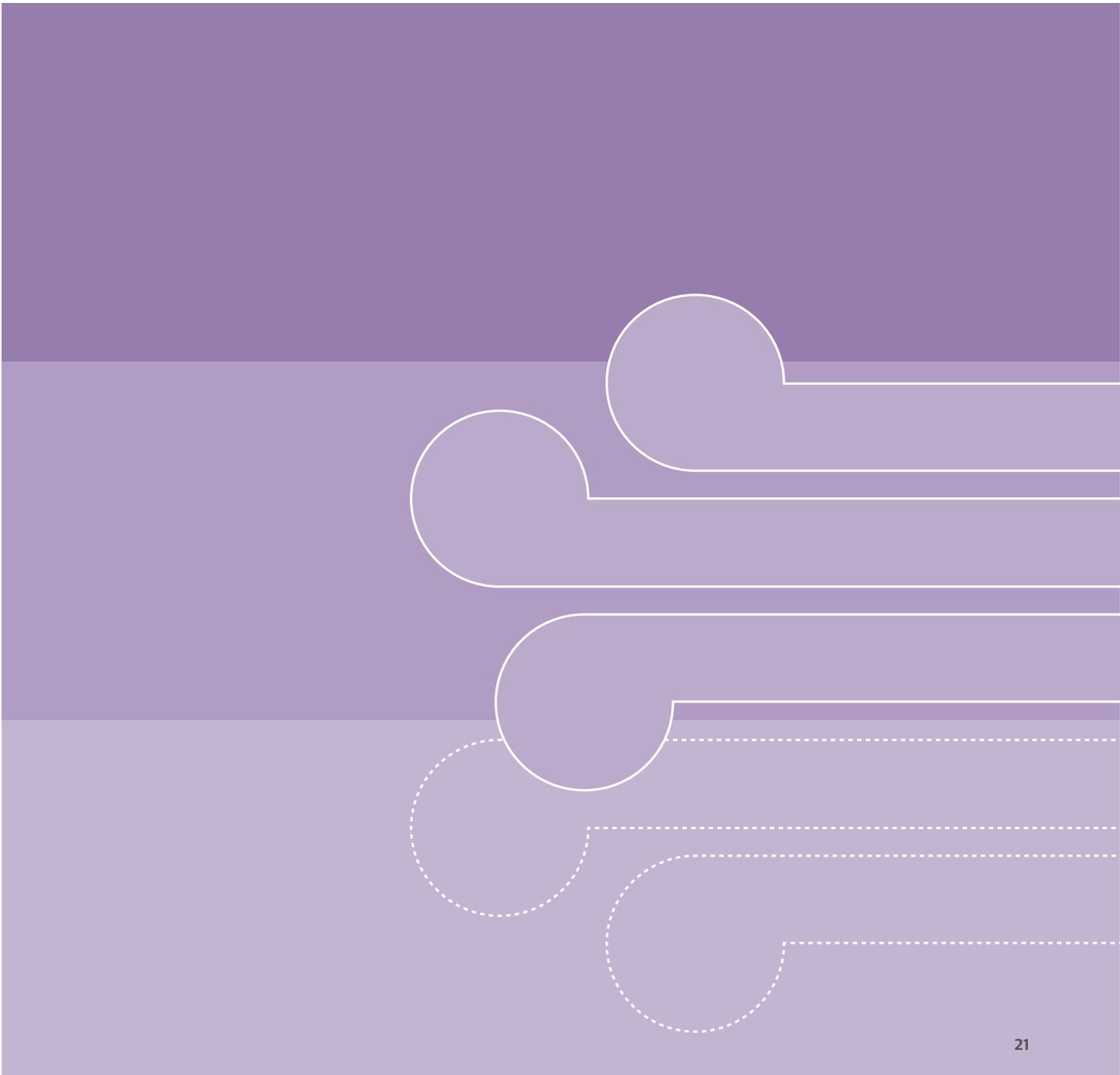


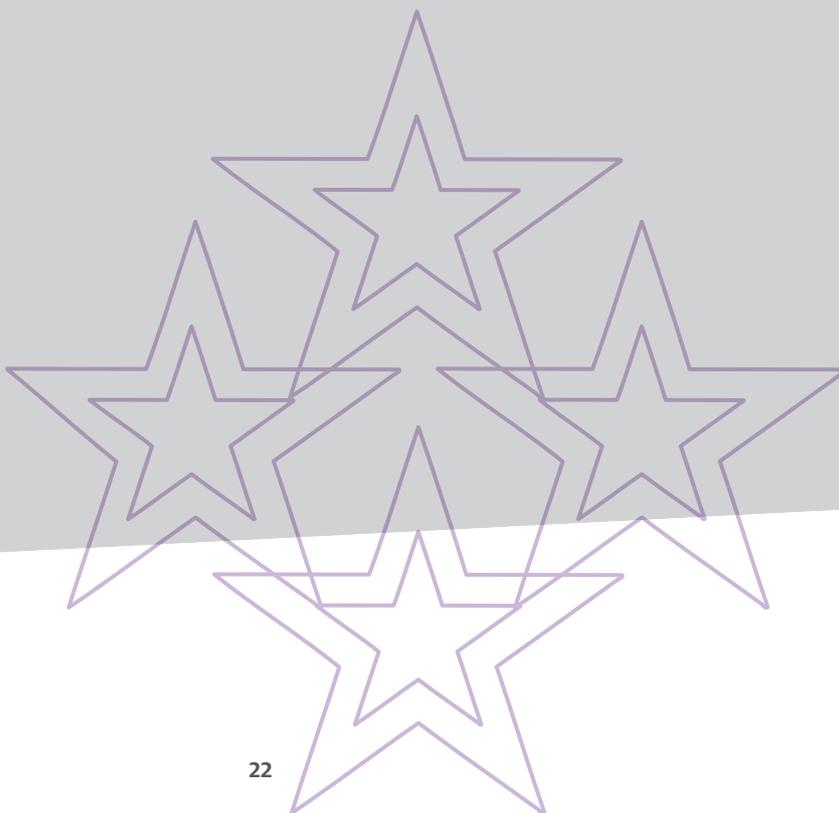
A Written Constitution



Recommendations

The Panel recommends the Government:

- notes that although there is no broad support for a supreme constitution, there is considerable support for entrenching elements of the constitution
- notes the consensus that our constitution should be more easily accessible and understood, and notes that one way of accomplishing this might be to assemble our constitutional protections into a single statute
- notes people need more information before considering whether there should be change, in particular information about the various kinds of constitution, written and otherwise, and their respective advantages and disadvantages
- supports the continued conversation by providing such information, and notes that it may be desirable to set up a process whereby an independent group is charged with compiling such information and advancing public understanding



A written constitution

New Zealand has a constitution – it is just not all written down in a single document. Our constitution determines how we live together as a country, how the country is run and how laws are made. Our constitutional arrangements have evolved over time and will continue to do so.

After the signing of the Treaty of Waitangi, Letters Patent were issued bringing into force the provisions of the New South Wales Continuance Act 1840 (UK), establishing New Zealand as a separate colony. The Constitution Act 1852 established an elected General Assembly (now known as the House of Representatives), an appointed upper house known as the Legislative Council, and provincial governments. The Assembly had the power to make laws for the 'peace, order, and good government of New Zealand', although the Governor retained the right to refuse assent to laws that he found to be 'repugnant' to British law.⁸

Section 71 of the Constitution Act 1852 provided for self-governing Māori districts. Māori attempts to realise this autonomy, such as the Kingitanga and the Kotahitanga movements, were not recognised by the government. The section was never implemented.

Amendments to the Constitution Act 1852 had to be approved by the Queen. In practice even substantial changes were assented to, including weakening the reserve powers of the Crown and the abolition of the provinces in 1876.⁹

Over the next century Aotearoa New Zealand gradually became more independent from Britain, becoming a Dominion in 1907.¹⁰ Enactment of the Statute of Westminster Adoption Act 1947 meant that the British Parliament no longer had any power to make laws affecting New Zealand's constitutional arrangements.¹¹

As the Constitution Act 1852 had become largely obsolete, in 1984 an Officials Committee was convened to look at specific areas of New Zealand's constitutional law.¹² The report led to the enactment of the Constitution Act 1986 which repealed and replaced the 1852 Act.¹³

The Constitution Act 1986 is now New Zealand's principal formal statement of constitutional arrangements.¹⁴ The Act describes the role and powers of Sovereign, the Executive, the Legislature and the Judiciary. It provides that Parliament has the full power to make laws, and that Parliament controls public finances. The Act does not have the status of higher law and can be amended by a majority vote of Parliament.¹⁵

Our constitutional arrangements also include legislation such as the New Zealand Bill of Rights Act 1990, foundational documents such as the Treaty of Waitangi, and established constitutional principles including that the Government must govern according to the law.¹⁶

⁸ See Appendix E, The Constitution Act 1852.

⁹ See Appendix E, Abolition of the Provinces Act 1875

¹⁰ See Appendix E, Dominion Status Acquired (1907).

¹¹ See Appendix E, Statute of Westminster Adoption Act 1947 and New Zealand Constitution Amendment (Request & Consent) Act 1947.

¹² See Appendix E, Officials Committee on Constitutional Reform (1984).

¹³ See Appendix E, Constitution Act 1986.

¹⁴ The Rt Hon Sir Kenneth Keith, 'On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government', *Cabinet Manual* (2008).

¹⁵ With the exception of section 17 (term of Parliament) which is entrenched by section 268 of the Electoral Act 1993.

¹⁶ A description of the current arrangements can be found in the Panel's information resources.

Perspectives

While many participants had clear views about whether or not developing a written constitution would benefit New Zealanders, a significant number remained undecided.

Reasons for supporting the current unwritten constitution included:

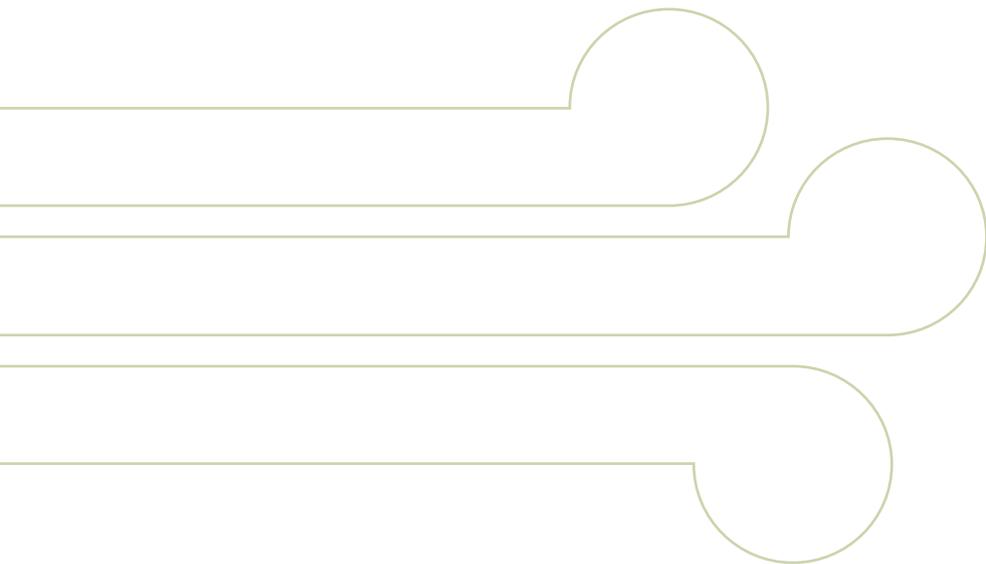
- it is working well, resulting in stable and effective government
- the current flexibility and ability to adapt to changing circumstances has allowed the country to develop pragmatic solutions to issues as they arise
- the values of government can stay in line with changing social values.

Reasons for supporting the development of a written constitution included:

- to make the constitution more accessible and easier to understand
- to make the constitution a more effective check on state power, in particular by giving the Judiciary the power to assess whether legislation is consistent with the constitution
- to protect important rights, institutions and values vulnerable to change by a majority in Parliament by entrenching the constitution.

Another grouping considered a written constitution was necessary or desirable to achieve particular reforms. Suggestions for reform included a constitution which better reflects the Māori-Crown relationship or which establishes New Zealand as a republic.

For some, the perceived risk of such reforms happening was one reason not to support the development of a written constitution.



Options and reflections

Improve accessibility

Almost all of the discussions under this topic and throughout the Conversation touched on the need to make the constitution easier to access and to understand. It was common for people to ask 'do we even have a constitution?' Two clear options for improving accessibility of the constitution emerged: consolidation of the current arrangements into one document, and improving education about the existing arrangements.

Consolidation

Consolidating existing constitutional laws and principles into a single document was seen as a step towards improving accessibility and making it easier for people to assess whether or not state action and legislation meets constitutional standards.

Some people said that a consolidated constitution would not serve the intended purpose, because it is not possible to express all elements of a constitution in a single document. Written constitutions record high level standards and aspirations, which are implemented in legislation and further developed by the courts. For example, a consolidated constitution is unlikely to include the entire Electoral Act 1993.

Another option might be to consolidate the values and principles of government in New Zealand, for example by developing a preamble to the Constitution Act 1986.

Improving education

The importance of improving accessibility and understanding of our constitutional arrangements was a strong message from participants. Achieving this aim does not necessarily require legislative change, but can happen with better information resources and education in schools and wider communities.

Effective checks on state action

Supremacy: reforming the respective roles of the Judiciary and Parliament

New Zealand's Parliament can make laws about anything if a majority of MPs support the proposal. A 'supreme' written constitution would define the limits on Parliament's law-making power, and could empower the Judiciary to 'strike down' or invalidate any legislation that does not fall within those limits. Alternatively, the courts might have the power to declare legislation to be inconsistent with the constitution without rendering that legislation invalid.

This potential impact on parliamentary sovereignty appeared to be a crucial factor for many submitters. Submissions that rejected a written constitution often raised concerns about judges being unelected and therefore unaccountable to the voters. This group suggested that judges have no mandate to assess whether legislation meets constitutional standards.

There was no significant support for a supreme fully entrenched written constitution, which empowers judges to strike down legislation and that can only be amended through specified processes. Support appears to lie, for now, with contested issues being decided in Parliament through the legislative process or other negotiated processes rather than by the courts.

There may be support for a single written constitution which sets out a short and simple set of standards, but without additional judicial powers. This would leave the Executive and Parliament flexibility to decide which policies, within those standards, best suit the circumstances of the day.

The respective roles of the Executive and Parliament

Discussions also touched on the powers of the Executive. While in formal terms the Executive and Parliament are separate, in practice the Executive by definition holds the confidence and support of a majority in Parliament: the Government is made up of the group of MPs which holds that support. The Executive therefore has a considerable influence over legislation and can also make significant rules on delegation from Parliament (delegated legislation). Discussions also raised the Executive's powers to appoint certain public officials (including judges) and to develop and implement foreign policy with limited participation by Parliament. The process for entering into free trade agreements was of particular concern.

For some people, a written constitution could be a mechanism (or would be necessary) to rebalance this relationship, placing greater controls on the Executive's powers.

Change processes

A key reason for supporting a written constitution is that it could be entrenched to protect important rights, principles and institutions. Entrenchment requires a special process for changing the constitution, ensuring that citizens could participate in and endorse any constitutional change, either directly through a referendum or by a special majority, say 75%, of elected representatives.

Options discussed included:

- entrenching specific elements of the existing arrangements, such as the New Zealand Bill of Rights Act 1990 and the Constitution Act 1986
- entrenching a consolidation of existing rules and principles.

Another grouping preferred retention of the flexibility of the current arrangements. To this grouping, entrenchment could amount to imposing this generation's values on future generations. They suggest that public participation in decisions about constitutional change is already sufficient or can be improved without entrenchment, for example through greater use of referenda or deliberative and consensus-building processes.

Process of developing a written constitution

The potential effect of drafting a written constitution was another factor participants took into account when developing their views. One grouping suggested that drafting a written constitution could enhance social cohesion, by providing an opportunity to discuss common goals and values and to celebrate Aotearoa New Zealand's diversity and uniqueness. Another grouping saw a risk of exacerbating existing social and political divisions. Submitters who question whether or how to reflect Māori-Crown relationships in a written constitution are particularly concerned about this risk.

There was broad agreement that the process for developing a written constitution should be one that most people accept to be legitimate. The popular endorsement of a written constitution as the fundamental basis of government was of particular interest.