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“Constitutions – reviewed, revised and adapted”

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Paper by

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“The New Zealand Constitutional Review”

New Zealand is undertaking a constitutional review which stemmed from the confidence and supply agreement between the National Party and Maori Party after the November 2008 general election.

A final report summarising the views of New Zealanders on constitutional issues will be submitted to the Cabinet by the end of 2013 and the Government then has six months in which to respond.

A linking project is the Independent Review of MMP being undertaken by the Electoral Commission which will make its final proposals to the Minister of Justice by 31 October 2012.

Background

A constitution can be seen as the rules about how we live together as a country.

Unlike most other countries, New Zealand does not have a law called “The Constitution.” Instead, the rules for how the country is governed are in what is often called an unwritten constitution. Most of it is in fact written down in various laws, rules, and practices - just not in a single document.

Important elements of our constitution include:

- Laws passed by New Zealand’s Parliament such as the Constitution Act 1986, the Electoral Act 1993 and the New Zealand Bill of Rights Act 1990
- British laws adopted by New Zealand through the Imperial Laws Application Act 1988, for example the Magna Carta.

- The powers of our head of state, the Queen (or King) – for example the power to appoint the Governor-General, whose role is established by the Letters Patent Constituting the Office of Governor-General.
- Underlying constitutional principles, such as the rule of law, responsible government, and the separation of powers.
- Some decisions of the courts.

The New Zealand constitution increasingly reflects the fact that the Treaty of Waitangi is regarded as a founding document of government in New Zealand.

In addition, a set of constitutional conventions, or practices governments follow even though they are not set out in law, have developed over time which fill in gaps in our constitutional arrangements. The conventions are based on democratic principles. Countries with written constitutions also commonly develop constitutional conventions.

Previous reviews

Previous large-scale constitutional related exercises in recent history include the 1986 Royal Commission into the Electoral System and the 2004 Inquiry to review New Zealand's existing constitutional arrangements.

The 1986 Royal Commission into the Electoral System made wide ranging recommendations to change the electoral system, including the term of parliament, the size of parliament, Māori representation and introduction of the Mixed Member Proportional (MMP) voting system. This report led to the 1990 referendum on a four-year term of Parliament and the 1992 and 1993 referenda on the First Past the Post (FPP) and MMP voting systems.

In 2004/5 the Constitutional Arrangements Committee undertook a stock-take exercise that traced historical milestones in the development of New Zealand's current constitutional arrangements. The Committee reported back to the House of Representatives in August 2005. The report identified and described:

- 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.
- The processes that it would be appropriate for New Zealand to follow if significant constitutional reforms were considered in the future, including specific processes for facilitating discussion within Māori communities.

Overseas experience

As considered by the 2004/05 Constitutional Arrangements Committee, it is important to draw on experience from relevant overseas constitutional review processes, such as:

- The 1986-1988 Australian Constitutional Commission tasked with reviewing the Australian Constitution.
- The 1998 Australian Constitutional Convention on the Republic.
- The Canadian 1990-1992 exercise in which the federal and provincial governments sought to engage with the public on a set of proposed constitutional reforms.

The New Zealand Constitutional review

- **New Zealand is undertaking a constitutional review. The review is part of the confidence and supply agreement between the National Party and the Māori Party.**
- **We want to enable debate on constitutional issues, hear the public's view, and consider whether any changes are needed.**
- **We have deliberately set wide terms of reference and a long timeframe to allow all New Zealanders the opportunity to absorb and understand the issues.**
- **We are open to considering other issues that may be raised during the public review.**

Terms of reference for the review

Electoral matters including:

- The size of Parliament.
- The length of terms of Parliament and whether or not the term should be fixed.
- The size and number of electorates, including the method for calculating size.
- Electoral integrity legislation.

Crown-Maori relationship matters including:

- Maori representation including the Maori Electoral Option, Maori electoral participation and Maori seats in Parliament and local government.

- The role of the Treaty of Waitangi within New Zealand's constitutional arrangements.

Other constitutional matters:

- Whether New Zealand should have a written constitution.

Bill of Rights issues:

- The review will also be open to considering other issues and perspectives that are raised during public engagement. For example, this may include public interest in whether New Zealand should move to a republic, or the relationship between central and local government.

The review process

On 8 December 2010, the Government announced a wide-ranging review of New Zealand's constitutional arrangements.

It was the start of a considered process that is taking place over three years.

The review stemmed from the 16 November 2008 confidence and supply agreement between the National Party and Maori Party to establish a group to consider constitutional issues, including Māori representation. That agreement followed the November 2008 general election.

Māori Party co-leader and Minister of Māori Affairs Dr Pita Sharples said at the time of the December 2010 announcement: "The Maori Party sought this review because of the interest in constitutional matters among Maori people generally, including how tikanga Maori might be recognised, and the place of the Treaty of Waitangi in the constitution."

After the November 2011 general election the National and Māori parties signed a confidence and supply agreement which included agreement to continue to progress the constitutional review.

The review is deliberately wide-ranging and includes matters such as the size of Parliament, the length of the electoral term, Maori representation, the role of the Treaty of Waitangi and whether New Zealand needs a written constitution.

New Zealand has a long history of incremental constitutional change and we are keen to stimulate debate on these matters, hear the public's views and consider whether any aspects require change.

We are keeping in mind that enduring constitutional changes generally require a broad base of support. Significant change will not be undertaken lightly and will require either broad cross-party agreement or the majority support of voters at a referendum.

The review is being led by Deputy Prime Minister Bill English (National Party) and Māori Affairs Minister Dr Peter Sharples (Māori Party co-leader) in consultation with a cross-party reference group of MPs. They are Hon Simon Bridges (National), Hon Peter Dunne (United Future), Te Ururoa Flavell (Māori Party), Hon David Parker (Labour), Kennedy Graham (Green Party), Hone Harawira (Mana Party).

Public consultation is guiding the review, and information and education campaigns will be part of the review process.

Māori want to talk about the place of the Treaty of Waitangi in our constitution, and how our legal and political systems can reflect Tikanga Māori. Proper consideration of these issues cannot be rushed.

Following the announcement of the Consideration of Constitutional Issues programme on 8 December 2010 the focus was on identifying issues for consideration and appointment of the Constitutional Advisory Panel.

Constitutional Advisory Panel

In August 2011, Ministers English and Sharples announced an independent Constitutional Advisory Panel of 12 New Zealanders to lead public discussion. The panel has a broad range of skills, including constitutional expertise and experience with community engagement.

This advisory panel is supporting the ministers, who will make a final report to Cabinet by the end of 2013. The Government will respond within six months.

The review took a break in the second half of 2011 to allow for the general election. It resumed in 2012. The ministers will then provide six-monthly reports to Cabinet.

The Constitutional Advisory Panel has set up a website <http://www2.justice.govt.nz/cap-interim/index.html> and is in the first stage of its engagement strategy. It has also just published (September 2012) a booklet, *New Zealand's Constitution: the Conversation So Far*.

It contains a very brief constitutional overview, and then deals with each of the Consideration's terms of reference in turn, summarising "the conversation so far" and raising "questions and perspectives".

Link to booklet:

<http://www2.justice.govt.nz/cap-interim/documents/CAP%20-%20summary%20info%20booklet.doc>

In a report in August 2012 the panel reports holding "early conversations" with a range of organisations and active networks that represent a significant number of New Zealanders, including Māori and community organisations.

It is asking them to provide a gateway to their members and for advice about how to inspire them to participate.

“We have been very encouraged by the interest in and enthusiasm for our engagement with the people of New Zealand,” the panel reports in its August update – *Building Relationships*.

The wider public engagement programme will begin later this year.

Constitutional Review Criticisms

Three major criticisms of the Constitutional Review have been made to date:

Reaction to Focus on Maori seats/Treaty of Waitangi

Typical of adverse reactions to this element of the review is the statement of Rt Hon Winston Peters MP, that is “a sham designed to sneak Treaty of Waitangi ‘principles’ into all laws governing everyday existence in this country”. Argument continues over whether the Treaty is or ever was valid. There has also been a reaction to a discussion of the status of the Maori seats, and a repetition of the desire in some quarters to abolish them, resurrecting the old argument that ethnically based seats are divisive to New Zealand. The overarching question of the constitutional situation of Maori and a sentiment that this review is biased towards Maori interests, as it was initiated by the Maori party, have featured in criticisms of the review.

Republic question absent

Another criticism arises in respect of the review as it made no mention whatsoever of a change to the head of state initially. This issue was mentioned only under ‘other issues when considering a written constitution’ in the booklet, *The Conversation So Far* put out by the Constitutional Advisory Panel. Proponents of Republicanism such as the Republican Movement of Aotearoa argue that this is a major constitutional issue that needs to be addressed, and shouldn’t be relegated in such a way. Lewis Holden (Chairman of the Movement) states “New Zealand republicans are unhappy that the issue of a New Zealand republic was taken off the constitutional review’s remit.”

Lack of public consultation about review

Chen and Palmer, a law firm, have expressed the opinion that constitutional changes require public support, and “*The bottom line is that no Government should be able to justify any major change to New Zealand’s Constitution such as moving to supreme law without “authorisation” “by the people,” likely to be through a majority vote at a plebiscite*”, referencing in particular the examination of the question of whether the Bill Of Rights Act 1990 should be entrenched. They feel that this review is being considered without sufficient public consultation or support for any potential change. There is a sentiment at large that the review is merely the product of a deal between parties while the wider public ignore it, through lack of engagement.

Other Developments

Mixed Member Proportional

Parliament and Elections

New Zealand's Parliamentary and electoral arrangements are unique amongst English speaking countries. Contrasting with the United Kingdom, USA, Canada, and Australia, the national Parliament is uni-cameral. As a country without states, this means New Zealand has just one tier of Parliamentary representation. Our Mixed Member Proportional (MMP) electoral system also sets us apart from the 'first-past-the post' (FPP) electoral systems prominent elsewhere in the English speaking world. A third major point of difference is the existence of two separate electoral rolls: a popular 'general' roll and an indigenous 'Māori' roll. The two rolls see separate Māori and General electorates operating concurrently in the same Parliament.

Uni-Cameralism

New Zealand uni-cameralism developed late, after the near century-old Legislative Council was abolished in 1951 under the first National Government. That change significantly impacted all subsequent developments of the New Zealand Parliament. Over time, it has seen the development of one of a robust committee process. It also combined with the country's then first-past-the-post electoral system to generate concerns of the 'unbridled power' of the single-party, single-House-based Executive. These concerns were a significant contributing factor to the 1986 review of our electoral system and the development of proportional representation.

Mixed Member Proportional

The adoption of MMP was arguably New Zealand's most significant constitutional change since achieving independence from Britain in 1947. A move to the system was recommended by a Royal Commission into the review of the electoral system in 1986 and chosen by New Zealanders in a 1993 referendum. It has now operated with minimal change since the 1996 election. The system is based on the German model of proportional representation. Parliament is divided into electorate MPs, elected by geographical constituencies, and list MPs, allocated to parties to maintain proportionality under the party vote.

The potential excesses of proportional representation were fortunately identified by the Royal Commission, and the system constructed to balance stable Government with strong local and proportional representation. The 120-seat Parliament was divided into 60 list and 60 electorate members to ensure both proportional and local representation. A threshold of four per cent of the party vote or one electorate seat to achieve representation was recommended by the Commission to prevent a proliferation of fringe parties in Parliament. This four per cent recommendation was lifted to five per cent by Parliament to further protect against such a proliferation.

With a broader range of realistic choices before the voting public, support for both major parties crashed at the first MMP election in 1996. Almost 38 per cent of voters opted for a minor party, and no party was strongly placed to form a stable Government. National was able to form an unstable one seat majority by entering into coalition with the conservative-nationalist *New Zealand First* party. In subsequent elections the Parliament stabilised to a degree, despite hung Parliaments being very narrowly missed in both 2005 and 2011.

New Zealanders chose MMP in 1993 on the understanding that they would have another say after two elections. However, after a change of Government, this say took the shape of a Parliamentary review instead of a referendum. In subsequent elections, the National Party incorporated the pledge of another referendum on MMP into their election policy to uphold the promise given when last in office. When elected to Government in 2008, National implemented a binding referendum to coincide with the 2011 general election. New Zealanders could choose between retaining MMP or changing to a different system, and also between four alternative systems, the most popular of which would go up against MMP in a subsequent referendum if voters opted for change. If voters opted to retain MMP, a review of the system would be led by the Electoral Commission.

At the referendum, 57 per cent of voters opted to retain MMP. The Electoral Commission embarked upon its review early in 2011, including a comprehensive public consultation process. Political parties were also able to make submissions on the process, with the governing National Party arguing against changes which would further reduce the stability of Government, and the opposition Labour and Green parties arguing to lower the party vote threshold and remove the electorate seat threshold. The Commission released a draft set of proposals for further consultation in August, and will make its final proposals to the Minister of Justice by 31 October this year.

MMP has curbed the worst excesses of the concentrated power exercised by Governments from 1950-1996. The system's strengths are in the ability for new political forces to form and gain representation more easily, and for the Parliament to more accurately represent the diversity of New Zealand – female and multi-cultural representation having been aided by party lists. However, no electoral system is without fault, and proportional representation has made for a legislative process which is often slower, less predictable, less stable, and less coherent. As a system of multi-party Government, the potential for the party which wins the most votes at the election to be pushed into opposition by a coalition of the losers remains a significant threat to the system's integrity. The disproportionate influence of small cross-bench parties is also often singled-out for criticism as the 'tail wagging the dog.'

Māori Electorates

Māori electorates were established in 1867, with four seats initially allocated on a geographical basis. A range of factors drove the creation of the seats at this early stage in New Zealand's political development. However, the primary factor was a need to enfranchise Māori as communal landholders. As was common throughout the Commonwealth at that time, only men with certain levels of property ownership were entitled to vote. Despite holding much of New Zealand's total land mass, most Māori land was held communally, denying them the right to vote. The Maori seats ensured that separate rules could apply to Māori electors to recognise their circumstances, and that at least a minimal level of representation was maintained.

The number of Māori seats remained unchanged for well over a century, until the introduction of MMP. Over time, the electoral arrangements of the Māori electorates evolved to recognise social and political changes in Māori society as well as in New Zealand's overall constitutional and electoral arrangements. However, equal status and electoral rights were slow to emerge. It was not until the introduction of MMP

that Māori and general electorates enjoyed completely equal electoral rules, and some constitutional differences remain.

Under MMP, the number of Māori electorates has gradually increased, with seven Māori seats operating for the last two elections. Māori may choose between the two roles initially, and then have the opportunity to switch between them in a five-yearly 'Electoral Option'. The next electoral option will be held in 2013. The roles are separate only for the purposes of choosing a local representative with the candidate vote. To maintain proportional representation, the two roles are combined for the party vote.