim Murphy and Patrick Twomey, Hart Publishing, Oxford, 1998.

⁴⁴³ All-Party Oireachtas Committee on the Constitution 2001, *Sixth Progress Report: the Referendum*, Stationery Office, Dublin, p. 5, http://www.taoiseach.gov.ie/attached_files/upload/publications/475.pdf

⁴⁴⁴ <http://www.oireachtas.ie/ViewDoc.asp?fn=/documents/bills28/acts/default.htm&CatID=53&m=1> provides lists of Acts passed by the Oireachtas including amendments to the Constitution.

⁴⁴⁵ Politicians Brace Themselves for Bitter Abortion Fight, *Irish Examiner*, 31 January 2002; Ahern May be Forced to Hold Early Abortion Poll, *Irish Examiner*, 23 July 2001.

⁴⁴⁶ Ann Sherlock, Constitutional Change, Referenda and the Courts in Ireland, *Public Law*, Spring 1997, pp. 125–136.

Government and legislative actions

The All-Party Oireachtas Committee on the Constitution, comprising members of both the Dáil (lower house) and the Seanad (upper house), was established in 1997 to provide focus to the place and relevance of the constitution and to establish areas where constitutional change may be desirable or necessary.⁴⁴⁷ The committee hears public submissions on issues, and has written a number of reports recommending to the government possible constitutional amendments.

A proposal to amend the constitution must be initiated in the Dáil as a bill. The bill is to be expressed “An Act to amend the Constitution”, and must not contain any proposal except for the proposed amendment to the Constitution (meaning the bills are invariably very short). Once passed by both Houses of the Oireachtas, the bill must be submitted by referendum to the decision of the people.

Public consultation and consensus building

The public consultation process for a referendum is prescribed by decisions of the Irish Supreme Court. The Irish government is forbidden to use public funds to campaign to influence voters one way or the other in a referendum following a 1995 Irish Supreme Court decision. The Referendum Commission is funded to promote a public awareness campaign and to encourage people to vote.⁴⁴⁸

Public campaigning for referenda has often had to overcome considerable voter apathy and lack of interest. This was especially the case with the referendum on the Treaty of Nice in June 2001, when, despite a public education campaign of £2.5 million by the Referendum Commission, many Irish voters were put off by the complexity of the issues and the impenetrable jargon of the Brussels bureaucracy.⁴⁴⁹

After the rejection of the Nice Treaty in 2001, there were concerns expressed at the effectiveness of the arrangements that had evolved, and of the ability of Irish voters to fully comprehend the complexity of referendum issues, especially those concerning international treaties. The All-Party Committee of the Oireachtas, in reviewing the 2001 referendum, commented that the Referendum Commission, in presenting both arguments in such a neutral way “leads to leaden rather than lively presentation.... The engagement of the commission directly in the campaign tends to weaken the sense that the political parties and the interest groups should be the protagonists in the debate.”⁴⁵⁰ As a result, the role of presenting both sides of the argument and fostering debate and discussion on the referendum subject was removed from the Referendum Commission, and government funding to both sides of the referendum debate through the Referendum Commission was removed.

⁴⁴⁷ All-Party Oireachtas Committee on the Constitution, *Sixth Progress Report: the Referendum*, 2001, Stationery Office, Dublin. http://www.taoiseach.gov.ie/attached_files/upload/publications/475.pdf

⁴⁴⁸ All-Party Oireachtas Committee on the Constitution, *Sixth Progress Report: the Referendum*, 2001, Stationery Office, Dublin. http://www.taoiseach.gov.ie/attached_files/upload/publications/475.pdf

⁴⁴⁹ All-Party Oireachtas Committee on the Constitution, *Sixth Progress Report: the Referendum*, 2001, Stationery Office, Dublin, p. 17, http://www.taoiseach.gov.ie/attached_files/upload/publications/475.pdf; Vaughne Miller, *The Irish Referendum on the Treaty of Nice*, 2001, House of Commons Library, <http://www.parliament.uk/commons/lib/research/rp2001/rp01-057.pdf>

⁴⁵⁰ All-Party Oireachtas Committee on the Constitution, *Sixth Progress Report: the Referendum*, 2001, Stationery Office, Dublin, p. 25, http://www.taoiseach.gov.ie/attached_files/upload/publications/475.pdf

The rejection of the Nice Treaty in 2001 led to a second referendum in 2002. In October 2001, the Government established the National Forum on Europe to facilitate discussion of EU issues.⁴⁵¹ The Forum includes members of the Oireachtas, members of the European Parliament, and people nominated by political parties. For the 2002 referendum the Forum heard submissions from the public, and travelled Ireland holding public meetings in an effort to promote debate and awareness of the referendum. It has been questioned how effective this was however, “since it consisted almost exclusively of people and groups with a prior interest in European issues, talking to each other, it is questionable whether the Forum’s establishment accounts for any of the difference between the two referendum results.”⁴⁵²

There was a more focused government campaign on the Nice Treaty, including clear guides sent to voters on the Nice Treaty to broaden public understanding on the issues. In addition, without public funding being made equally available to both sides, the “Yes” campaign (able to draw on considerable private support from generally pro-European business) was able to outspend the “No” campaign by a considerable margin.⁴⁵³

The referendum process

A Referendum Commission that is brought into effect before a referendum and wound up after the referendum oversees referenda. The primary role of the Referendum Commission is to explain the subject matter of referendum proposals, to promote public awareness of the referendum and to encourage the electorate to vote at the poll. The Referendum Commission is an independent body. The Chairman of the Commission is a former judge. The other members of the Commission are the Clerk of the Dáil, the Clerk of the Seanad, the Ombudsman and the Comptroller and Auditor General. The Referendum Commission is independent in its actions and is supported by a secretariat from the Office of the Ombudsman.⁴⁵⁴

Turnout for referenda is not high. In 2001 the referendum on the Nice Treaty attracted a turnout of only 33 percent.⁴⁵⁵ In the following year, the turnout was less than 50 percent of voters.⁴⁵⁶

⁴⁵¹ <http://www.forumoneurope.ie/>

⁴⁵² Karin Gilland, *Ireland's Second Referendum on the Treaty of Nice, October 2002*, Referendum Briefing no. 1, Opposing Europe Research Network, Falmer, <http://www.sussex.ac.uk/sei/documents/irelandno1.pdf>

⁴⁵³ Yes Side Spend Far Outweighs That of No Promoters, 7 October 2002, *Irish Times*, <http://www.forumoneurope.ie/index.asp?locID=210&docID=514>

⁴⁵⁴ <http://www.refcom.ie/RefCom/real/ref.nsf/PageCurrent/AboutUsNotes?OpenDocument>

⁴⁵⁵ Ireland Rejects EU Expansion, *BBC news*, 8 June 2001, <http://news.bbc.co.uk/1/hi/world/europe/1376379.stm>

⁴⁵⁶ Ireland Backs EU Expansion, *BBC news*, 20 October 2002, <http://news.bbc.co.uk/1/hi/world/europe/2344193.stm>

The process of constitutional reform in Israel

Overview

Under the Declaration of the Establishment of the State of Israel, proclaimed in 1948, a draft constitution was to be prepared by a constitutional committee and to be adopted by an elected constituent assembly. After convening in 1949, the Constituent Assembly instead converted itself into the first Knesset.⁴⁵⁷ The assembly could not agree on a comprehensive written constitution, partly out of fear that a constitution would create conflict between religious and state authorities, partly out of a belief that a rigid constitution was inappropriate for a dynamic new society.

Though it deals with the establishment of the State, its nature and principles and the rights of its citizens, the Declaration of the Establishment of the State of Israel is not a constitution.⁴⁵⁸ However, courts interpret the law in the light of the Declaration. According to Justice Z. Berenson:

The legal force [of the Declaration] exists in the [rule] that every legal provision should be interpreted in its light and to the extent possible, in keeping with its guiding principles and not contrary thereto. However, when an explicit statutory measure of the Knesset leaves no room for doubt, it should be honored even if inconsistent with the principles in the Declaration of Independence.⁴⁵⁹

The Israeli solution to the lack of a constitution has been a “building-block” method. In 1950 the Knesset passed a compromise resolution, known as the “Harari resolution”, approving a constitution in principle but postponing its enactment until a future date. The resolution stated that the constitution would be evolved “incrementally, in such a way that each section shall be a freely standing Basic Law. The sections shall be presented to the Knesset insofar as the committee completes its work, and all of the sections shall be combined into the Constitution of the State.” There are eleven Basic Laws passed by the Knesset.⁴⁶⁰

The Human Dignity and Liberty and Freedom of Occupation Basic Laws both state in their preamble that Israel is founded on respect for human rights and the principle that all people are free. According to Chief Justice Aharon Barak, the passage of these two laws amounted to a constitutional revolution in that it allowed the High Court of Justice to override laws that conflicted with the principles espoused in the Basic Laws.⁴⁶¹

There is nothing to stop the Knesset from simply changing the Basic Laws through a new Act of the Knesset.

⁴⁵⁷ <http://www.jewishvirtuallibrary.org/jsource/History/decind.html>

⁴⁵⁸ http://www.knesset.gov.il/description/eng/eng_mimshal_hoka.htm

⁴⁵⁹ <http://www.jewishvirtuallibrary.org/jsource/History/decind.html>

⁴⁶⁰ <http://www.idi.org.il/english/article.asp?id=1425>;

<http://www.jewishvirtuallibrary.org/jsource/Politics/basicloc.html>;

http://www.knesset.gov.il/description/eng/eng_mimshal_hoka.htm#4; *Israel Yearbook and Almanac*, 1998, vol. 52, pp. 106-107

⁴⁶¹ Hillel Neuer, *Aharon Barak's revolution*, <http://www.daat.ac.il/daat/ezrachut/english/hillel.htm>; *Israel Yearbook and Almanac*, 1998, vol. 52, pp. 259-260; http://www.knesset.gov.il/description/eng/eng_mimshal_yesod.htm

Initiating constitutional change

Recent changes to the Basic Laws have been due to political instability, in particular the ability of minor parties to wield excessive influence. This led to proposals for a more presidential system by an umbrella organisation, the Public Committee for a Constitution for Israel, various academics and Knesset members during the late 1980s and early 1990s.⁴⁶²

Government and legislative actions

The process of legislating Basic Laws is no different to that of legislating an ordinary law by the Knesset.⁴⁶³ Some Basic Laws contain a degree of protection in that they cannot be affected by emergency regulations.⁴⁶⁴ For example, the Basic Law: Human Dignity and Liberty cannot be varied, suspended or amended by emergency regulations except under particular declarations and “provided the denial or restriction shall be for a proper purpose and for a period and extent no greater than required.”⁴⁶⁵

There have been numerous amendments and even wholesale replacements of the Basic Laws. The Basic Laws are susceptible to change through a majority of the Knesset enacting an amendment or a new Act. As recently as December 2004, the Knesset rejected an attempt by the Government to amend the Basic Law: The Government to allow Shimon Peres to become the second Deputy Prime Minister.

The referendum process

No national referenda have been held in Israel. A referendum was considered during the term of Prime Minister Yitzhak Rabin over a withdrawal from the Golan Heights in return for peace with Syria.⁴⁶⁶ Peace negotiations with Syria collapsed, but in 1999 the Knesset passed a law calling for a national referendum before any withdrawal from the Golan Heights. When peace negotiations with Syria resumed, it triggered a debate in the Knesset about how the referendum would be conducted, but the collapse of peace talks meant the issue lapsed.

As part of the continuing debate over Sharon's peace plan, opponents of the withdrawal have proposed a national referendum as a means to delay the disengagement plan. However, the proposal was defeated in the Knesset in March 2005.⁴⁶⁷

⁴⁶² Reuven Y. Hazen, Changing Israel's Constitution: Direct Popular Election of the Prime Minister, in *Voting and Democracy Report: 1995*, Center for Voting and Democracy; <http://www.fairvote.org/reports/1995/chp7/hazen.html>

⁴⁶³ http://www.knesset.gov.il/description/eng/eng_work_mel2.htm

⁴⁶⁴ *Basic Law: The Judiciary*, section 22; *Basic Law: The Knesset*, section 44; *Basic Law: The President of the State*, section 25; *Basic Law: Freedom of Occupation*, section 6.

⁴⁶⁵ *Basic Law: Human Dignity and Liberty*, section 12.

⁴⁶⁶ Background: a History of National Referenda, *Jerusalem Post*, 28 March 2005, <http://www.ipost.com/servlet/Satellite?pagename=JPost/JPArticle/ShowFull&cid=1111980178472&p=1078027574097>

⁴⁶⁷ Israeli Parliament Rejects Gaza Referendum, *Washington Post*, 28 March 2005, <http://www.unitedjerusalem.org/index2.asp?id=572039&Date=3/29/2005>; The Gaza Referendum, *The Jerusalem Post*, 8 February 2004; Knesset Rejects Gaza Referendum, *BBC news*, 28 March 2005, http://news.bbc.co.uk/1/hi/world/middle_east/4386937.stm

As the *Jerusalem Post* has noted,

Sadly, Israel's lack so far of referenda reflects no adoption of this or that great political idea. Rather, it is yet another symptom of our famously fractured and embattled country's lack of a constitution, or even just a process that would allow the gradual growth of a constitutional substitute. What Israel has done so far when faced with questions that demand constitutional answers was what it knows best ... muddle through.⁴⁶⁸

⁴⁶⁸ The Gaza Referendum, *Jerusalem Post*, 8 February 2004.

Summary

A number of points emerge from the review of the above case studies and the general review of the processes of constitutional reform.

The first general point is that a codified constitution does not mean inflexibility and rigidity when it comes to constitutional reform. Although the vast majority of democracies have codified constitutions that mandate the process by which they amend or reform their constitutions, constitutional change appears to be attempted as often in these countries as in Britain, Israel, and New Zealand. It is certainly true, however, that the latter countries enjoy more flexibility when it comes to choosing a reform process in any particular instance.

Second, the process of constitutional amendment or reform appears to be as important as the final content. A carefully staged process of consultation, negotiation, drafting, and adoption—respectful of local histories, traditions, and cultures—is seen as necessary if the adopted reforms are to acquire the legitimacy crucial for their ongoing operation and survival.⁴⁶⁹

Third, constitutional reform appears to involve both constitutional dialogue and strategic debate. In the former, the primary focus is the interests of the people as a whole, before consideration of the interests of sub-groups in society. In strategic debate, the special interest advocates take part to the extent that their interests are recognised.⁴⁷⁰

Fourth, it is unclear whether a process that attempts to change an extensive range of constitutional reforms is more or less productive than a process that tackles constitutional issues incrementally. The experiences of a number of countries suggest that comprehensive or extensive constitutional change is usually more difficult than a process that deals with constitutional issues in an incremental fashion. Switzerland, for example, has attempted a total revision of its constitution on four occasions, only one of which (in 1874) succeeded. Australia also has attempted major constitutional change on four occasions without much success, while the 1990-92 Canadian efforts at extensive constitutional reforms also failed.

This might tend to suggest that an incremental approach to constitutional reform is more effective. The British approach, for example, has been characterised as one of “ad hocery”—one that has dealt adequately with constitutional problems in the past and one that perhaps offers a good degree of flexibility, at least for governments of the day, when constitutional reform issues emerge on the political agenda.⁴⁷¹

Incremental or ad hoc approaches, however, have been criticised on a number of grounds: a process has to be established afresh for each new constitutional inquiry; there is no body of continuing expertise which could be tapped; there is no corpus of technical knowledge which might have been built up over the years and which would be available; there are significant limitations in the terms of reference and the working methods of some of the

⁴⁶⁹ J. Ford, p. 5.

⁴⁷⁰ Graham Hassall, Cheryl Saunders, *Asia-Pacific Constitutional Systems*, Cambridge University Press, Singapore, 2002, p. 161.

⁴⁷¹ Brazier p. 23.

traditional types of inquiry; opportunities for public participation can prove to be limited, and therefore public confidence in the constitution and the means of reforming it may not be enhanced.⁴⁷² It is also possible that incremental constitutional reform lacks the symbolic significance and legitimacy associated with a more formal, deliberative approach.⁴⁷³

A fifth issue is the appropriate extent of public participation in the process of constitutional reform. Public participation is increasingly regarded as a necessary and important component of the constitutional reform process beyond the mere ratification of amendments through the use of referenda. Nevertheless, the Canadian experience illustrates that an extended level of public participation does not always guarantee effective constitutional reform.

⁴⁷² Rodney Brazier, pp. 26–27.

⁴⁷³ Watts, p. 13.

Annex A

The constitutional amendment process in selected countries

Australia

Section 128 of Chapter VIII of the Australian Constitution provides that constitutional amendments require an absolute majority in both houses of the federal parliament and the approval in a referendum of the proposed amendment by a majority of electors nationwide, and a majority in a majority of the states, and the approval of a majority of electors in each state specifically impacted by the amendment.

Austria

In Austria, significant constitutional amendments must be approved by referendum if one-third of the National Council or the Federal Council (the Upper House which represents the “Laender” or provinces) request such a vote.

Canada

Since the repatriation of the constitution in 1982, amendments can only be passed by the Canadian House of Commons, the Senate of Canada, and a two-thirds majority of the provincial legislatures representing at least 50 percent of the population. Though not constitutionally mandated, a popular referendum in every province is also considered to be necessary by many, especially following the precedent established by the Charlottetown Accord.

Denmark

In Denmark, constitutional amendments must be approved by a simple majority of those voting in a referendum, representing at least 40 percent of eligible voters.

France

The constitution also sets out methods for its own amendment either by referendum or through a parliamentary process with Presidential consent. The normal procedure of constitutional amendment is as follows: the amendment must be adopted in identical terms by both houses of the Parliament, then must be either adopted by a simple majority in a referendum, either by three-fifths of the congress of both houses of the Parliament (article 89).

Ireland

Any part of the constitution may be amended but only by referendum. The procedure for amendment of the constitution is specified in Article 46. In Ireland, a bill amending the constitution must first be adopted by both Houses of the Oireachtas (national parliament), and then be submitted to a referendum. An amendment finally comes into effect on being signed into law by the President. The constitution has been amended more than 20 times since its adoption. Controversial amendments have dealt with such topics as abortion, divorce and the European Union.

Italy

In Italy, a referendum on a constitutional amendment is required only if requested by one-fifth of the members of either chamber, or by 500,000 voters or five regional councils, within 3 months of the publication of the amendment.

Spain

In Spain, a constitutional amendment can be submitted to a referendum for ratification if one-tenth of the members of either chamber so request within 15 days of the amendment passage.

Sweden

To amend or to make a revision of a fundamental law, the Parliament needs to approve the changes twice in two successive terms, with a general election having been held in between.

Switzerland

In Switzerland, all alterations of the constitution must be affirmed by a majority of citizens. In addition, any amendment proposed by 50,000 citizens becomes the subject of a referendum (unless Parliament responds proposing its own amendment, and the sponsors withdraw their initiative). Constitutional changes must be approved by a majority of those voting, and by a majority of cantons.

United States of America

Article V of the constitution of the United States outlines the process of amendment, a process requiring two steps, proposal and ratification. It takes a two-thirds vote of both Houses of Congress or a special constitutional convention called by Congress at the request of two-thirds of the state legislatures to propose amendments. To become part of the constitution, three-fourths of the states must in turn ratify these proposals; Congress specifies whether the states will do this through their legislatures or through special ratifying conventions.

Appendix D

Individuals and groups who contributed

Submitters

Allan, Professor James	Human Rights Commission
Baron, Dominic Paul	Jansen, Sir Ross
Bollard, Judge R J	Keith, Rt Hon Sir Kenneth
Brayshaw, Christopher Neave	Local Government New Zealand
Carter, John	MacClement, David
CCS	Mann, L R B
Children's Commissioner	Mathieson, Hayden
Christiansen, Nicholas James	Matthews, Roger, Grant Hewison, John Sheppard
Commonwealth Press Union (New Zealand Section)	Merrylees, Michael
Cooke, Lord of Thorndon	Metge, Dame Joan
Cox, Associate Professor Noel	Metuamate, Areti
Drummond, B J	Miller, Andrew
Ecumenical Coalition for Justice	Mountier, Barbara
Entwisle, Peter	Mundy, Reg
Evans, Professor Jim, Richard Ekins	National Council of Women of New Zealand
Federation of Māori Authorities Inc	Network Waitangi Ōtautahi
Goldsbury, Peter	Nixon, Curtis Antony
Greenhough, R J	Parker, Iain
Harris, Professor Bruce	Pax Christi Aotearoa-New Zealand
Holloway, Victor C	Pearce, Stephen
Hooker, John	

Penney, Phil	Te Rūnanga O Kirikiriroa Trust (Inc)
Porte, Robert	Te Rūnanga o Ngāi Tahu
Rata, Dr Elizabeth	Te Rūnanga O Te Rarawa
Rishworth, Professor Paul	Te Taura Whiri i te Reo Māori (Māori Language Commission)
Robinson, Kim	Te Whānau A Kahu
Ruawaipu Tribal Authority	The Peace Foundation
Scarry, John	Treaty Relationships Group of the New Zealand Society of Friends (Quakers), David James, Jillian Wychel
Selwyn, Tim	Treaty Tribes Coalition
Sheppard, John	Warmington, Julian
Smith, Graham	Wells, Anne
Stuart, Cameron	Williams, Dr David V
Taurua, Merehora	Women's International League for Peace and Freedom
Te Runaka ki Ōtautahi o Kai Tahu	
Te Rūnanga Ā Iwi O Ngāpuhi	

People who posted comment on the committee website

Burn, M	Roberts, Benjamin
Constantine, Eric	Selwyn, Tim
de Wet, P	Snyder, Evan
Dwyer, Edward	Stevens, John
Glesti-Drayton, Martin	Toebes, Heather
Hopgood, David	Work, Aidan
McKechnie, Ross	Zohrab, Peter
Pene, David	

Appendix E

NEW ZEALAND CENTRE FOR PUBLIC LAW

Te Wananga O Nga Kaupapa Ture A Iwi O Aotearoa

15 July 2005

Chair
Constitutional Arrangements Committee

SUMMARY OF SUBMISSIONS

Introduction

The Constitutional Arrangements Committee received 66 submissions. They dealt with a wide range of topics. This final summary of submissions (including late submissions) replaces the previous summary of 13 May 2005 prepared by the New Zealand Centre for Public Law. The summary is set out under seven headings. These headings are the five headings set out in the Committee's terms of reference, as well as two additional headings, as follows:

- (1) **New Zealand's constitutional development since 1840** – historical information provided about the evolution of New Zealand's constitution.
- (2) **The key elements in New Zealand's constitutional structure, and the relationship between those elements** – comments relating to the Sovereign in right of New Zealand, the Governor-General, the legislature, the judiciary and the executive.
- (3) **The sources of New Zealand's constitution** – references to the Treaty of Waitangi ("Treaty")¹, constitutional conventions, other relevant statutes, international treaties and conventions and other sources.
- (4) **The process other countries have followed in undertaking a range of constitutional reforms** – all comparative analysis and comment on constitutional reform and constitutional form in other countries.
- (5) **The processes which it would be appropriate for New Zealand to follow if significant constitutional reforms were considered in the future** – all suggestions for changes to New Zealand's constitutional arrangements.
- (6) **Whether significant change is necessary** – material that questions whether significant constitutional change is warranted.

¹ The Treaty and Te Tiriti o Waitangi are used interchangeably in this document to reflect the terminology used in the relevant submission.

(7) **Other comments** – comments on matters that do not fall under any other heading are summarised in this final section.

Of the 66 people or organisations who made submissions

- 15 said they would like to make oral submissions before the Committee
- 49 did not specify whether they wanted to make oral submissions
- 2 specified that they did not want to make an oral submission.

Preparing this summary of the submissions gives rise to the following overall observations. The issue that attracts the most comment from submitters is clearly the place of the Treaty of Waitangi in the constitutional arrangements of modern New Zealand. Following on from that are questions about the respective roles of Parliament and the judiciary, and whether it might be desirable to move to a written constitution. The question of a change to a republic also arises frequently.

Across all of these questions, there is a clear theme from the submissions on the appropriate process. The message that comes through is that major change should not be made hastily, and should only be made with broad public support. There is a strong call for a major effort on public education as a first step, and wide and unhurried public discussion as any change is contemplated. Most submitters assume that major changes should be made only if supported at a referendum. Several suggest that constitutional change should require a “super-majority” of, say, 75% in a referendum, or a parliamentary vote, or both.

This paper has been prepared by the Director and Deputy Director of the NZCPL, Matthew Palmer and Claudia Geiringer, and by Nicola White, Senior Research Fellow at the Institute of Policy Studies. David van der Zouwe and Laura Carter provided research assistance. We are, of course, happy to discuss this memorandum with the Committee and to undertake further work on the issues raised.



Prof Matthew S. R. Palmer
Director, NZ Centre for Public Law

(1) New Zealand's constitutional development since 1840

James Allan submits that the way the Supreme Court was introduced in 2004 was unconstitutional.

Dominic Paul Baron states that New Zealand has had arrested constitutional development. He states “that until we have a democratic constitution we remain mired in political infancy”.

Nicholas James Christiansen sets out historical sources of the New Zealand constitution and selected developments between 1947 and 2003. More detailed analysis can be seen in document 22W.

R J Greenhough sets out how the legal status of the Treaty of Waitangi has evolved since 1840, from a “simple nullity” to references in legislation, reliance on it in court decisions, parliamentary vets of proposed legislation, and the work of the Waitangi Tribunal.

Sir Ross Jansen provides a comprehensive overview of major constitutional developments throughout our history. This includes a substantial discussion of the abolition of the upper house.

Iain Parker sets out various pieces of legislation that gave rise to the Westminster system including Magna Carta (1297), Petition of Rights (1628), the 1688 Bill of Rights and the various Habeas Corpus Acts. He goes on to describe New Zealand prior to the signing of the Treaty of Waitangi through to New Zealand adopting the Statute of Westminster in 1947.

Pax Christi submits that our constitution has too often ignored Māori rights.

The Treaty Tribes Coalition objects to the use of 1840 as the date for starting this assessment. It notes this excludes the 1835 Declaration of Independence.

Ruawaipu Tribal Authority provides a history of what they viewed to be the major constitutional developments in New Zealand and what results from these.

(2) The key elements in New Zealand's constitutional structure, and the relationship between those elements

Lord Cooke of Thorndon comprehensively sets out the elements of New Zealand's constitution. These include

- the Head of State (Sovereign—Constitution Act 1986 s2(1))
- the Governor-General (as the Sovereign's representative in New Zealand s2(2))
- the division of powers (but not the separation of powers)
- periodic elections for the Legislature, with wide suffrage and wide powers
- respect for minority rights and interests
- an independent judiciary.

He states that no single institution is “sovereign”; the legislative and judicial functions are complementary, and in reality sovereignty is shared between the three branches. He notes that Parliament holds the greatest power but that even this “great power could not confidently and should not be asserted to be unlimited”.

Associate Professor Noel Cox considers:

“to what extent the Crown remains important as a source of legitimacy for the constitutional order and as a focus of sovereignty; how the Crown has developed as a distinct institution; and what the prospects are for the adoption of a republican form of Government in New Zealand”.

He states that the New Zealand Crown has become an institution grounded in our own unique settlement and evolution since 1840 and questions whether the evolution will lead to New Zealand becoming a republic in the “short-to-medium term”.

Professor Jim Evans and Mr Richard Ekins state that Parliament is sovereign, and outline three advantages of this: that it achieves “rule of law values of certainty, predictability and stability”, that Parliament is structured properly to hold final law-making authority, and that Parliament is more democratically legitimate.

R J Greenhough outlines that the key elements are the relationships between

- Māori and Pacific Islanders
- the Crown
- New Zealanders and Permanent Residents
- the New Zealand Court Systems.

The submission states that these relationships are governed by the Treaty of Waitangi, so therefore this must be part of the constitutional arrangements. It is noted that the Crown is an important factor in all these relationships, and that the courts must be independent of the Crown.

Professor Bruce Harris suggests that addressing the following issues may provide a better structure for the functioning of the government system

- a clearer and more comprehensive form of law setting out the constitution
- settling the status of the Treaty
- addressing concerns the community may have about the law-making freedom Parliament has and whether there should be a greater separation of powers. In particular whether courts should be able to review legislation to ensure that it complies with a written constitution
- addressing whether New Zealand should become a republic.

Sir Ross Jansen sets out a discussion of Parliamentary supremacy and the role of the judiciary, with a view to improving understanding of our current system.

Sir Kenneth Keith, in the introduction to the Cabinet Manual 2001, notes that the Constitution Act 1996 sets out the key elements of the constitution which are the Queen as Head of State, her representative, the executive, the legislature and the judiciary.

Michael Merrylees queries the current status of the Crown in New Zealand.

Reg Mundy outlines his views that the monarch is traditionally the defender of the people, but that the current Queen has not followed this tradition and thus the New Zealand people have lost their defender. He appeals to the Committee to tell the Queen that she has failed in this job.

Network Waitangi Ōtautahi submits Parliamentary supremacy should not be seen as an alternative to judicial supremacy and there is a need for constitutional arrangements to moderate such a centralised view of power. It submits Te Tiriti o Waitangi needs to be at the heart of a new framework limiting judges and politicians powers.

Iain Parker suggests an elected legislation advisory committee to review all proposed legislation to ensure it does not contravene the Bill of Rights. Once a bill has been enacted it is to be implemented by the judiciary and not further interpreted. If a judge wants clarification of the legislation, this is to be provided by the legislation advisory committee.

Other suggestions included considering becoming a republic, replacing the Governor-General, in coalition governments the percentage each party represents in the House being replicated in Cabinet, and the date of the general election being set by convention.

Tim Selwyn states that “the judiciary will not interfere with constitutional issues that are not described in statute”. He also outlines that it is currently possible for Prime Ministers to appoint themselves as Governor General and to operate as a triumvirate with two other ministers. He also points out that the Constitution Act 1986 contains no acknowledgement of the Supreme Court.

Te Rūnanga o Ngāi Tahu states that New Zealand is a constitutional monarchy, founded on the rule of law, constitutional government, and respect for rights and freedoms. Its submission also states that the main elements of our constitution are Parliamentary sovereignty, the doctrine of separation of powers, and judicial independence.

Te Rūnanga O Te Rarawa queries whether New Zealand has sufficient separation of powers between the executive, the judiciary and the legislature. The submission also expresses concern that New Zealand has no written constitution or means of controlling executive power.

The **Women's International League for Peace and Freedom** identifies as problems with the current structure: the lack of proper checks and balances on the executive, the erosion of the separation of powers, the fact that Parliament can legislate to override the common law and human rights statutes, the lack of protection for minorities, and that there is no genuine freedom of information legislation.

(3) The sources of New Zealand's constitution

Relevant statutes

The **Human Rights Commission** submits that the constitution is contained in statutes, including the Constitution Act 1986 and the Bill of Rights Act, as well as conventions, common law principles, and the Treaty of Waitangi. It states that the Bill of Rights, the Human Rights Act and other statutes containing human rights elements ensure that “human rights are key elements at the heart of New Zealand’s current constitutional arrangements”.

Sir Kenneth Keith, in the introduction to the Cabinet Manual 2001, notes that statutes other than the Constitution Act 1996 (which is mentioned above) that are sources of our constitution are the State Sector Act 1988, the Electoral Act 1993, the Judicature Act 1908, the Ombudsman Act 1975, the Official Information Act 1982, the Public Finance Act 1989 and the New Zealand Bill Of Rights Act 1990.

Sir Kenneth also notes various English statutes regulate relations between the state and individual and form part of New Zealand law. These acts are the: Magna Carta 1297, the Bill of Rights 1688, the Act of Settlement 1700 and the Habeas Corpus Acts.

Te Rūnanga o Ngāi Tahu refers to the Bill of Rights but notes that it is not supreme. It also refers to imperial and New Zealand law as important sources of our constitution.

The Treaty of Waitangi

Judge R J Bollard sets out the current law in terms of the relationship between the Resource Management Act and Treaty and Māori issues.

Lord Cooke of Thorndon notes that the Treaty has permanent significance as the “principal source of the national partnership. The reciprocal responsibilities created by it are indelible ... They cannot be ignored in contemplating any major constitutional change”.

Peter Entwisle discusses the history of the signing of the Treaty and the later declarations of sovereignty over New Zealand. He concludes that the Treaty is not a *legal* founding document, despite its social and political significance.

The **Federation of Māori Authorities** states that a key component of our constitution is the Treaty, and that it is “integral to the legitimacy of the current constitutional arrangements”.

Peter Goldsbury submits that “the Government has no right to pretend that it can unilaterally nullify the place of the treaty as a signed contract, or to remove it from its status as the founding document of our nation”.

Professor Bruce Harris submits that the future legal status of the Treaty and the recognition of Māori interests in law require particular attention by the committee. He suggests three options for the future status of the Treaty:

- (a) remove all references to the Treaty from legislation in an attempt to further the principle that the same law should apply to all New Zealanders; or
- (b) the status quo could be maintained with the Treaty and common law rights being left in their current positions outside and inside the law respectively; or
- (c) the original two versions of the Treaty or the principles of the Treaty could be included in an entrenched written constitution which purported to limit the operation of the legislative, executive and judicial branches of government.

John Hooker suggests that the Māori version of the Treaty text is flawed because it was drafted by Henry Williams: he comments that Williams' skill as a draftsman and understanding of Māori left a lot to be desired. He also comments that the tribal leaders and Queen Victoria were parties to a document but the Treaty did not create a legal partnership.

The **Human Rights Commission** notes that the Treaty of Waitangi is recognised by many as our founding document.

Sir Ross Jansen submits that the Treaty is our founding document, and discusses the evolution of legal thinking on it. He states that people need to be better informed on Treaty.

Sir Kenneth Keith, in the introduction to the Cabinet Manual 2001, notes that the Treaty may indicate limits in our polity on majority decision making and that the law sometimes gives special recognition to Māori rights and interests.

LRB Mann sets out the view that the status of Māori chiefs, after the Treaty, was that of subjects of a monarchy which brought them the rule of law.

Joan Metge states that the Treaty is an important part of our constitution "and an essential part of our identity as a nation". She defines the Treaty as including both texts but also the context that produced it, that is the texts representing the "formal expression of unwritten agreement" of two peoples to live together. She believes the Treaty is still relevant in terms of our multi-cultural society because it "establishes the right of those who cannot claim Māori descent to put down roots in this country".

Areti Metuamate supports New Zealand having a comprehensive constitution. In support of this opinion Areti cites the confusion and controversy that surrounds Te Tiriti o Waitangi. Areti further submits that the Te Tiriti o Waitangi must be a major feature of New Zealand's constitution.

The **National Council of Women** submits that "the crucial importance of the Treaty of Waitangi and the complexity of accommodating it in the Constitution must have priority".

Network Waitangi Ōtautahi notes that "the well-mandated Hīrangī Hui of 1995 confirmed Māori agreement that the Te Tiriti o Waitangi is central to the constitutional arrangements".

It submits that the legitimacy of Parliament has its origins, not in democratic mandate, but in the Te Tiriti o Waitangi as an agreement between two sovereign peoples.

It submits Māori approaches to the regaining and retaining of tino rangitiratanga and of their kaitiaki responsibilities need to be part of the ongoing process where Te Tiriti o Waitangi is understood as a powerful tool which can bring people together.

The **Peace Foundation** believes that there is currently insufficient recognition given to tangata whenua and the Treaty/Te Tiriti.

Stephen Pearce states that the initial attempts by Māori to form a united tribal structure and the subsequent agreement between the majority of Māori tribes to relinquish governorship but not sovereignty in the Treaty of Waitangi should form the cornerstone of any constitutional document.

Elizabeth Rata discusses the relationship between New Zealand's constitutional heritage and the legal and political relationships between individuals and groups. She submits that the "foundational group" (which she defines as a non-divisible group bound by kinship or ethnic/race bonds that exist outside and beyond individuals' agreement) is not recognised in New Zealand's constitutional arrangements. Only the "individual" and "associational group" are compatible with democracy. The submission warns that it would undermine the strength of New Zealand's democracy if constitutional recognition were to be given to tribal kin groups.

Tim Selwyn describes the Treaty as "the supreme instrument of constitutional rule".

Merehora Taurua opposes the replacement of Te Tiriti as our founding document; she believes that it and all its principles should be retained in the constitution.

Te Rūnanga Ā Iwi O Ngāpuhi submits that the rights and obligations which flow from the Te Tiriti o Waitangi should be constitutionally recognised and protected. This can be achieved by formally incorporating Te Tiriti o Waitangi into our constitution. The submission says that the need to recognise Te Tiriti o Waitangi formally arises because:

- (a) It is the founding document of New Zealand
- (b) It is a sacred compact between Māori and the Crown (originally the British Crown, now the Crown in right of New Zealand) that created and affirmed rights and obligations
- (c) Our current constitutional arrangements have failed to provide sufficient protections to Māori, as the tangata whenua (indigenous peoples) and to Te Tiriti o Waitangi as our founding document
- (d) Te Tiriti o Waitangi still remains a pivotal influence in New Zealand society.

Te Runaka ki Ōtautahi o Kai Tahu submits that the Treaty is our founding document, and that constitutional arrangements need to preserve the rights guaranteed in it, and need to establish compliance mechanisms for its enforcement.

Te Rūnanga O Kirikiriroa Trust (Inc) believes Te Tiriti o Waitangi is fundamental to any codified constitution for New Zealand. It states the Articles of Te Tiriti o Waitangi must take precedence over the Principles of Te Tiriti o Waitangi and they should be doubly entrenched within the resultant document and/or legislation.

Te Rūnanga o Ngāi Tahu submits that the Treaty of Waitangi “gave, and continues to give, legitimacy to the Crown’s presence in New Zealand”. It refers to it as the cornerstone of New Zealand’s constitution, “it was an exchange of promises between two sovereign people, giving rise to obligations for each party”. It also notes that because of its constitutional importance, the courts use as the Treaty as an interpretation aid.

Te Rūnanga O Te Rarawa sets out that the Treaty should underpin any review of constitutional arrangements. In particular the Crown is responsible for protecting te tino rangatiratanga of hapū (including Te Rarawa customary rights and obligations) and recognising Crown treaty obligations to hapū.

The Treaty Relationships Group (Quakers) states that “the Treaty must be central to any consideration of our constitutional arrangements and... future constitutional provisions must more adequately reflect the Treaty and its intent”. It submits that it was originally intended that the Treaty would provide only a “thin” sovereignty but that this has become more encompassing. It states that “the changes have made it impossible to imagine that we can return in a simple way to the original expectations of the Treaty. The challenge is to find ways to embody the spirit and intent of the Treaty in our current constitutional planning.”

The Treaty Tribes Coalition states that until constitutional discussion can begin from the idea that there are two sovereign and legitimate authorities in New Zealand—Iwi and Crown—we will be unable to move forward as a nation.

“Treaty Tribes’ primary concern is to see the Treaty given full effect by being enshrined in constitutional legislation, such that both subsequent legislation and actions of the executive can be tested against it in the ordinary Courts”.

Julian Warmington states that a key element of the constitution is Te Tiriti o Waitangi, as our founding document. He states that Te Tiriti gives Tangata Tiriti (those people living within a rohe who are not members of the local hapū or iwi) the right to be here and to create system of government to manage their affairs.

He believes that the Executive is only legitimate if “it continues to include meaningful and real reference to Te Tiriti o Waitangi in all prospective legislation, or as an alternative, makes specific provision for all such proposed bills to be first referred back to local iwi and hapū insofar as suggested legislation may effect them, up to and occasional including the right of veto”.

Also he claims that the judiciary is only valid if it “maintains a balance between the wishes of the nation, and the tyranny of the majority against the mana of tangata whenua and their right to tino rangatiratanga, whether signatories to the treaty or not”.

Anne Wells states that she considers Te Tiriti o Waitangi is the basis of the constitutional arrangements for this nation. Te Tiriti o Waitangi reaffirmed the right and authority which Māori had exercised for centuries and that was also confirmed in the Declaration of Independence 1835.

Dr David Williams states “we need to reshape our constitutional arrangements taking the Treaty of Waitangi as the starting point and the foundation stone for the legitimacy of an autochthonous constitution that springs from all the peoples of this nation”.

The **Women’s International League for Peace and Freedom** refers to the Treaty as our foundation.

Constitutional Conventions

R J Greenhough refers to some of the sources of the constitution as being principles, conventions and legal customs.

Sir Kenneth Keith, in the introduction to the Cabinet Manual 2001, notes that conventions regulate, control and in some cases transform the use of legal powers arising from the prerogative or conferred by statute.

Te Rūnanga o Ngāi Tahu also refers to constitutional conventions.

International Treaties/Conventions

The Commissioner for Children seeks to ensure children’s rights as defined in the United Nations Convention on the Rights of the Child 1989, ratified by New Zealand in 1993, and New Zealand’s obligations under that Convention are considered in any review of New Zealand’s constitutional arrangements.

The Commissioner submits that a source of New Zealand’s constitution includes New Zealand’s obligations under international human rights law, which arise from international human rights treaties ratified by New Zealand and customary international law.

The Children’s Commissioner considers that the appropriate ways to implement the United Nations Convention on the Rights of the Child 1989 include:

- (a) direct incorporation of the convention into domestic law
- (b) reference to children’s rights in any supreme law constitution
- (c) establishment of a permanent mechanism to ensure appropriate coordination of implementation of the Convention, which may include children’s rights as a separate category for consideration in the law making process.

Te Rūnanga o Ngāi Tahu notes the growing importance of New Zealand’s international obligations.

Te Rūnanga O Te Rarawa thinks that the place of international conventions, principles and other instruments ought to be clarified in the constitutional review process.

Other sources

Dominic Paul Baron thinks that the source of the constitution should come directly from the people of New Zealand.

Peter Entwisle discusses the moral and political philosophical base that underpins democracy, the principle of equality, and civil rights.

Sir Kenneth Keith, in the introduction to the Cabinet Manual 2001, notes that there are prerogative powers that the Queen holds, which are generally exercised by the Governor-General, are part of the common law, and exist independently of statutes. He also notes that various decisions of the courts, for instance, upholding rights of the individual against the powers of the state, and determining the extent of those powers, form part of the constitution.

Hayden Mathieson states that the sources of our constitution are unclear.

The National Council of Women refers to the rule of law as being the cornerstone of the constitution. The Council also states that MMP has resulted in better control over the power of the executive.

The Peace Foundation believes insufficient recognition is given to community and voluntary organisations, local government, the Human Rights Act, and the Bill of Rights (including economic, social, group and cultural rights).

Te Rūnanga o Ngāi Tahu notes the constitutional significance of the rule of law and the common law.

(4) The process other countries have followed in undertaking a range of constitutional reforms

Dominic Paul Baron suggests the Swiss model as approved by referendum in 1999. Of particular note was that any amendment or revision can only be ratified by the people in a referendum.

The Commissioner for Children cites South Africa as an example of a country where children's rights have been incorporated in a constitution.

Nicholas James Christiansen examines the processes that have been followed for constitutional change in Australia and Canada. He examines the Constitutional Conventions and the Constitutional Commission (Australia) and the Citizen's Assembly on Electoral Reform (Canadian province of British Columbia). Further information on Nicholas's findings is set out under the "processes" heading below.

The Commonwealth Press Union (New Zealand Section) highlights the constitutional guarantees given to freedom of expression in Denmark, Iceland and Sweden. It also looks at the protections given to freedom of expression in the United States of America. Two suggested advantages over the New Zealand system are:

- (a) the primacy of constitutional protections over other laws
- (b) where exceptions are made, those exceptions are determined by the Supreme Court as opposed to government.

The Federation of Māori Authorities gives several overseas examples, noting that:

- in Canada discussions began in the 18th century, yet were not finalised until 1982
- in South Africa these issues took seven years, with 2 million public submissions. The process was conducted in phases with participation at different times on different issues, and resources committed to ensure serious dialogue
- in Rwanda there was focus on training, followed by consultation, writing, and then a referendum
- with regards to the place of indigenous peoples FoMA considers the examples of Canada, Nicaragua, Colombia, and Bolivia.

R J Greenhough submits that it is important that New Zealand does it our way.

Professor Bruce Harris suggests that New Zealand should examine models used in other jurisdictions and assess their suitability for use in New Zealand.

Michael Merrylees suggests an assessment of Scottish law for possible advantages over our current system.

Network Waitangi Ōtautahi suggests that the Canadian Charter of Rights and Freedoms is an approach which should be examined.

Te Rūnanga Ā Iwi O Ngāpuhi states that the Te Tiriti o Waitangi affirmed Ngāpuhi's right of self-government. It submits that this right ought to be in New Zealand's

constitution and note that similar principles have been recognised in Canada and the United States of America. It submits that New Zealand's constitution, present or future, must provide for Ngapuhi's inherent right of self government.

Te Taura Whiri i te Reo Māori (The Māori Language Commission) notes that in Hawaii the indigenous language has become part of its national image and identity. It submits "New Zealand is well behind in its understanding and acceptance of Māori language and people as foundation stones for nationhood and national identity."

Anne Wells sets out that checks and balances that exist in the system in the United States of America should be considered.

(5) The processes which it would be appropriate for New Zealand to follow if significant constitutional reforms were considered in the future

Dominic Paul Baron states that the essential process would need to be a constitutional convention controlled by the people.

Christopher Neave Brayshaw notes the need for “quality timeframes and processes” and submits that this “should not be done hastily”. He also submits that “future Constitutional Arrangements for New Zealand must strongly reflect meaningful commitment to honouring Te Tiriti o Waitangi... The Constitutional rights of the Māori people as our first (native) inhabitants must be legislatively recognised”. He also feels that “the current Constitution is monocultural and must be turned around. This requires changes in the entrenched attitudes and mindsets by those in power”.

Nicholas James Christiansen, after analysis of processes used for constitutional change in Australia and Canada, observed:

- (a) the influence of party-political forces is to be avoided during the process, particularly at the stage of drafting and decision-making
- (b) experts should be utilised, particularly at the stage where guiding principles are formed and in the education of decision-makers and the public
- (c) the active participation of the public in the formative stages and the decision-making process should be promoted
- (d) constitutional change is an ongoing process
- (e) indigenous people hold a unique position and we must provide for their participation at every stage of the process.

The submission goes on to suggest a six stage process for change. These stages are: initiation and pre-negotiation, education and consultation, design and drafting, decision-making, legitimisation and ratification and implementation.

The Ecumenical Coalition for Justice suggests an assessment of historical written material but states that it should be noted that the Māori, a major partner in the initiation and development of our constitutional model, have a strong oral tradition. Therefore, oral history should be taken into account. The Coalition also makes the point that the Pākehā culture encourages us to look forward in the search for answers. The Māori culture looks to the past to help to decide its future approach. It stresses that these different approaches need to be taken into account.

Peter Entwisle discusses the place of the Treaty in modern New Zealand and submits that if there is to be any recognition of it in modern law it should probably be confined to an acknowledgement of its affirmation of the principle of legal and political equality for Māori and non-Māori.

On whether New Zealand should become a republic, he comments that the best argument for change is that a constitutional monarchy enshrines the principle of granting public office by descent, which offends against the democratic principle. He supports election of a

head of state by members of Parliament, in order to avoid the problem of separate popular mandate. Any change should be decided by referendum.

On whether New Zealand should develop a written constitution, Mr Entwisle urges the Committee to draw attention to the inherent dangers of the status quo, in which core parts of the constitution are able to be amended by ordinary legislation and, because of the unwritten nature of the constitution, the system is also crucially dependent on the wisdom of judges.

Mr Entwisle also considers future directions for New Zealand sovereignty, and suggests that New Zealand should consider greater participation in regional and global organisations, as well as the possibility of joining Australia.

Professor Jim Evans and Richard Ekins comment that our current state of parliamentary sovereignty should not be changed in any way. They do submit that parliamentary procedures should be reformed to slow the legislative process down and ensure that parliamentary power is exercised responsibly. They raise the possibility that this could be achieved by the introduction of a second house. They also feel that the Bill of Rights is not clear and settled so therefore can't be made superior law, as judges do not have the skills to determine those issues.

The Federation of Māori Authorities submits that the process must be democratic, and that there must be time for debate. The Federation states that time is needed for education and discussion. It submits that a Royal Commission should be set up, co-chaired by a Supreme Court judge and a nationally-recognised kaumātua, and that there should be a non-political panel of experts to consider Treaty issues.

The Federation also submits that New Zealand needs to incorporate the Treaty into domestic law to show that an intention to honour it. It comments that New Zealand should recognise aboriginal rights at international law to a level that is not below what is guaranteed in the Treaty. It believes there is a need for wider Treaty education. The submission also lays out several questions on the place of the Treaty that need to be considered.

R J Greenhough notes that constitutional bills are more important, and therefore the final vote should pass by more than simple majority (possibly 75 percent). The submission suggests that the proper process would be to look at the submissions, then set up a Royal Commission, who would work out a bill to be passed into law, and that this should all happen within 3 years.

Professor Bruce Harris sets out that reform should not be rushed and further research and consultation with the community is essential. He suggests a Māori Constitutional Commission should work together with a general constitutional commission to facilitate education and dialogue which would ultimately lead to a recommendation to Parliament. He suggests final community input after the report is completed. He notes the enactment of this type of legislation is normally subject to electorate approval by referendum. He suggests incremental reform, which over time could be integrated and in the end should be comprehensive.

For further discussion of constitutional matters Professor Harris also attaches an article titled “The Constitutional Future of New Zealand” (attached to document 51W). In this article he suggests a possible order for the future development of the New Zealand constitution.

Victor C Holloway comments that if a republic is being considered we should have a referendum on the issue.

The Human Rights Commission notes that “any review of New Zealand’s constitutional arrangements must strengthen the relationships between all New Zealanders”. The Commission submits that, because of this, the Treaty must be considered “in a constructive and rational way, guided by a fair and fully inclusive process”. It states that all New Zealanders need to be involved “in a constructive dialogue”. It also submits that indigenous rights need to be considered alongside the Treaty.

The Commission submits that there is a need for more explicit recognition of human rights in New Zealand’s future constitutional arrangements. It comments that currently human rights law is fragile, and that “the clearest commitment a State can make to the protection of the human rights of its citizens is by embedding them in a Constitution”. It also suggests that New Zealand should consider incorporating the rights set out in the ICESCR, and should consider entrenchment of human rights.

Sir Ross Jansen submits that there is a need for a constitutional debate as there has never been one in New Zealand. He considers there are three main things to be debated:

- (a) whether we should have a written constitutional document; who holds sovereignty; and the place of “separation of powers”
- (b) the place of Treaty issues
- (c) the possibility of NZ at some stage becoming a republic.

He considers that all these three things need to be considered together.

Sir Ross comments that we need a system with restraints on the use of power and a constitutional description of the separation of powers. He submits that there should be a Commission of Judicial Affairs to control appointments and monitor the conduct of judges. He also states that the way the current Resource Management Act operates is against the separation of powers, and that a Tribunal should be adopted to fix this.

Sir Kenneth Keith suggests, in a letter to the Committee, that it would be useful to bring together and review the range of historical material available on the workings of New Zealand’s constitution, which is contained in Official Yearbooks, parliamentary material, and materials prepared by political scientists, historians, lawyers, economists and politicians. He states that this material can show how the constitution has evolved, illuminate the underlying principles and the tensions between them, and put the constitution into its context.

David MacClement emphasises the need for time to consider these issues. He submits that existing arrangements are not sufficiently based on the Treaty, and that there needs to be improvement by a “good-will-based accommodation between kāwanatanga and

rangatiratanga (“joint protection under the law but separate sovereignty over assets and taonga”).

Hayden Mathieson suggests that perhaps New Zealand should set up an Office of Constitutional Affairs to inform public. He also submits that New Zealand needs some way to acknowledge the central importance of the Treaty to the constitution, and yet cater to emerging multiculturalism.

Joan Metge submits that New Zealanders need to be given “full, accurate and unbiased information about the content and context of the Treaty so that they can discuss its present and future role from a basis of understanding instead of misinformation and prejudice”.

Andrew Miller sets out what the constitution should look like. The main points he suggests are that it should:

- be as non-controversial as possible
- be contained in a single document
- be entrenched or requiring a referendum to modify
- define the top-level of government
- be framed in general terms
- include provisions to “ensure electoral integrity”
- guarantee basic human rights (he sets out seven that should be included)
- avoid too much power in one person
- be judicially enforceable.

He also believes we should abolish the monarchy.

Under his proposals, binding referenda would be required to:

- amend the constitution
- dissolve Parliament
- dismiss a judge or MP.

Barbara Mountier submits that we need to change the whole paradigm, that is, our way of conceptualising the constitution, to ensure that Māori are treated with equality and respect.

The **National Council of Women** states that writing a constitution is a “major undertaking with wide ramifications”. The Council states that New Zealand needs a discussion after wide public education, and that the process must avoid a confrontational structure. It suggests that the consultation should be about current arrangements, not republicanism and that any discussions of republicanism would require public education and a transparent process. The Council comments that “any actions to implement wide-ranging constitutional changes by invoking parliamentary urgency or as a pragmatic accommodation with a political ally will be strongly challenged by NCWNZ”.

Curtis Nixon argues for a change of our flag, and the replacement of the Governor general with an “indigenous” head of state. He sets out a proposal that could be followed to achieve this head’s appointment.

Iain Parker suggests that New Zealand should have an entrenched constitution and bill of rights which would need to be supported by at least a 75 percent majority in Parliament.

Pax Christi is concerned that the proposed inquiry “will not give proper consideration to the human rights of New Zealand’s indigenous Māori people, particularly those relating to self-determination as an indigenous people and to the exercise of their customary guardianship and access to resources as a first nation”. It is also concerned that the disregard for indigenous rights shown through Foreshore and Seabed process will happen again here. It has no confidence that the process “will give due regard to the cultural preferences of Māori, thus continuing the monocultural viewpoint adopted by all New Zealand legislation since 1840. We would ask that the terms of reference for the review be made so transparent as to obliterate this fear”. And it considers that the same level of consultation as the Waitangi Tribunal recommended in the Foreshore and Seabed case should be adopted here, that is, “widespread, patient and considerate consultation on an issue which involved the fundamental rights of a people”.

Phil Penney supports the idea of a written constitution. He thinks it would need to identify who we are as people. He also sets out what he thinks a New Zealand constitution should represent.

Robert Porte submits that New Zealand needs to progress now to become a truly independent nation. In particular he considers that New Zealand should move to become a republic, with a President elected by the people.

Tim Selwyn submits that “most people suspect this entire committee process is a farce because the most obvious constitutional questions—Republic and Treaty—are not on the agenda”.

Graham Smith submits that we need a “written constitution, entrenched clauses sustaining common law and international obligations, including the Treaty of Waitangi, to protect the most important minority interest [Māori] in Aotearoa New Zealand”.

Cameron Stuart comments that constitutional changes should only be undertaken when strictly necessary and not simply for the sake of change. When it is undertaken, it should not occur hastily or without widespread consultation. He supports the creation of a Constitutional Affairs Department or Commission that would be a constitutional watchdog and advisor to Parliament and the public. An important part of its role would be to ensure extensive public education and involvement (more than was undertaken for the MMP referenda). He proposes that major change only be adopted after a series of referenda, on whether to consider change, on the options for change, and on whether finally to adopt the most popular option. Adoption would follow only if there was a high level of participation (75 percent) and a high level of support.

Merehora Taurua states that Māori “have the right under Te Tiriti o Waitangi to be the primary party with whom any government should negotiate any constitutional changes ... prior to encouraging any debate on the subject with “all New Zealanders”. To this end she

submits that the government should negotiate first “with a duly elected 7-person Māori representative body to negotiate the implications and ramifications of any constitutional changes in New Zealand, prior to promoting public debate on the issue”.

Te Runaka ki Ōtautahi o Kai Tahu submits that Treaty rights and obligations should be central to the reform process, and that “full and appropriate consultation with Māori is imperative to ensure the arrangements are legitimate and responsive”. It also feels that appropriate time must be taken to work through issues and that “formal development of a constitution requires considerable time and effort, and should be seen as a long-term project”.

Te Rūnanga o Ngāi Tahu states that there is a need for a planned process, that is, a departure from the current ad hoc approach to constitutional change. There is a need for an informed, well-resourced debate that engages the entire nation. Ngāi Tahu also sees a need for a high degree of consultation, resulting in the acquiescence of Māori and non-Māori. “An inclusive reform process provides citizens with the education, information and opportunity to fully participate”. The submission also comments that “it is essential to start the process based on principles of mutual recognition and accommodation”. Ngāi Tahu states that it is important that the reform body is credible and effective, that it needs to be independent, that the members need to represent different community constituencies, and that many will need to be Māori.

Ngāi Tahu also submits that New Zealand should resolve uncertainty about the application of the Treaty by including it in a comprehensive constitution. It suggests that the Waitangi Tribunal should have binding powers. The submission comments that, because of the Treaty, New Zealand would need the acquiescence of Māori to change our constitutional status, and also that widespread consultation is needed on the basis of Māori being tangata whenua. Ngāi Tahu also comments that there should be a constitutional embodiment of the right to development, and that the Bill of Rights should be supreme.

Te Rūnanga O Te Rarawa considers an independent royal commission of inquiry would improve the objectivity of the process, alternatively they would support the establishment of a constitutional review commission led by a suitable independent party chosen from the international community. Te Rarawa submits that community involvement and education on the Treaty as essential to the process.

Te Taura Whiri i te Reo Māori (The Māori Language Commission) recommends a joint Māori and Government working party, including international language representation, to examine options for entrenching the Māori Language into New Zealand’s constitution arrangements.

Te Whānau A Kahu states that a New Zealand constitution must have the consent of the Tangata Whenua.

The Treaty Tribes Coalition suggests that Māori should be involved in the process primarily at iwi level, where the greatest resources exist to participate. The Coalition opposes the use of a “Māori Consultative Group” that might be perceived as having authority to speak on behalf of iwi.

The Coalition states that the imperative of attaining majority support for constitutional reform should not overshadow the importance of protecting minority rights.

The submission also states that the conduct of any constitutional reform process should be handed over to a secretariat or commission which is free of the taint of political interference or control.

Anne Wells sets out that education to enhance public understanding of New Zealand's constitutional arrangements and the Treaty is essential to the reform process.

Dr David Williams suggests the processes and procedures for constitutional reform should involve "bottom up" rather than a "top down" mechanism for law reform. The New Zealand Constitution Act 1852 was a "top down" imposition of the imperial Parliament of the British Empire. He also states that, if a starting point for the reform process cannot be agreed, the system is not so seriously in need of reform that it cannot wait a few years to allow deeper consideration of the governance questions, and in particular of the governance questions that reflect the tino rangatiratanga/kāwanatanga power relationships in the Treaty.

The Women's International League for Peace and Freedom is supportive of informed debate, and concerned about the Government's approach. This concern comes from the fact that the Constitutional Arrangements Committee was set up and the terms of reference decided without negotiation with Māori; it has a superficial nature; is being conducted within a limited timeframe; the enquiry is being held in election year; and the reluctance to hear oral submissions. It submits that this process cannot be rushed. It also believes that the starting point must be the Treaty and that the first step must be that a "process for genuine consultation and negotiation with iwi and hapū be established; and that there be no time limit set on that process".

(6) Whether significant change is necessary

Lord Cooke of Thorndon submits that our current constitutional arrangements work pretty well and that there is no justification for change on basis of “ambiguity, contradiction or frustration”. He submits however that there are good arguments for change in two respects:

- first, a fully enforceable Bill of Rights (noting, however, that the current Bill is working tolerably well)
- second, the incorporation and entrenchment of the Treaty of Waitangi (commenting, however, that it is possibly not the right time to attempt this).

Bruce Drummond makes the following points in support of his proposition that New Zealand does not need a written constitution

- a constitution is relevant at the time it is written but not necessarily after a passage of time
- a constitution is designed so that it cannot be easily changed, regardless of changed conditions
- a constitution can be the subject of many legal battles. Interpretations will be made by life-tenured and unelected judges, who may have their own agenda. These interpretations cannot be easily changed by the people
- that he believes in the supremacy of a parliament that is elected at regular intervals; virtually all of its decisions can be overturned by the will of the people.

Victor C Holloway wants everything to remain as it currently is. He is concerned about what will happen to the Treaty, and the grievance process. He also feels there is a lack of information, is concerned with the rush on submissions, and has doubts as to whether his submission will even have an impact. He is cynical of the Government’s intentions, considering the process that was followed in the Foreshore and Seabed case.

LRB Mann states that any attempt to change our constitution should be soberly examined and in his view no legitimate reason exists for any review of our constitution.

The National Council of Women submits that the present system is working well, and that we can review and remedy any problems with mechanisms that are already in place. The Council also feels that the reasons for this inquiry are not well justified, and that this raises suspicions of a political agenda.

Paul Rishworth comments on the situation in South Africa and uses the comparison to question whether a similar “transformation” is required in New Zealand. He highlights that our existing structure and current process of incremental improvements may be preferable in New Zealand in the absence of drastic need provided by a “constitutional moment”.

(7) Other comments

John Carter submits that the Magna Carta is God's supreme law, and therefore Parliament does not have "full power" to make laws. He also feels that we can't become a republic because that would be separating from our British "tribe".

CCS comments that the ability of NGOs to make submissions should not be restricted in a healthy functioning constitution, and seeks clarification of this process.

The Commissioner for Children considers that protection of human rights (which include children's rights) are key elements in New Zealand's constitutional structure and the way children's rights are dealt with by the three organs of government should be key to the consideration of the Committee.

The Commonwealth Press Union (New Zealand Section) submits that freedom of the news media is fundamental to a participatory democracy. It further submits that a review of the constitution must include consideration of entrenching or making into "higher law" a declaration of fundamental democratic rights, such as those in section 14 of the Bill of Rights Act 1990 relating to freedom of expression and freedom of information.

Lord Cooke of Thorndon notes the possibility that the abolition of the monarchy could be technically unlawful or revolutionary, and that its validity would ultimately fall to be decided by judges. The courts would in the end have to decide that by reference to vague considerations of the public will, rather than any clear legal standard.

John Hooker suggests that the name Aotearoa is a recent adoption and was not the traditional Māori name for New Zealand. He suggests that the name New Zealand should be retained for the whole country with the name of each Island to be changed (he suggests Ruapehu as a name for the North Island and Aoraki for the South Island).

Local Government New Zealand (LGNZ) states that the place of local government within New Zealand's constitutional arrangements needs to be recognised. This would take the form of recognition in any written constitution, or entrenchment of local government legislation. Either of these would provide certainty for councils when assessing their roles and powers.

LGNZ also set out that the New Zealand should endorse subsidiarity as the principle upon which to determine the relative roles of local, regional and national spheres of government. Subsidiarity is defined as the principle "whereby decisions should be taken at the level closest to the citizens, town or municipality, and that only those tasks that the local level cannot effectively carry out alone should be referred to higher levels".

Roger Matthews, Grant Hewison and John Sheppard argue that the place of local government in our constitutional arrangements is both neglected and highly important.

It is submitted that it is essential that any review of new Zealand's constitutional arrangements should properly consider the role of local government. It is clear that local government has been part of New Zealand's constitutional development since 1840 and the recognition and formalisation of this is long overdue. In order to protect the purpose and role of local government, it is submitted that there is an immediate

need for local government to be recognised in the New Zealand Constitution Act 1986.

Areti Metuamate queries where the name New Zealand came from. The submission states that fundamental questions about our national identity must be considered when assessing how our constitution is to develop.

Stephen Pearce states that at the time of inauguration the British Monarch was God's representative of state in the world. Despite the fact that the British Monarch fails to fulfill this role in New Zealand, to fail to acknowledge a deity would be to ignore 2000 plus years of Christian history.

Kim Robinson submits that all New Zealanders, including those who are profoundly deaf, should have access to all elements and sources of the constitution and be able to contribute to constitutional developments in this country. All forms of communication, including sign language, should be used in this process.

Te Rūnanga O Te Rarawa expresses cynicism about Government processes of inquiry and review generally, including select committee processes.

John Scarry comments on the constitutionally vital role that government departments, Parliament and select committees play in the drafting, review and debate of legislation. He particularly emphasises concerns in light of his experiences with the passage of the bill that became the Building Act 2004. "Key to New Zealand's constitutional arrangements is the belief that Parliament will responsibly review and amend legislation in a meaningful way".

Te Taura Whiri i te Reo Māori (The Māori Language Commission) recommends that the Māori language be entrenched in New Zealand's constitutional arrangements.

Dr David Williams suggests other matters that need to be considered are: a move to a republic once the constitutional status of the Treaty of Waitangi has been finalised, robust division of powers in the constitutional arrangements of the nation, any significant constitutional reforms requiring a 75 percent majority of Parliament, consideration of entrenching other constitutional norms and a debate over the design of the national flag.

Appendix F**NEW ZEALAND CENTRE FOR PUBLIC LAW**

Te Wananga O Nga Kaupapa Ture A Iwi O Aotearoa

13 May 2005

Chair
Constitutional Arrangements Committee

PARLIAMENTARY SOVEREIGNTY

As requested, this background briefing paper seeks to outline the key dimensions of the issues and debate surrounding the doctrine of “parliamentary sovereignty” and the respective roles of the legislature and the judiciary in New Zealand’s constitution.

The paper starts by providing a summary statement of parliamentary sovereignty according to prevailing orthodoxy. It examines the limitations built into the doctrine, particularly focusing on the role of the judiciary vis-à-vis the legislature. It also describes the general law-making role of the courts. The balance between these branches of government is informed by comparative examples from the United States, Canada and the United Kingdom. The paper concludes with a summary statement of the current state of the doctrine in New Zealand’s constitution.

A summary statement of orthodoxy

The doctrine of parliamentary “sovereignty” is core to the Westminster model of government. The classic statement belongs to the nineteenth century United Kingdom constitutional lawyer, Professor Albert Venn Dicey:⁴⁷⁵

The principle of parliamentary sovereignty means neither more nor less than this, namely, that parliament thus defined has, under the English constitution the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of parliament.

The historical origins of the doctrine of parliamentary sovereignty can be most easily understood as an outcome of the struggle between the United Kingdom Parliament and

⁴⁷⁵ A V Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (10 ed, London, MacMillan & Co, 1959; 1st ed 1885) pp39-40. And see Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press, Oxford, 1999).

the monarchy in the sixteenth and seventeenth centuries. Parliament eventually succeeded in asserting its ability to exercise ultimate decision-making power over a previously absolutist British monarchy. Its assertions gained authority when the courts recognised Parliament's power as correct in law. So the doctrine of parliamentary sovereignty initially evolved as a reaction to claimed monarchical power.

Limits on Parliament's sovereignty

There are a number of extra-legal constraints on Parliament's lawmaking powers. For example, the legislative process contains *procedural* limits on how Parliament can make laws. Further, it is now generally accepted that Parliament is able to bind the manner and form in which future Parliaments may make laws (if not the substance of those laws). The requirement for a 75% majority of the House to amend certain provisions of the Electoral Act 1993 and Constitution Act 1986 is an example.

There are also practical constraints on how Parliament can legislate. For example, international obligations and lack of international power constrain the effectiveness *in practice* of legislation that purports to have extra-territorial effect. And, again in practice, it is thought unlikely that Parliament would go mad enough to pass extreme legislation that (to use Dicey's example) decided that all blue-eyed babies should be murdered. Public opinion, international condemnation and democratic electoral incentives would prevent it.

What if practical constraints fail? A controversial question is whether there are any legal constraints on Parliament's law-making powers. Are there *any* circumstances in which the courts may be entitled to refuse to uphold the validity of legislation passed by Parliament.

In New Zealand up to now, this debate has been primarily theoretical and academic, the judicial contribution having been largely confined to a series of increasingly assertive comments, especially by then President of the Court of Appeal, now Lord Cooke, in the Muldoon era that: "[s]ome common law rights presumably lie so deep that even Parliament could not override them."⁴⁷⁶ It is probably not coincidental that the judicial contemplation of this direction occurred at a time when there seemed to be a higher likelihood of Parliament passing legislation that trespasses extremely on rights and freedoms than it does now.

Although this is largely an academic question, it is nonetheless an inevitable focal point for debate as people seek to understand and test the limits of the doctrine of parliamentary sovereignty. It is not, however, clear that the question is capable of resolution, nor that it would be of benefit to resolve it. As the historical origins of the doctrine of Parliamentary sovereignty illustrate, the foundations that the doctrine rests on are political as much as legal. Over the centuries, a balance has emerged between the respective roles of the monarch, the executive, the legislature and the courts. We now have a pyramid structure which enables the monarch, as the formal head of state and source of authority, to be combined with a modern democracy (Parliament), with a formal justice system (the courts) and with representative and responsible government (the executive). A complex web of relationships binds the different points of that pyramid together.

⁴⁷⁶ *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398 (CA).

As long as each actor stays within their conventional role, the whole structure is stable. But if one acts in a dramatically unconventional or unorthodox way, then the web of links between them means that there is likely to be a reaction from one of the other actors. Action induces reaction. And the reaction may also be unorthodox or unconventional, in order to match or neutralise the initial action. It can be expected that the reaction would be designed to bring the system back into balance and in particular to ensure that it remained grounded in the fundamental principles of democracy and the rule of law.

So what can Judges do?

Even without questioning Parliamentary sovereignty, there is probably little popular appreciation of the extent of courts' power in exercising their core judicial functions.

Courts interpret statutes

Simplistic orthodoxy holds that Parliament makes statutes which courts interpret in particular cases when ambiguity or inconsistency in statutory wording so requires. But in interpreting statutes courts have adopted a variety of techniques and presumptions that can stretch a long way. Courts will presume, for example, that Parliament does not intend to legislate inconsistently with international obligations, nor to take private property without compensation.

A presumption that has received particular emphasis in recent court decisions in the United Kingdom, is the "principle of legality". In practice, this could have the effect of giving some legislation a privileged status over other legislation. In the words of Lord Hoffman:⁴⁷⁷

Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights ... The constraints on Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, through acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.

The principle of legality has already influenced New Zealand judges, e.g. *R v Pora*.⁴⁷⁸ It will be clear from Lord Hoffman's words, above, that common law presumptions of this kind are powerful tools by which the courts contribute to the contours of New Zealand law. The fact should, however, never be lost sight of that if Parliament is unhappy with the outcome of such court decisions, it is free to legislate. Thus, the deployment of common law presumptions is best seen not as a transgression of the doctrine of parliamentary

⁴⁷⁷ *R v Secretary of State for the Home Dept; Ex parte Simms* [2000] 2 AC 115 (HL).

⁴⁷⁸ [2001] 2 NZLR 37.

sovereignty but rather, as part of the organic ebb and flow in the relationship between the legislative and judicial branches of government.

It seems to us that Chief Justice Elias’s recent extra-judicial writing can, at least in part by understood as a reference to the courts’ interpretive powers rather than a front-on attack on the notion of parliamentary sovereignty.⁴⁷⁹

In addition to these common law presumptions, Parliament itself has legislated for some general presumptions of statutory interpretations. For example, section 5(1) of the Interpretation Act 1999 provides that “[t]he meaning of an enactment must be ascertained from its text and in the light of its purpose.” Section 6 of the New Zealand Bill of Rights Act 1990 provides that “[w]herever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning”.

In applying these and other presumptions it is for the courts to determine the sometimes difficult question as to how far the words of a statute are capable of being stretched to ensure consistency with the underlying presumption of interpretation. There will always be different views, both as to underlying philosophy and as to the particulars of the statutory language, that will impact on how this question should be resolved in any given case. That is the nature of the judicial role. Undoubtedly, there have been occasions where the words of a statute have been strained by a court determined to give it an interpretation consistent with an underlying, legislative or common law presumption. Equally, there are occasions where courts feel constrained to confirm the plain meaning of legislative words even where they surely could not have reflected Parliament’s intention. Again, in all instances it is always possible for Parliament to pass new legislation confirming its intention.

The *Lesa* case on Samoan citizenship provides a useful example of the interaction between legislation, court decision and subsequent parliamentary action.⁴⁸⁰ This Parliament has recently given careful consideration to the rights and wrongs of this episode of New Zealand’s history.⁴⁸¹

Courts make law

When we move beyond statutes, there is no question but that courts make law. “Common law” is the law contained in the aggregation of individual court decisions. It was originally supposed to express the common understanding of the populace of the customary rules that govern private interactions in England, and it evolved to encompass aspects of the relationship between individuals and the State.

Of course, common law can be overruled—modified or even abolished—by a statute passed by Parliament. New Zealand’s accident compensation scheme abolished tortious liability for personal injury at common law. Introduced to the New Zealand Parliament this month is a Bill that would codify into statute a major body of common law—the law of

⁴⁷⁹ Rt Hon Dame Sian Elias, “Sovereignty in the 21st century: Another spin on the merry-go-round” 14 *Public Law Review* 148 (2003).

⁴⁸⁰ *Lesa v Attorney-General* [1982] 1 NZLR 165.

⁴⁸¹ *Petition 2002/44 of Dr George Paterson Barton Vaitoa Sa and 100,000 others: Report of the Government Administration Committee*, (2004) AJHR I5C.

evidence. But much of the law of tort, contract, property and equity law in New Zealand is still common law in origin and evolution. And courts make it.

One branch of the common law that is of particular significance for the relationship between the judicial and political branches is administrative law and, in particular, the High Court's judicial review jurisdiction. In New Zealand as in other common law jurisdictions it has long been recognised that the High Court exercises an inherent supervisory jurisdiction over administrative decision-making as well as over the decisions of inferior courts. The Judicature Amendment Act 1972 clarifies aspects of this review power but does not displace the underlying, inherent jurisdiction.

Consistent with the doctrine of parliamentary sovereignty, the courts' inherent supervisory jurisdiction does not entitle it to disapply legislation. For that reason, where Parliament has entrusted a decision to a particular body or official, the courts do not generally re-make the decision. Rather, they review the decision for procedural fairness, reasonableness and compliance with the law. The precise contours of this review jurisdiction (for example, the meaning of the phrase "reasonableness") are, however, malleable and accordingly, the scope of the courts' review jurisdiction has changed over time and will continue to change. This is part of the organic ebb and flow of the relationship between judicial and political power.

Courts make constitutional law

Common law decisions, along with key statutes and constitutional conventions, also form part of the unwritten constitution in the United Kingdom and New Zealand. There are common law rules that uphold the rights and freedoms of citizens, such as freedom from arbitrary arrest or detention and freedom of expression, movement and association. The New Zealand Bill of Rights Act 1990 reinforces many of these rights and freedoms with statutory authority, but does not remove or replace them. To the extent that part of our constitution lies in the common law, it is made by judges.

This point could be taken further. Fundamental constitutional doctrines, such as separation of powers and parliamentary sovereignty and the rule of law, are thought to be part of New Zealand's unwritten constitution. Part of why we think that is because judges say so in their common law decisions. Court judgments are cited as authority for the validity of the doctrine of parliamentary sovereignty. Some commentators have therefore suggested that if the doctrine of parliamentary sovereignty is based in the common law, there is nothing to prevent the judiciary from either refusing to continue to recognise it (for example, by disapplying objectionable legislation) or re-examining its precise scope. Other commentators have, however, responded that while the common law may affirm parliamentary sovereignty, it did not create it. Further, just as there is nothing to stop the courts from refusing to recognise Parliament's lawmaking powers, likewise there is nothing to stop Parliament from refusing to recognise the powers of the courts.

In the end, as we have suggested above, the question is as much one of *real politik* as of law. Our fundamental constitutional doctrines depend primarily on mutual respect and recognition between the branches of government. If one constitutional actor were to step dramatically outside its conventional role, reactions could be expected from the other branches.

Comparisons with overseas

The constitutional experiences of other common law nations suggest two important lessons: first, parliamentary sovereignty is not the only model within which a democratic nation can resolve the relationship between the judicial and the political branches and second, there are many different ways in which the balance between different constitutional actors can be struck.

The United States of America is the classic example of the former proposition. In the United States, the courts exercise a power to strike down legislation that violates the Constitution. That power is not written in the Constitution. Rather, in *Marbury v Madison*⁴⁸² the United States Supreme Court determined that the proper interpretation of the written Constitution required the court to exercise such a power. The other branches of government acquiesced and popular opinion in the United States now seems firmly in favour of the judicial exercise of such powers.

Canadian courts have also been given the right to strike down legislation that is inconsistent with the Canadian Charter of Rights and Freedoms. However, that power can be overridden by explicit legislative wording that the provision was enacted “notwithstanding” the Charter. Thus, although the courts’ constitutional powers are significantly expanded, the legislature formally retains the final word.

A different balance has been struck in the United Kingdom under the Human Rights Act 1998 (UK). Although the courts cannot strike down legislation that is incompatible with the Human Rights Act, the Act provides the courts with an explicit power to declare legislation “incompatible” with it, and provides the executive with a fast-track process to amend legislation declared by the courts to be incompatible without the involvement of Parliament.

The New Zealand Bill of Rights Act 1990 does not contain an express power for the courts to make such declarations of “incompatibility” or “inconsistency”. However the New Zealand Court of Appeal has indicated that it regards such a power as implicit in the Bill of Rights and that it would be prepared to do so on an appropriate occasion.⁴⁸³ Such a declaration would not affect the validity of legislation, but would be a formal statement by the court of the legislation’s compatibility with human rights standards. Parliament did not respond explicitly to that judgment, but the 2001 amendments to the Human Rights Act 1993 gave a power to the Human Rights Review Tribunal to make such declarations. The legislation also requires a process for executive and parliamentary response to such a declaration.

These examples suggest that the better question is not which constitutional actor has ultimate authority but rather, how is the exact balance between the branches of government struck at any one time. The answer to that question can, however, be expected to be in a constant state of flux and change.

⁴⁸² 1 Cranch 137; 2 Led 60 (1803).

⁴⁸³ *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 9; see also Thomas J in *R v Poumako* [2000] 2 NZLR 695, 715-720.

Conclusion

The doctrine of parliamentary sovereignty is not the sole determinant of the relative power of the legislative and judicial branches of New Zealand government. The relative power of the legislature and judiciary plays out in their day-to-day activity of making statutes, making common law and interpreting statutes. On the whole, Parliament's will is dominant.

The judiciary does make law, in contributing to the evolution of the common law and in interpreting statutes. It can even contribute to the making of constitutional law in our unwritten constitution. In the future New Zealand courts may further develop their role of statutory interpretation. In adopting the principle of legality they may set a higher requirement of legislative clarity before bending to Parliament's intention in legislating inconsistently with core constitutional or human rights values. None of these judicial roles contradicts the doctrine of parliamentary sovereignty.

In an extreme situation, if Parliament were to be very clear in enacting legislation that trespasses extremely on citizens' rights and freedoms, it is possible that New Zealand courts might react by taking the extreme step of finding that to be outside Parliament's substantive power. But until such an extreme circumstance happens, this sort of exception to Parliament's sovereignty remains academic and theoretical. The ultimate resolution to such an extreme situation of conflict between the branches of government would, in practice and in principle, ultimately lie with the opinion of the New Zealand public.

This memo has been prepared by the Director and Deputy Director of the NZCPL, Matthew Palmer and Claudia Geiringer, and by Nicola White, Senior Research Fellow at the Institute of Policy Studies. We are, of course, happy to discuss this memorandum with the Committee and to undertake further work on the issues raised.



Professor Matthew S. R. Palmer
Director, New Zealand Centre for Public Law

Appendix G

Menu of possible constitutional issues

I THE FORM OF NEW ZEALAND'S CONSTITUTION

- 1 Should New Zealand have a written Constitution? What would be in it?
- 2 Which branch(es) of government should have ultimate authority over a written Constitution?

II CONSTITUTING AND OPERATING GOVERNMENT

A Constitution and Operation of the Sovereign

- 3 Is the nature of New Zealand's head of state, as a monarch, appropriate to New Zealand's evolving national and constitutional identity?
- 4 What sort of head of state is most appropriate for New Zealand in the 21st century? Should New Zealand abolish its monarchy? If so:
 - What should replace it?
 - How would the head of state be appointed/elected?
 - What should the powers of the head of state be?

B Formation and Operation of Executive Government

- 5 Are the rules for the formation of government clear enough? Do the reserve powers need clarification?
- 6 Are the accountability mechanisms for executive government sufficient?
- 7 Are the conventions of individual and collective ministerial responsibility operating effectively?
- 8 Are the laws and conventions governing the operation of the public service operating effectively?
- 9 Is the independence of the Commissioner of Police adequately protected?
- 10 What is the position now on the convention that New Zealand is a secular state? Is it being eroded by various statutory directives to consider cultural and spiritual values?

C Constitution and Operation of Parliament

- 11 Does Parliament operate effectively as a forum for party political contest?
- 12 Does Parliament operate effectively as a forum for law-making?
- 13 Are Parliament's mechanisms for holding the executive to account adequate?
- 14 Is Parliament the right size?
- 15 Is the 3-year term appropriate?

- 16 Should there be a second chamber? A “main committee”?
- 17 Are Parliament’s own resources, independent of executive government, enough in an MMP environment?
- 18 Does Parliament have adequate mechanisms to review and form views on aspects of the constitution?
- 19 Is the scope of parliamentary privilege appropriate?

D Constitution and Operation of Judiciary

- 20 Should there be a change in the process of appointing judges? e.g. Judicial Commission?
- 21 Should there be a change in the structure of the court system? For example, reversal of the creation of the Supreme Court? A response to the Law Commission’s 2004 report *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals*?
- 22 What is the state of the principle of open justice, given secrecy provisions and suppression powers available to various courts?

E Inter-relationships between Branches of Government

- 23 What strains are there on the relationship between the judiciary and other branches of government and do they need to be addressed?
- Should the conventions governing the relationship between the judiciary and legislature/executive government be reviewed? Are new mechanisms needed to mediate this relationship?
 - Is the current role of the Attorney-General with respect to the judiciary appropriate? What is the current status of the convention that judges are protected from political criticism?
- 24 Should the conventions on appropriate forms of legislation change, so that it is less common for judicial decision-making to be empowered by broadly worded legislation and the conferral of broad judicial discretion?

III REGULATING GOVERNMENT'S RELATIONSHIP WITH CITIZENS/ELECTORS

A Elections

- 25 Should the electoral system be changed?
- 26 Are any changes to MMP desirable?
- 27 Should the Māori seats continue to exist?
- 28 Should the structure for the administration of elections be reviewed? e.g. changes to the functions of the Electoral Commission and other electoral agencies.

B Direct Democracy

- 29 Should the existing mechanisms for initiating referenda be reviewed?
- Should it be easier or harder for citizens to initiate referenda?
 - Should governments use referenda more often? When? e.g. regarding constitutional issues?

- Should there be a system for government initiating referenda?
- Should there be a system of binding referenda?

C Protection of Rights and Freedoms

30. Are the protections for human rights and freedoms adequate and effective?
- Are there rights that need enhanced legal protection, e.g. through inclusion in the New Zealand Bill of Rights Act 1990 (Socio-economic rights? Property rights? Privacy?).
 - Does New Zealand need a better developed law or set of principles on regulatory takings, and on the allocation of protection of property rights in general?
 - Should rights be protected through a supreme law?
 - Should there be changes to the role of the judiciary or Parliament in relation to the New Zealand Bill of Rights Act 1990? e.g., alterations to the section 7 vetting procedure? An express power to make declarations of incompatibility such as is available under the Human Rights Act 1998 (UK)?
 - Are the principles of equality and freedom from discrimination being undermined by legal provisions that differentiate on the basis of race or ethnicity?

D Public Opinion and Information

31. Is the Official Information Act 1982 operating effectively?
32. Is the regulatory framework for the media contributing positively to the operation of our constitution?

E Local Government

33. Is the accountability framework appropriate in regulating local government's new power of general competence?
34. Should there be more devolution of power to local government?

F Treaty of Waitangi

35. What should be the constitutional place of the Treaty?
- Should it be put in law? Supreme law? With what effect?
 - What are the implications of the Treaty for other aspects of the operation of New Zealand's constitution.

G Aboriginal Rights

36. Should the law protect aboriginal and customary rights? How? And what relationship should that have with the Treaty of Waitangi and other law?

H International Law

37. Do government procedures and institutions for entering into international obligations need review?
- Should parliamentary involvement in the treaty-making process be enhanced?

- 38 Are there adequate systems for New Zealand institutions to consider or respond to international law and/or decisions by international bodies?
- To what extent should courts take direct account of international obligations?
 - How should executive government respond to decisions by international bodies?

IV THE PROCESSES OF CONSTITUTIONAL REVIEW AND REFORM

- 39 What should be the process(es) of significant constitutional change?

Appendix H**NEW ZEALAND CENTRE FOR PUBLIC LAW**

Te Wananga O Nga Kaupapa Ture A Iwi O Aotearoa

3 May 2005

Chair
Constitutional Arrangements Committee

PROCESSES FOR CONSTITUTIONAL CHANGE IN NEW ZEALAND

The Committee has requested a paper on possible options for processes for constitutional change that might be used in New Zealand. The Parliamentary Library has prepared a separate and comprehensive paper that describes the mechanics of constitutional reform processes in a number of other countries.

This paper does not replicate that material. Instead it adds some discussion of New Zealand experience of constitutional reform to date, and some overall commentary and analysis, in order to inform discussion of the broad approaches that might be considered in New Zealand. The paper concludes with a list of proposed key elements for any process of constitutional reform in New Zealand and with questions for discussion by the Committee.

A preliminary point

The first point to be made is that there is no clear fence around what does and does not amount to “constitutional” change. This is true everywhere, but particularly so in a country that does not have a document labelled “the constitution”. In many instances the question of whether something is appropriately described as constitutional becomes an active and contested part of the political debate. Labelling a reform as constitutional enables opponents to challenge the legitimacy of the process being followed as well as the substance of the reform. In New Zealand political debate “constitutional” often becomes a synonym for “important” or “controversial”.

Past practice in New Zealand

There is minimal legal prescription of how to go about constitutional change in New Zealand. Indeed, to the extent that New Zealand’s unwritten constitution is composed of common law and constitutional conventions, constitutional change can eventuate from judgments of the courts or from a sustained change in practice and understandings.

The only rules about constitutional change involving legislation that require something more than ordinary legislation making are the handful of entrenched provisions in the Electoral Act 1993 and Constitution Act 1986.

A range of processes has been used since New Zealand acquired full law-making authority in 1947, depending on the nature and significance of the change under consideration. The core of the process has always been ordinary legislation, but that process has at times been augmented in a range of ways. Techniques have included

- ordinary legislation (Constitution, State Sector and Public Finance Acts, and amendments to them; note that the Constitution and Public Finance Acts were passed with opposition support)
- legislation passed with a “super-majority” of 75 percent or more (entrenched provisions in the Electoral Act 1993 and Constitution Act 1986)
- some combination of a public discussion paper, expert advisory group, and ordinary legislation (Supreme Court Act, NZ Bill of Rights Act)
- Law Commission report and select committee consideration (changes to Parliament’s role in Treaty making)
- referenda (the term of Parliament, in 1967 and 1990)
- Royal Commission, followed by a referendum (with publicly funded and neutral information), parliamentary consideration of legislation, and a further referendum (the adoption of MMP).

Over the first part of last century, New Zealand’s constitutional evolution into an independent nation proceeded largely through negotiation between the government here and the British government, accompanied where necessary by legislation either here or in Britain. For example, although there were academic seminars at the time that the Statute of Westminster Adoption Act and the New Zealand Constitution Amendment (Request and Consent) Act were passed in 1947, there was no formal public consultation.

The abolition of the Legislative Council in 1950 could be described as a significant constitutional change. It was handled as a matter of contested party politics rather than as a constitutional change that required broader consensus or explicit consultation with the public. Two opposition (National Party) bills to abolish the Council were defeated in 1947 and 1949. Abolition was National Party policy in the 1949 general election and when National won the election they moved immediately to make the change. The first step was to appoint 26 new members of the Council, to ensure that the Abolition Bill would be supported when the Council voted on it. These 26 became known as “the suicide squad”, and their appointment to what had previously been a Labour dominated Council meant that the bill passed with a majority of 10 votes in the Council.

This history, and the point already made about the lack of any firm definition of what is or is not constitutional, combine to suggest that the process of reform in New Zealand on any given issue is ultimately determined by political judgment, informed by a mix of legal or constitutional principle, public opinion, and the nature and significance of the change being considered.

For example, changes to the Constitution Act could be considered fundamental to the constitution, and requiring a full process of expert, public, governmental and parliamentary consideration. In reality, however, the changes that have been made to that Act have been highly technical and non-controversial, with little if any impact on core constitutional principle or practice. Amendments have been made without any specific public discussion, often as consequential amendments from some other statutory reform. Core pieces of legislation such as the Official Information Act 1982 have even been amended through a Statutes Amendment Bill.

In New Zealand, the process of reform has always been pragmatic. The flexibility of our constitutional arrangements means that process can be tailored to the actual importance of the reform, rather than dictated by formal rules driven from the nature of the document being changed. We are able to look to the best of international experience as we create the processes for any particular discussion. It must also be expected that the process chosen is likely to be challenged by those opposing the reform: the fluidity of our arrangements means that there will never be an unquestionably right or wrong process.

The importance of the context of constitutional change

In looking to international examples of constitutional reform, it is important to consider the context in which the reform has arisen. That context will be relevant to the process that is followed, and the procedural standards that are required in order to effect change.

In general, constitutional changes arise in three quite distinct contexts

- following conflict or war (e.g. South Africa)
- as part of a move from a colony to an independent nation (e.g. Mauritius)
- within a settled social and legal order, in order to update or modernise aspects of a country's governance (e.g. Canada).

Post conflict constitution-building

Post-conflict constitution building will inevitably emphasise inclusiveness, and the need to create and demonstrate as broad a level of community support for the new governance arrangements as possible. Quite simply, this is because a key goal of the process will be to build a new “social contract” that will form the foundation of that society going forward. The durability of the new governance arrangements for that nation state quite literally depends on whether the process of forming that new social contract has bound in a sufficient majority of the population, and the previously warring groups. At a simple level, it can be suggested that South Africa managed this in the early 1990s, but that Fiji did not. One constitution is holding; the other did not.

South Africa employed a deliberately staggered process to generate a new Constitution. Through the multi-party negotiation process (with the National Party and the African National Congress the main players) an Interim Constitution was produced in 1993. The Interim Constitution prescribed the process by which a final constitution was to be developed, and included a set of 34 “constitutional principles” with which the final constitution had to be consistent. Before a final Constitution could come into effect, the newly created Constitutional Court would have to certify that it complied with these 34 principles. This device effectively enabled public and political debate to focus on reaching

agreement on a set of relatively simple principles, but built in a system for expert review of the more detailed document against those agreed principles.

The two Houses of the national South African Parliament, convened as the “Constitutional Assembly”, were charged with drafting the final constitution. The Assembly delegated much of the task to a 46 member Constitutional Committee (further sub-divided into a number of “theme” Committees) that was served by a Constitutional Secretariat and a number of expert constitutional advisers. There was a great deal of public participation throughout the development process, and intensive consultation, mediated through the political parties represented in Parliament. The two Houses of Parliament, sitting as the Constitutional Assembly, eventually adopted a final draft constitution in May 1996.

The South African Constitutional Court, however, found the final draft did not satisfy a number of the 34 principles and so did not certify it. The Constitutional Assembly then had to reconsider the final draft and to try to meet the concerns expressed by the Court in its judgement. In October 1996, a modified Constitution was produced which was then certified by the Constitutional Court on the basis that all of the grounds for non-certification had been eliminated.

The explanatory memorandum in the final constitution describes the objective of the overall process as being “to ensure that the final Constitution is legitimate, credible and accepted by all South Africans”.

Post-colonial constitution building

Post-colonial change inevitably tends to reflect the compact reached with the colonial power about the conditions under which that power is to be relinquished. The focus will be on the international, government-to-government compact, and any public process will be designed primarily to seek endorsement of that compact. The new constitution accordingly is less likely to reflect fully domestic issues or popular sentiment about the way in which the various parts of the community are to co-exist, or about the organisation of state power. This is one reason why the achievement of independence is often followed by a period of domestic political instability, which can spill into further constitutional reform. The removal of the colonial relationship is a first step, which then provides room for domestic constitutional issues to be explored more fully.

The transition from colony to independence in Mauritius provides a classic example of this process. Full independence from Britain was achieved in 1967–68, following formal discussions at the political level between Britain and Mauritian political parties. A general election in 1967 implicitly supported the change, as it elected a majority group of parties that supported independence. But there was no specific public consultation on the issue. Two decades of political instability followed, culminating in further constitutional change (including a move to a republic) in the early 1990s.

Constitutional change within a settled society

Constitutional change within a settled society can take on a different character, depending on the nature of the issue. At times, the context and the technical or uncontroversial nature of the changes being proposed may mean that they are not accompanied by a debate about a major issue affecting the social contract underpinning the society. As a consequence, the

broad socio-political need to seek and demonstrate broad popular support is much reduced. In practical terms, the likelihood of engaging a broad section of the population in the debate is also going to be smaller, if there are no compelling social issues on the table.

In the abstract, then, it could be suggested that the dominant goal when using mechanisms that measure popular support in this situation is likely to be to assess the politics of the issue. What confounds change in this situation, however, is that in many countries the legal requirements for constitutional change are likely to mean that a high level of popular support has to be demonstrated, either through a referendum or some kind of parliamentary process demonstrating support across the political spectrum.

The examples of most immediate relevance to New Zealand are probably the constitutional reform initiatives in Australia in the 1990s, and the reform processes in Canada throughout the 1980s and 1990s. The experience in both countries has been that it is very difficult to generate the level of public engagement that is required by the formal processes for change in each country's constitution. Proposals for constitutional reform in both countries have failed, in part as a result of this lack of engagement.

The Australian experience is discussed in more detail shortly. In Canada, two referendums on the question of Quebec independence have failed (in 1980 and 1995). Various Canadian Prime Ministers have also sought to bring about changes to the Canadian Constitution to achieve unanimous agreement amongst the provinces on power sharing and sovereignty issues. The Meech Lake Accord and the Charlottetown Accord were both unsuccessful attempts to negotiate constitutional change between the federal government and the provinces, with the Charlottetown Accord also being defeated in a nationwide referendum.

A recent provincial reform process is an interesting innovation. British Columbia (BC) has used a "Citizen's Assembly" to deal with the possible adoption of a new electoral system for the BC legislature (see www.citizensassembly.bc.ca, accessed 6 April 2005). This unique Assembly (which presented its report in December 2004) had 160 members, one man and one woman from each of BC's 79 constituencies plus two aboriginal members. Members were picked by random from a pool that reflected the gender, age and geographic make-up of British Columbia. Ultimately the Assembly recommended a form of STV be adopted, and this proposal is to be put to voters at the next provincial election. Once it presented its report, the assembly and its staff disbanded.

There are times when, even in a settled society, debate about constitutional change can raise issues that go to the heart of the understandings, or social contract, on which the society is built. In those instances, it is likely that the processes for constitutional change are going to need to be deep, and to engage a broad cross-section of society.

Lessons for New Zealand

As noted, New Zealand has the rare luxury of being able to tailor its process to the nature of the issues being debated in any process of constitutional reform. As it looks elsewhere for examples of good process, an awareness of context is needed. For example, the Commonwealth Human Rights Initiative (CHRI) developed a position paper on best practices in constitution making for the Commonwealth Heads of Government Meeting in Durban in 1999. The paper was developed against a focus on the desire in many countries,

particularly in Africa, to arrive at truly democratic and legitimate constitutions. The principles put forward are attached as Annex A.

While the broad principles are undoubtedly sound, the question for New Zealand would be whether aspiring to reach those standards in an absolute sense would be setting the bar too high. The principles were developed with a focus on countries embarking on post-conflict change and as emerging democracies, not on countries discussing reform within a settled and democratic social and political framework.

For New Zealand then, a first question is likely to be: do the changes being debated go to the heart of the current social contract or political norms on which our society is built? If the answer is no, then is it likely that that level of popular and emotional engagement could ever be generated? While the general principles hold true, careful thought would need to be given to the standards that were going to be required. If the answer is yes, then the same principles would apply but with much higher standards attached to them.

Learning from the Australian experience

The experience of constitutional discussion through the 1990s in Australia is highly instructive, given the similarities in our history and in our current social and political arrangements and areas of debate. Throughout that decade, the Constitutional Centenary Foundation (CCF) worked to assist informed public debate on all aspects of the constitutional system. It was clearly independent of government and non-partisan in its structure and its activities. The CCF functioned only for that decade, and at the end of its operation it produced a report summarising its experiences from a decade of working to promote public discussion on constitutional matters. Key points made in that report include

- overwhelming public support for referenda as part of the process for constitutional change
- great public concern about the lack of public knowledge and understanding of constitutional issues
- the importance of establishing public trust in the process for generating discussion, by ensuring that
 - public information about the constitutional system is accurate and reliable
 - information and activities are impartial, enabling people to make up their own minds
 - information and activities are independent of party politics
 - activities are conducted in a way that avoids unnecessary division and controversy, while still enabling free expression of views
- the difficulty of engaging public interest, and the need to create opportunities for people to be actively involved in discussions, and to relate discussions to topical and locally relevant issues
- the importance of any body overseeing the discussion process to

- be connected in same way with a wide range of the population, although there are difficulties with using membership organisations to achieve this
- have a link into the country's Parliament political process, whether by way of bi-partisan political representation on the board or by some requirement for regular briefings for political parties
- have a broad and diverse funding base, to maintain its independence.

The Deputy Chair of the CCF throughout its operation, Professor Cheryl Saunders, delivered two papers in New Zealand in 2000 in which she reflected on the Australian experience, and its relevance for New Zealand. (Both are published in C James (ed), *Building the Constitution*, Institute of Policy Studies, Wellington, 2000.) In summary, she commented that

- hurdles to effective public discussion in Australia included
 - the lack of public knowledge and confusion about the constitutional system
 - a reluctance to engage in the issues, in part because of a perception that the constitution was difficult and technical, entangled in party politics, and part of system that was alien to many people
 - the lack of experience on the part of all those involved in the issue, including the CCF, in techniques for promoting engagement.
- the question of change to a republic is an unusual constitutional issue, in that many layers of argument are nested within it and it can be cast as either a minor or major change, depending on your perspective. It also provides a springboard for raising a range of other, related constitutional changes. It is very easy for debate to become confused and, conversely, difficult to crystallise the issues into simple questions suitable for a referendum.
- the process of constitutional discussion that was followed for the republic question did not provide sufficient clarity on the key issues and technical questions, and did not give the public a sufficient sense of ownership of either the model being proposed or the process for debating it. The device of a constitutional convention failed because it was not adequately representative, its processes did not enable the full range of models to be considered, and the speed with which it was held did not allow public comment until after the model had been fully developed.

The hurdles to effective public discussion that Professor Saunders identified have clear resonance for the current New Zealand debate on constitutional issues. The technical, confusing and wide-ranging nature of the republican question would also be matched here. The challenges are therefore similar. The Australian experience with information programmes, public and community discussion techniques, constitutional conventions, and referenda can therefore provide valuable guidance as any New Zealand process is developed.

What about the Treaty of Waitangi?

A question that is unique to New Zealand is the relevance of the Treaty of Waitangi for any process for considering constitutional change. Undoubtedly the place of the Treaty is one

of the key topics for substantive discussion as debate proceeds, but it also needs to be considered at the outset in terms of its impact on the way in which discussion proceeds.

If the nature of the constitutional change being contemplated calls into question aspects of the relationship or norms established by the Treaty, or could be perceived to do so, then it will become important, in at least two senses, to be able to demonstrate a broad measure of Māori support for the change.

First, from a socio-political perspective, it would be important to have a broad level of support if the change is not to create or exacerbate social instability and friction, which would inevitably play out in the political arena. Such a consequence is the antithesis of the general goal of constitution building.

This aspect can be described in terms of social contract theory as well. Questions about the constitutional role of the Treaty of Waitangi are likely to call into question some basics of the social contract that currently underpins New Zealand society, as can be seen in the strands of the debate about equal treatment, the structure of government, security of property rights and so forth. Certainly the Treaty is perceived by many Māori as needing to be at the heart of the social contract. It therefore becomes inevitable that any debate about the constitutional role of the Treaty is going to require a level of engagement that matches that perception of the significance of the issue.

Second, from a legal perspective, it would be important to be able to demonstrate that broad measure of Māori support, because ultimately the courts could be asked to rule on the validity of the steps taken. (Alternatively, recourse could be had to international human rights bodies). In the absence of clear legal rules on the process to be followed, a court could be expected to search for indicators that signal the level of popular support for the initiative as well as the thoroughness of the process.

In New Zealand, and against the backdrop of the current significance accorded to the Treaty of Waitangi it would be likely that such a search would include a check that specific efforts had been made to seek Māori views. This procedural point derives reasonably simply from the general articulation of the duty of good faith decision-making on the Crown: the idea that the Crown should ensure that it is well informed about the Māori perspective on an issue of importance to Māori, before it takes decisions.

More controversially, it is possible that, on an issue of major constitutional importance, a court would also look to assess the level of Māori support for the change. It is conceivable that in an extreme case a court would intervene in a process that it considered to be seriously flawed. It is orthodox constitutional thinking that an extreme step by one branch of government may provoke an extreme step from another.

In the current environment it is difficult to identify significant constitutional questions that do not touch on the Treaty to a material extent, and that would not have social and political importance. The issues surrounding the constitutional impact of the Treaty are so unclear, contested, and socially significant, that it seems likely that anything but the most minor and technical constitutional change would require deliberate effort to engage with Māori as part of the process of public debate.

Conclusion

New Zealand has the luxury of flexibility in this area, and can tailor any process for constitutional reform to the issues in question. But if the issues being debated are at all significant, key elements of any process would probably need to include

- accurate, authoritative, neutral and accessible public information
- non-partisan mechanisms to facilitate ongoing public discussion, engagement and deliberation (models include a neutral foundation, a citizen's assembly or forum, a select committee or other multi-party parliamentary process, or a Royal Commission)
- specific processes for facilitating discussion with and within Māori communities on the issues
- processes for developing any outline models or principles into detailed reforms, which could include processes for public input into the development phase (an expert commission, or select committee, possibly supplemented by a convention or people's assembly)
- processes for public decision-making on whether to change, which would almost certainly need to include a referendum
- a generous amount of time, to give the community sufficient time to absorb and debate the information, issues and options. Experience suggests that haste is counterproductive.

The Committee may wish to decide

- whether it agrees with this list of key elements, or wishes to modify it
- whether it wishes to note or adopt this report, or go further in commenting on future processes, by suggesting how some or all of those elements might be delivered in practice in New Zealand.

This memo has been prepared by Nicola White, Senior Research Fellow at the Institute of Policy Studies and by the Director and Deputy Director of the NZCPL, Matthew Palmer and Claudia Geiringer, with research assistance from Ryan Malone. We are, of course, happy to discuss this memorandum with the Committee and to undertake further work on the issues raised.



Professor Matthew S. R. Palmer
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Annex A: Commonwealth Human Rights Initiative recommendations on best practices of participatory constitution making (extract from CHRI paper to the CHOGM meeting in Durban, 1999)

4. There is a desire amongst many countries, particularly in Africa, to arrive at truly democratic and legitimate constitutions. The experience of countries that have achieved this objective is that Governments must adopt credible processes for constitution making; that is, a process that constructively engages the largest majority of the population. This is necessary to ensure that the end product is seen as legitimate, and owned by all the people. To achieve these objectives, Governments are encouraged to ensure that:

- 4.1 The process of constitution making is, and is seen to be, as important as the substantive context of the constitution itself.
- 4.2 The management and administration of the process is credible and respected.
- 4.3 The public is informed and involved at all stages of arriving at the aims and objectives of the exercise of constitution making and how these objectives are to be achieved. This would ensure that the process is transparent, participatory and credible.
- 4.4 The process is made receptive and open to the diverse views existing in society.
- 4.5 The process by which citizens can make contributions is made truly accessible in terms of physical proximity, languages used, plain language and within a reasonable period of time.
- 4.6 Ordinary people are empowered to make effective contributions by giving them the necessary tools to participate through ongoing public education programmes using appropriate media and other methods to reach out especially to the disadvantaged and marginalised.
- 4.7 Dissenting views are valued as enriching to policy debate and ensuring that various sectors of society are represented.
- 4.8 Conflicting aims and views are mediated in a manner that enriches policy debates and does not stall it. In this regard, adequate provision should be made for conflict resolution and consensus building.
- 4.9 There is a continuous review and evaluation of the processes undertaken to confirm that operating principles and minimum standards are being adhered to.
- 4.10 The process of continuing education of the public, even after the adoption of the constitution, on its content and the values of constitutionalism continues to ensure that these are internalised by the people.
- 4.11 Constitutions are drafted in plain and simple language and translated into all the languages used in a country.
- 4.12 In the interest of protecting constitutionalism, all actions violating these values are unequivocally rejected.
- 4.13 Universally accepted rights are entrenched in the constitution along with independent institutions supporting a constitutional democracy, including specifically the Human Rights Commission, Women's Commission, Constitutional Court, Electoral Commission, Public Protector and the Auditor General.
- 4.14 Constitutions must enshrine the separation of powers.

Appendix I

Bibliography

Constitutional Milestones

Brookfield, Jock, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation*, Auckland University Press, 1999.

Coates, Ken & Paul McHugh, (eds) *Living Relationships: Kokiri Ngatahi: The Treaty of Waitangi in the New Millennium*, Victoria University Press, 1998.

Constitutional Reform Committee, *Report of the Constitutional Reform Committee*, AJHR I.18, 1952.

Department of Justice, *Constitutional Reform – Reports of an Officials Committee* (Reports 1 & 2), 1986.

Durie, Mason, *Te Mana, Te Kawanatanga: The Politics of Maori Self-Determination*, Oxford University Press, 1998.

James, Colin, (ed) *Building the Constitution*, Wellington, Institute of Policy Studies, 2000.

Joseph, Philip A, *Constitutional and Administrative Law in New Zealand*, 2nd ed, Wellington, Brookers, 2001.

King, Michael, *The Penguin History of New Zealand*, Auckland, Penguin, 2003.

McDowell, Morag & Duncan Webb, *The New Zealand Legal System*, 3rd ed, Wellington, LexisNexis Butterworths, 2002.

Minister of Justice, *A Bill of Rights for New Zealand: A White Paper*, AJHR, A.6, 1985.

Orange, Claudia, *An Illustrated History of the Treaty of Waitangi*, Wellington, Bridget Williams Books, 2004.

Palmer, Geoffrey & Matthew Palmer, *Bridled Power: New Zealand's Constitution and Government*, 4th ed, South Melbourne, Oxford University Press, 2004.

Palmer, Matthew, "Some Realism about Relevance: Who Interprets New Zealand's Constitution", *The Second Annual NZCPL Conference on the Primary Functions of Government*, 29–30 October 2004.

Spiller, Peter and others, *A New Zealand Legal History*, 2nd ed, Wellington, Brookers, 2001.

Te Puni Kōkiri, *He Tirobanga o Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal*, Te Puni Kōkiri, 2001.

Processes for constitutional change in other countries

Bennett, Scott & Sean Brennan, *Constitutional Referenda in Australia* (Research Paper 2), Canberra, Parliamentary Library of Australia, 1999.

<http://www.aph.gov.au/library/pubs/RP/1999-2000/2000rp02.htm>

Brazier, Rodney, *Constitutional Reform: Re-shaping the British Political System*, Oxford, Clarendon Press, 1991.

Ford, J, *The Age of Constitutions?: Reflecting on the New Faith in Federal Constitutions* (Paper no. 132), Canberra, National Europe Centre, Australian National University, 2004.

http://www.anu.edu.au/NEC/Ford_paper.pdf

Hart, Vivien, *Democratic Constitution Making* (Special Report 107), Washington, DC, United States Institute of Peace, 2003. <http://www.usip.org/pubs/specialreports/sr107.html>

Kirby, Michael, "A Centenary Reflection on the Australian Constitution: the Republic Referendum 1999", *The Round Table*, vol. 361, 2001.

Leydet, Dominique, "Compromise and Public Debate in Processes of Constitutional Reform: The Canadian Case", *Social Science Information*, vol. 43, no. 2, 2004.

McSorley, John, *The New Zealand Constitution* (Background Note 2000/1), Wellington, Parliamentary Library, 2000.

<http://www.clerk.parliament.govt.nz/content/plib/00-1NZConstitution.pdf>

Warhurst, John, *Constitutional Convention to Republic Referendum: A Guide to the Processes, the Issues and the Participants* (Research Paper 25), Parliamentary Library of Australia, Canberra, 1999. <http://www.aph.gov.au/library/pubs/rp/1998-99/99rp25.htm>

Watts, Ronald, *Processes of Constitutional Restructuring: The Canadian Experience in Comparative Context* (Working Paper 1), Institute of Intergovernmental Relations, Queen's University, Kingston, Ont., 1999

http://www.iigr.ca/pdf/publications/140_Processes_of_Constitutio.pdf

Parliamentary Sovereignty

Cooke, Rt Hon Sir Robin, "Fundamentals", *New Zealand Law Journal*, May 1988.

Cooke, Rt Hon Sir Robin, "How Like an Angel", *Constitutionalism Human Rights & the Rule of Law Essays in honour of Soli J Sorabjee*, ed M C Sharma, R Ramachandran, Universal, 2005.

Elias, Rt Hon Dame Sian, "Sovereignty in the 21st century: Another spin on the merry-go-round", (2003) 14 PLR 148.

Elias, Rt Hon Dame Sian, "Fighting talk and rights talk", *New Zealand Law Journal*, June 2005.

Goldsworthy, Jeffrey, "Is Parliament Sovereign? Recent Challenges to the Doctrine of Parliamentary Sovereignty", *The Second Annual NZCPL Conference on the Primary Functions of Government*, 29–30 October 2004.

Joseph, Philip A, “Parliament, The Courts, And The Collaborative Enterprise”, *King’s College Law Journal*, 2004, 16:321–345.

Keith, Rt Hon Sir Kenneth, “Sovereignty at the Beginning of the 21st Century: Fundamental or Outmoded?”, *Cambridge Law Journal*, 63(3), November 2004.

Loughlin, Martin, “Ten Tenets of Sovereignty”, in *Sovereignty in Transition* ed Neil Walker, Oxford, Hart, 2003.

Thomas, Justice E W, “The Relationship of Parliament and the Courts: A Tentative thought or two for the New Millennium”, *Victoria University of Wellington Law Faculty’s Centennial Lecture*, 30 June 1999.

General

Belich, James, *Making Peoples*, Auckland, Penguin, 1996.

Constitutional Reform Committee, *Report of the Constitutional Reform Committee*, AJHR, I.18, 1952.

Department of Justice, *Constitutional Reform – Reports of an Officials Committee* (Reports 1 & 2), 1986.

Goldsworthy, Jeffrey, “Is Parliament Sovereign? Recent Challenges to the Doctrine of Parliamentary Sovereignty”, *The Second Annual NZCPL Conference on the Primary Functions of Government*, 29–30 October 2004.

Graham, Douglas, *Trick or Treaty?* Institute of Policy Studies, Victoria University of Wellington, 1996.

Harris, B V, “The Constitutional Future of New Zealand”, *New Zealand Law Review*, 2004.

Havemann, Paul, (ed) *Indigenous Peoples’ Rights in Australia, Canada and New Zealand*, Oxford University Press, 2001.

Joseph, Philip A, *Constitutional and Administrative Law in New Zealand*, 2nd ed, Wellington, Brookers, 2001.

Kawharu, I H, (ed) *Waitangi: Māori and Pakeha Perspectives of the Treaty of Waitangi*, Auckland, Oxford University Press, 1989.

Keith, Rt Hon Sir Kenneth, “On the constitution of New Zealand”, *The Cabinet Manual*, 1990, updated 2001.

McHugh, Paul, *Aboriginal Societies and the Common Law*, Oxford University Press, 2004.

Minister of Justice, *A Bill of Rights for New Zealand: A White Paper*, AJHR, A.6, 1985.

New Zealand National Party, *Policy Taskforce: Constitutional Issues*, April 2001.

Orange, Claudia, *The Treaty of Waitangi*, New Zealand, Bridget Williams Books, 1987.

Palmer, Matthew, "Some Realism about Relevance: Who Interprets New Zealand's Constitution", *The Second Annual NZCPL Conference on the Primary Functions of Government*, 29–30 October 2004.

Quentin-Baxter, A, (ed) *Recognising the Rights of Indigenous Peoples*, Institute of Policy Studies, 1998.

Snedden, Patrick, *Pakeha and the Treaty: why it's our Treaty too*, New Zealand, Random House, 2005

Upton, Simon, "Nation Building in Distant Seas", Speech to the 2003 Knowledge Wave Conference Auckland, 2003. http://www.arcadia.co.nz/treaty/nation_building.htm