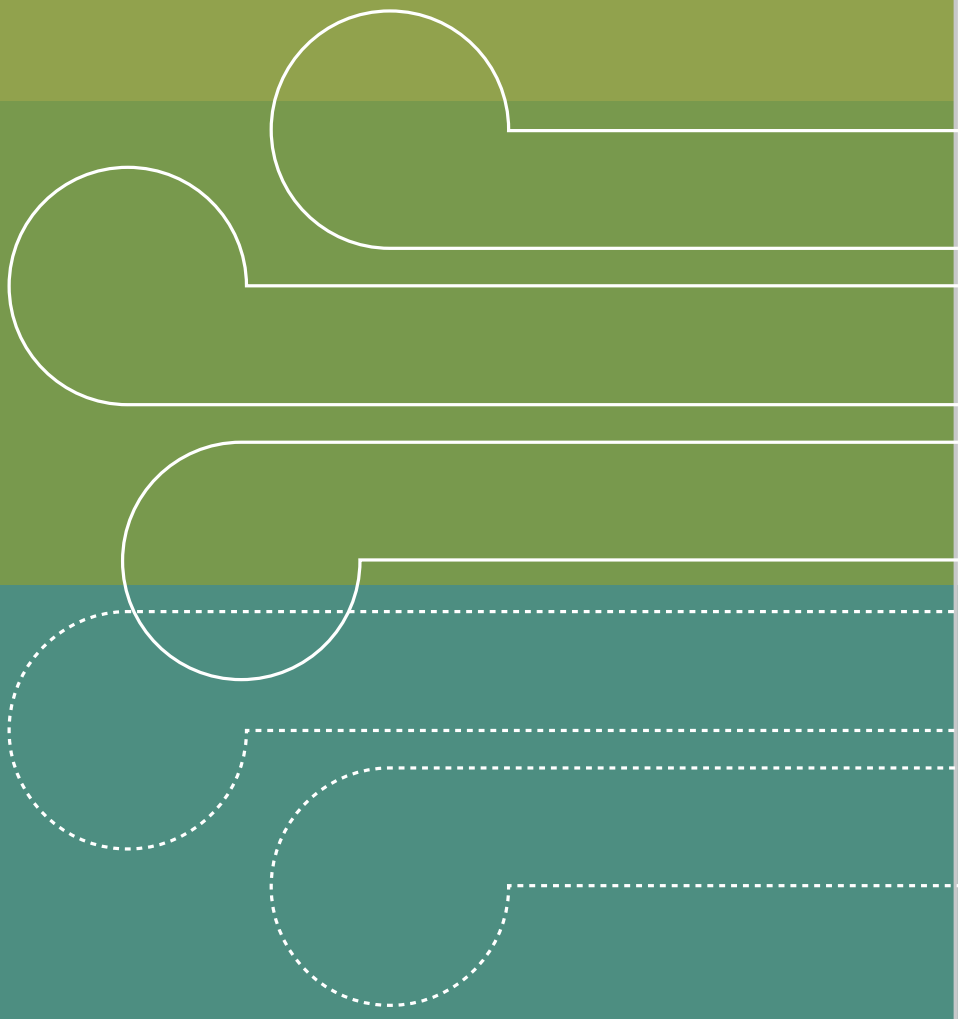
Constitutional Advisory Panel

New Zealand's constitution

The conversation so far

SEPTEMBER 2012



New Zealand Government

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.

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Invitation

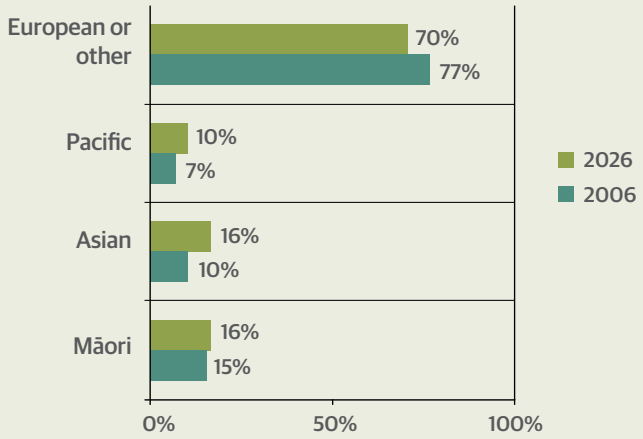
The Constitutional Advisory Panel invites you to take part in a conversation about New Zealand's constitutional arrangements. A constitution can be seen as the rules about how we all live together as a country. So it's your constitution and your conversation.

The Panel has been established to inform and encourage a conversation among New Zealanders about constitutional issues. We will report to Ministers by the end of 2013 with advice on the constitutional issues and any points of broad consensus where further work is recommended.

Public understanding and participation is needed for enduring constitutional arrangements that reflect the values and aspirations of New Zealanders. We are committed to ensuring that you – along with your friends, whānau, family, colleagues, communities and iwi – have an opportunity to tell us what you think.

We will reflect your views fairly and accurately in our report to the Ministers.

Mid-range population projection by self-identified ethnicity



The aim of this booklet is to inform and support your conversations with summary information about our existing constitutional arrangements, the conversation so far, and the questions and perspectives that have been expressed along the way.

In gathering the information and perspectives reflected in this booklet we relied on existing resources, including academic texts, previous ministerial inquiries, case law, Waitangi Tribunal reports and news media.

You will find links to more detailed information about the constitutional issues on our website. The website also contains the Panel's terms of reference, engagement strategy, and information about the Panel's engagement activities.

During your conversations, we invite you to think about your vision of what Aotearoa/New Zealand might look like in the future, and to consider how our constitutional arrangements would support that vision.

An example of how New Zealand might look different is in the projected ethnic composition. New Zealand's population in 2012 is 4.4 million, with a projected increase to 5.0 million by 2026. New Zealand's population of all ages is projected to become increasingly diverse. More New Zealanders will identify with Māori, Asian, and Pacific ethnicities.

The population projection for 2026 by self-identified ethnicity is set out below, based on figures from the 2006 census.[1]

An additional 1% of the population identified with Middle Eastern, Latin American, and African ethnicities in 2006. Projections of these smaller ethnic groups are unavailable.

[1] Source: Statistics New Zealand. The total percentages add up to more than 100% because people can and do identify with more than one ethnicity. These projections are not predictions, due to possible changes in ethnic identification and trends in ethnic fertility, mortality, and migration.

Next steps

The Panel will meet New Zealanders to listen to your conversations. We will also provide other ways to give us your thoughts, including through social media and a website.

We have summarised the stages of the engagement programme below.

These dates are indicative only and we may adjust the timing in response to public demand.

More information about the Panel's task and the current engagement activities is on our website: www.cap.govt.nz

Contact us

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Stage 1 June-Sept '12	Stage 2 Oct '12-Feb '13	Stage 3 Feb-July '13	Stage 4 Aug-Sept '13	Stage 5 Oct-Dec '13
Preparing the resources and building relationships that will form the foundation of the process.	Building awareness and public understanding of New Zealand's constitutional arrangements.	Engaging with a broad and diverse range of communities and individuals.	Working with a cross section of New Zealanders to consider the views reported to the Panel.	Reporting to Ministers by the end of 2013.

The Constitutional Advisory Panel

The Deputy Prime Minister and the Minister of Māori Affairs appointed the Constitutional Advisory Panel in August 2011 to support the Consideration of Constitutional Issues. The Panel's task is to deliver a report that provides the Ministers with an understanding of New Zealanders' perspectives on this country's constitutional arrangements, topical issues and areas where reform is considered desirable.

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Sir Tipene O'Regan (Ngāi Tahu)

MEMBERS

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Our Constitution

What is our constitution?

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.

The foundations of our constitution

Rule of law

The rule of law means everyone in New Zealand must follow the law, including governments.

It also means the law must be clear and understandable, new laws apply to future and not to past activities, and everyone should easily be able to find out what the law is.

We can expect the government and other people to treat us according to law and if they don't we can get help. In particular, public officials – including Ministers, members of Parliament, and public servants – have to make decisions according to the law, not according to their personal beliefs or interests.

All New Zealanders have certain basic human rights and freedoms that the state should not interfere with, unless it has a lawful and justifiable reason.

The rule of law ensures we have a free, safe, and orderly society. The rule of law also ensures the economy can function smoothly, since businesses can be sure about the rules that apply to them and how they will be enforced.

Representative democracy and responsible government

New Zealand is a *representative democracy*. Voters elect people to represent them in Parliament. Elections held using the *Mixed Member Proportional* (MMP) voting system are how voters give Parliament and the government the legitimate power to make decisions for the country as a whole.

We have a *responsible government*. The Ministers who make up the government must be members of Parliament and the Ministers are responsible to the Parliament. This means our elected representatives in Parliament can hold the government to account.

Separation of powers

The power to make decisions which affect the public is divided between the three *branches* - Parliament (also known as the Legislature), government (also known as the Executive), and independent judges (the Judiciary). The three branches together are called *the state*.

Separation of the state's powers prevents any one branch from having too much power. Each branch acts as a check and a balance on the power of the others. For example, our independent Judiciary interprets and applies the law in individual cases, not the government or Parliament (which has made the law).

The Treaty of Waitangi

The Treaty of Waitangi was signed in 1840 between representatives of the British Queen and Rangatira (Chiefs) on behalf of their hapū. The Treaty records an agreement that enabled the British to establish a government in New Zealand and confirmed to Māori the right to continue to exercise rangatiratanga.[2] The Treaty also provides citizens with equal rights and responsibilities.

The Waitangi Tribunal is responsible for defining what the Treaty means in a modern context and plays a key role in settling historical and contemporary Treaty breaches.

Successive governments have acknowledged the Treaty's guarantees have not been consistently honoured, and have taken responsibility for redressing breaches of the Treaty through the settlement process. They have also accepted that the principles of the Treaty must be considered when making decisions, if future breaches are to be avoided.

[2] "The Treaty confirms rangatiratanga ... different hapū and iwi independently have and exercise rangatiratanga. Article II guarantees te tino rangatiratanga, which is absolute authority for chiefs (or rangatira) to be chiefs and hold sway in their territories." Waitangi Tribunal The Tāmaki Makaurau Settlement Process Report (2007) p6.

What the people in our constitution do

The head of state

New Zealand is a *constitutional monarchy*, which means that our head of state is a Queen or King who must act in accordance with our laws and conventions.

New Zealand's current head of state is the Queen of New Zealand. The Queen appoints a Governor-General to represent her in New Zealand. The Prime Minister recommends who to appoint to that role for a limited term, usually five years.

The head of state and the Governor-General take the advice of the Prime Minister and other Ministers when exercising his or her powers, and cannot act without that advice.

The Governor-General's role is not political. By convention, the Governor-General avoids becoming involved in the party politics of government, despite having an integral role in the formal processes of government.

Most of the Governor-General's powers are set out in the Letters Patent Constituting the Office of Governor-General 1983 and in laws made by Parliament. These powers include:

- Appointing the Prime Minister and Ministers and other significant public roles.
- Granting a pardon, reducing a sentence, or referring a criminal case back to the Courts for reconsideration, under the prerogative of mercy.
- Dissolving Parliament before an election and summoning Parliament following an election.
- Assenting to legislation, the final step in Parliament's process of making law.
- Recognising New Zealanders' achievements through the honours system.

Parliament can make laws about anything and everything, so long as a majority of members of Parliament support the proposal. This power is often known as *parliamentary supremacy*.

In a few situations, the Governor-General has power to make decisions without Ministers' advice – these are called the reserve powers. The Governor-General would follow established democratic principles (or conventions) to make the decision required in the situation.

The Governor-General also takes part in public ceremonies and in community events. The Governor-General's formal title includes the phrase "Commander-in-Chief in and over New Zealand" but he or she does not play an active role in military matters.

Parliament – the Legislature

Parliament is made up of the Queen – represented by the Governor-General – and the House of Representatives. The House of Representatives is made up of members elected by voters.

The House has several important roles:

- To provide the government (Executive) from among its members.
- To make new laws and update old laws.
- To represent the people.
- To examine and approve government taxes and spending.
- To hold the government to account for its policies and actions.

Parliament can make laws about anything and everything, so long as a majority of members of Parliament support the proposal. This power is often known as *parliamentary supremacy*.

Parliament can decide to limit how a law can be changed, through the entrenchment process. In New Zealand, only some provisions are entrenched: certain parts of the Electoral Act 1993 and the Constitution Act 1986 can only be changed by referendum or with the support of 75% of the members of Parliament.

Laws are usually proposed by the Executive, but can be proposed by any member of Parliament. Proposed laws are called Bills. Select committees of members of Parliament examine Bills, usually taking comments from the public, and recommend whether to make them law. A Bill that has gone through the parliamentary process becomes an Act of Parliament when the Governor-General assents to it.

Parliament can give the Executive the power to make the more detailed laws required to implement a particular Act. These laws are known as *regulations and rules*, or more generally as *subordinate legislation*. Parliament watches over how this power is used and the Courts can examine whether individual regulations are outside the purpose of the parent Act.

It is illegal for governments to impose a tax without Parliament's authority. This authority can only be given by Parliament in legislation.

The government regularly requires Parliament's approval to spend the money needed to run the country. This is known as *obtaining supply*. If a government fails to obtain supply, a change of government or a general election may result. Without supply of funds, the government is unable to pay its bills and the House is said to have lost confidence in the government.

Parliament also watches over how public money is spent. Members of Parliament can ask Ministers to explain the government's actions. Select committees regularly meet with Ministers and officials to ask about the government's policies in more detail. Parliament also appoints parliamentary

officers, including the Ombudsmen and the Auditor-General, with powers to look into the government's actions and spending.

Government – the Executive

The government (also known as the Executive) governs the country in accordance with the law, develops public policy, proposes legislation, co-ordinates the delivery of public services, and keeps the peace.

The Executive is made up of the Prime Minister and other Ministers, and the government departments that develop and carry out government policy. All Ministers must be members of Parliament. The Executive is sometimes known as *the Crown*.

The Governor-General appoints the Prime Minister based on the result of the election and discussions between political parties in Parliament about who will form the government. The Governor-General then appoints the other Ministers on the Prime Minister's advice.

The Prime Minister is the head of the government. The Prime Minister and Ministers decide what policy and actions they believe will achieve the best results for New Zealand. Important decisions are normally made in weekly meetings of senior Ministers called Cabinet.

Government departments and the wider state sector help Ministers to develop policy and to implement their decisions. They also co-ordinate the delivery of services to the public.

The people who work in government departments are called "public servants." Public servants are politically neutral. They must give Ministers the best possible advice, honestly and without taking their own political opinions into account.

The Police exercise the Crown's power and responsibility to keep the peace. The Police act independently, so the government cannot influence their day-to-day work. Their role in keeping the peace means the Police may legally use or threaten force against another person and detain them, although this power is subject to legal limits.

The government decides which international agreements to enter into and on what terms, under the Crown's foreign affairs prerogative. Parliament has an opportunity to comment on the more significant international treaties before the government signs them. The commitments the government makes in an international agreement only change New Zealand's law if Parliament agrees.

Judges – the Judiciary

The Judiciary is made up of the judges of the Supreme Court, the Court of Appeal, the High Court, District Courts and several topic-based Courts such as the Family, Māori Land, and Employment Courts. Most judicial appointments are made by the Governor-General on the advice of the Attorney-General.

Judges are independent. The government cannot influence their decisions or easily remove them from office.

Judges decide what the law means in individual cases and apply the law to make decisions about people's rights and responsibilities. They are bound to treat similar cases in similar ways.

Judges in New Zealand do not have the power to strike down legislation, or to say any law is unconstitutional and consequently invalid.

Judges in the High Court can make decisions about complaints that people in government have acted unfairly or outside their legal powers. This check on the government is called *judicial review*.

There are many ways in which you can influence what the people in our constitution do and the decisions they make.

Local government

Local government includes regional councils and territorial authorities. Their powers and responsibilities are set out in law made by Parliament. Councils and authorities are elected by the people who live or pay rates in that area or region.

Local government can make laws called bylaws which apply in that region and can charge rates based on property values.

Regional councils mainly make decisions about the use of the natural environment.

Territorial authorities, such as city councils, provide local services, including roads, water supply, rubbish collection, public transport, recreation services, community and economic development, and town planning.

You

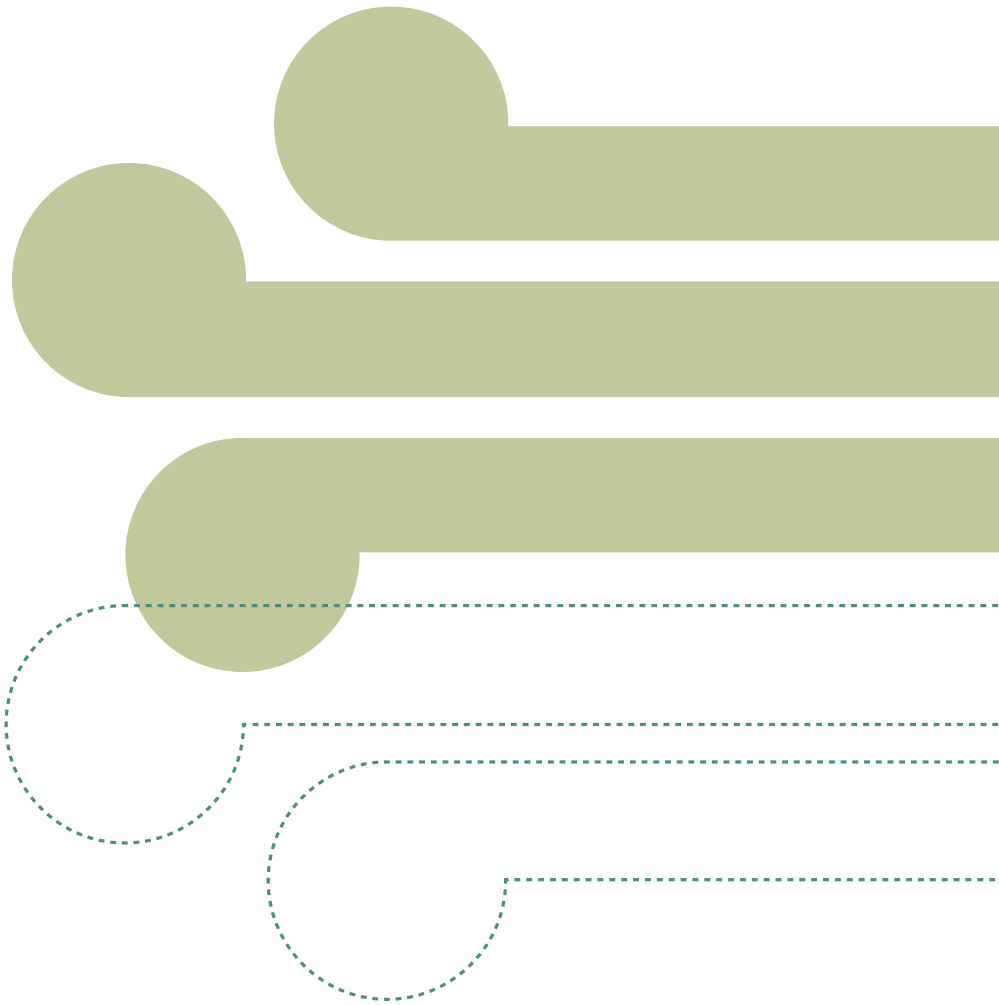
There are many ways in which you can influence what the people in our constitution do and the decisions they make, including:

- Voting in an election or standing for election to Parliament or local government.
- Writing or talking to a member of Parliament, a Minister, a government department, a mayor, or a local councillor.
- Going to Court for a review of a decision or a regulation.
- Writing or talking to a parliamentary select committee about a Bill.
- Asking a select committee, the Ombudsmen or the Auditor-General to look into something.
- Starting or signing a petition to set up a citizens-initiated referendum, which would ask all voters what they think about an issue.
- Making a submission on your town plan or on a public discussion document about a policy question.
- Joining a protest march or hikoi.
- Joining or forming a lobby group or a political party.
- Writing a letter to the newspaper.
- Using social media to tell other people and the government what you think.

You can ask a government department or a Minister for a copy of any information they hold. This information, called *official information*, can help you to find out the reasons for decisions. The information must be given to you unless there is good reason to withhold it. The process and reasons are set out in the Official Information Act 1982.

During your conversations, we invite you to think about your vision of what Aotearoa/New Zealand might look like in the future, and to consider how our constitutional arrangements would support that vision.

Electoral Matters



1. The size of Parliament

The size of Parliament in our constitution

New Zealand's Parliament has a minimum of 120 seats: 63 general electorate seats, seven Māori electorate seats, and 50 list seats.[3]

A question emerging in the conversation so far is whether 120 is the right size for New Zealand. The most commonly proposed alternative is 99 or 100 seats.

The conversation so far

In the conversation so far, arguments made in favour of the status quo suggest 120 seats are required to ensure MMP operates optimally to achieve proportionality of representation and Parliament operates effectively.

Arguments in favour of reducing the number of seats in the House focus mainly on the potential financial savings.

Prior consideration

Until 1996, New Zealand used the First Past the Post voting system (FPP) to elect members of Parliament. The number of MPs fluctuated during the 19th century, but was fixed at 80 in 1900, including four Māori seats.

Amendments to the Electoral Act in 1965 provided for 25 South Island seats. They also provided for the number of North Island electorates to gradually increase, as the population increased faster than the South Island's.

This approach led to five-yearly increases in the number of MPs, in proportion to the growth of the population. At the time of the last FPP election in 1993, the House comprised 99 MPs.

If the shift to MMP had not taken place in 1993, and the distribution of electorates had continued under the Electoral Act 1956, New Zealand would now have 109 electorates, and 109 members of Parliament.

In 1986, the Royal Commission on the Electoral System recommended replacing FPP with the MMP voting system. The Commission suggested that the issue of the size of Parliament should be approached by considering how many MPs were required to fulfil the following functions:[4]

- To represent the nation, reflecting national characteristics, values, and opinions and as representatives of different groups (for example, women, Māori, farmers, environmentalists).
- To represent constituents (advocates of local interests and assisting individuals).
- To provide effective government (to introduce and administer policy and law and control government departments).
- To enact legislation and scrutinise the actions of the Executive.
- To provide a pool of talent for ministerial and select committee duties.

The Royal Commission initially suggested that the number of MPs should increase to 140 to best meet these objectives. The Royal Commission's final recommendation was 120 seats.

The Electoral Law Select Committee inquired into the Report of the Royal Commission, reporting in 1988. The majority of the committee's members supported the proposed 120-seat House, on a similar basis to the Royal Commission.

[3] The precise number of seats can change, because the number of list seats can fluctuate to allow for an "overhang." An overhang occurs if a party wins more electorate seats than the total number of seats it would gain through its share of the party vote. For example, the 2011 General Election resulted in an overhang of one MP because the Māori Party gained one more electorate seat than their percentage of the party vote otherwise would have given them. Parliament therefore comprises 121 MPs, with 70 general electorate and Māori electorate MPs and 51 list MPs.

[4] Royal Commission (1986): 117-119.

If the shift to MMP had not taken place in 1993, and the distribution of electorates had continued under the Electoral Act 1956, New Zealand would now have 109 electorates, and 109 members of Parliament.

The Electoral Reform Bill 1993 proposed a House of 60 general electorate seats and 60 list seats. The Department of Justice's Departmental Report on the Bill considered the option of an MMP Parliament with 100 seats. A 100-seat Parliament with 60 constituency seats and 40 list seats was considered viable because it retained the minimum number of constituency seats the Royal Commission considered necessary and, in general, it would still maintain overall proportionality. Splits of 50:50 and 55:45 were not favoured as they would double the workload of constituency MPs and provide insufficient South Island seats.[5]

The Bill was enacted as the Electoral Act 1993, which provided for the current form of MMP, with a Parliament of 120 MPs.

Revisiting the 120-seat House of Representatives

In 1994, a group of MPs circulated a petition calling for a citizens-initiated referendum on the size of Parliament. The petition asked whether the size of Parliament should be reduced from 120 MPs to 100 by reducing the number elected from the party lists. The petition lapsed in 1995, so no referendum was held.

Another petition was then initiated by a member of the public. The petition was successful, and a citizens-initiated referendum was held with the General Election on 27 November 1999. Voters were asked: Should the size of the House of Representatives be reduced from 120 members to 99 members?

Little public debate took place during the petition phase. Once a referendum was imminent, several MPs spoke in favour of a reduction. A group of political scientists, public policy specialists and constitutional and public law experts called on voters to keep the 120-seat Parliament.[6]

Of the 84.8% of eligible voters who voted in the referendum, 81.5% were in favour of reducing the size of the House from 120 to 99 members, with 18.5% against. The referendum was indicative so the result was not binding. No change was made to the size of Parliament.

Two years later the MMP Review Select Committee[7] considered the issue of MP numbers, among other matters. Ninety-one of the 146 public submissions to the committee favoured 120 or more seats, while 55 favoured fewer than 120 seats. The committee was divided on the issue, and was unable to make a recommendation, as it was required to reach a consensus.

The 2005 Constitutional Arrangements Select Committee did not consider the question of size of Parliament in any detail, as it focused on describing New Zealand's constitutional arrangements and identifying issues which could be explored as part of future processes. In its menu of possible constitutional issues which could be explored further, the committee asked "Is Parliament the right size?"

The Electoral (Reduction in Number of Members of Parliament) Amendment Bill 2006, a member's Bill, proposed reducing the size of the House to 100 MPs by reducing the number of list seats, with no change to the number of general electorate seats or Māori seats.

[5] Ministry of Justice, 2001: 9, citing Department of Justice, 1993.

[6] *The Press*, Venter, 4 October 1999.

[7] The Committee's report is available at www.parliament.nz

The select committee examining the Bill recommended it not be passed. It considered that the benefits of reduction would be outweighed by the adverse effects on Parliament's proportionality and diversity, and therefore its effectiveness.[8] The committee also noted:

- It did not consider that New Zealand was over-represented compared with other countries, considering its unicameral (single house) Parliament.
- With population growth, under either MMP or FPP 100 members would be inadequate.
- The role of list MPs was misunderstood and more education about list members and their role under MMP was required.

The Bill was not passed.

Questions and perspectives

Some common themes run through the conversation so far about the size of Parliament.

MMP and Proportionality

Commentators who support the status quo generally say 120 seats are required to ensure MMP operates optimally to achieve proportionality of representation, and to encourage a representative House with more women and greater ethnic diversity.

Some commentators who support a smaller Parliament say 100 seats could still provide adequately for proportionality if the number of electorate seats were reduced relative to the number of list seats. This approach would increase the geographic size of electorates.

Other commentators note reducing the size of Parliament without reducing the number of electorate seats would increase the likelihood of an overhang. For example, if Parliament had comprised 100 seats at the 2011 election an overhang of three seats would have occurred, with a total of 103 seats.

Some commentators who support of reducing the size of Parliament suggest removing list MPs altogether. This approach would do away with the MMP voting system, as the list seats are one of its defining features.

Quality and effectiveness of Parliament and Ministers

A 120-seat Parliament is seen by some commentators to provide about the right number of select committees of an appropriate size, and to balance the number of Ministers to other MPs.

Select committees support Parliament's function as an effective check on the Executive. The current Parliament has four select committees established by Standing Orders[9] and up to 13 subject committees. Each committee has seven to 12 members, who are appointed roughly in proportion to their party's share of seats in the House. *Ad hoc* committees may also be established.

Backbench MPs contribute to debate in the House and in government and Opposition caucuses. Some commentators, therefore, suggest Parliament should have sufficient seats to balance the number of Ministers (the Executive) and the number of other MPs.

Some commentators suggest other arrangements could ensure an effective Parliament with fewer seats. For instance, Parliament could use other methods to scrutinise the Executive. Select committees and caucuses could become more influential by, for example, having fewer government chairs or majorities on select committees. The 1988 Electoral Law Committee suggested a

[8] Justice and Electoral Committee 2006: 4.

[9] Standing Orders (2008) 74, 180 and 184.

review could look at how select committees could become more influential in the political system and more responsive to the public.[10]

Another suggestion is the re-introduction of a second legislative chamber or upper house. New Zealand's second chamber, the Legislative Council, was abolished in 1950.

MPs' workload and relationship with constituents

Some commentators who support a larger Parliament suggest that it ensures a reasonable workload for members of Parliament and ensures that constituents have access to their representatives, by limiting the size of their constituencies.

In response, other commentators say fewer seats could ensure MPs have a full workload and work efficiently, while maintaining a ratio of MPs to constituents that is not out of step with other countries.

Financial considerations

Some commentators suggest a reduction in MP numbers could decrease the amount of money spent to support MPs. Others suggest the money is a good investment.

Implementing the 1999 referendum

Some commentators argue that democratic principle requires the result of the 1999 referendum to be implemented without further delay.

Others respond that citizens-initiated referenda are not accompanied by a formal education campaign about advantages and disadvantages. As voters had little technical and non-partisan information on which to base their decision, some argue that many voters made their decision without full information about the impact of change.[11]

Implementing change

Implementing any change to the number of seats would require amendments to the Electoral Act 1993. Amendments to the following sections may be required:

- Section 35: 16 South Island seats; mechanism for determining the population quota; calculation of the North Island general electorate seats.
- Section 45: calculation of the Māori electorate seats.
- Section 191: mechanism for determining the number of list seats available.

Section 35 is entrenched, and therefore any amendment would require majority support in a referendum or the support of 75% of the members of Parliament. Sections 45 and 191 are not entrenched, so a simple majority in Parliament would be sufficient to implement any amendments.

[10] Electoral Law Committee 1988: 87.

[11] New Zealand Election Study (2000): 5.

2. The term of Parliament and the election date

The term of Parliament in our constitution

Under New Zealand's constitution, Parliament can run no longer than three years after an election (section 17(1), Constitution Act 1986). A General Election must be held once the term has ended. Limiting the term of Parliament means we regularly get a chance to vote and to elect members of Parliament to represent us.

The Prime Minister decides when the term of Parliament will end and the date of the election. He or she can choose to trigger a General Election at any time by advising the Governor-General to dissolve Parliament and bring the term to an end. The Governor-General will act on the Prime Minister's advice so long as the government appears to have the confidence of the House and the Prime Minister maintains the support as the leader of that government. A vote of no confidence in the government does not necessarily lead to an election being held: a new government may be appointed from the existing Parliament, if a government can be formed that has the confidence of the House.

The conversation so far about the term of Parliament

Some commentators suggest New Zealand should move to a four-year maximum parliamentary term. A five-year term has also been proposed.

The conversation so far about the term of Parliament has focused on two key factors: whether a longer term would improve the effectiveness of government and whether voters would have appropriate influence over government and Parliament.

Previous consideration

Under the Constitution Act 1852, the term of Parliament was five years. In 1879, following the abolition of the provinces and an increase in the power of central government, the term was reduced to three years. The aim was to make central government more accountable to the electorate. The three-year term was temporarily extended three times to four or five years, during the Great Depression (1934-1937) and World Wars I and II.

Referenda on the term of Parliament were held in 1967 and in 1990, both resulting in decisive rejections of an extension to the three-year term.

The 1967 referendum had a 69.7% turnout. The results were:

- 68.1% in favour of a maximum of three years as at present.
- 31.9% in favour of a maximum of a maximum of four years.

The 1990 referendum had an 85.2% turnout. The results were:

- 69.3% in favour of a three-year term of Parliament.
- 30.7% in favour of a four-year term of Parliament.

Questions and perspectives about the term of Parliament

Effective government

Some commentators suggest a longer term may allow more time for the government to plan, implement, and test government policies. Parliament, including select committees and Opposition parties, could take longer to consider legislation and have more opportunities to hold the Executive to account.

Limiting the term of Parliament means we regularly get a chance to vote and to elect members of Parliament to represent us.

Commentators also suggest a longer term could lead to more certainty, as policies might change less often. Some say members of Parliament and governments make decisions that ensure the economy is in good shape in an election year, but which have a negative effect in the long run.

Other commentators suggest a longer term does not necessarily lead to better planning or to more effective government, and a shorter term might even encourage efficiency.

Voters' power to choose representatives

Some commentators suggest elections are the most direct way for voters to pass judgement on government policies and the performance of members of Parliament. Shorter terms mean more frequent elections, which may give voters greater control over the government than under a longer term.

Other commentators suggest the arrangements under MMP, including more frequent minority governments which have to work with other parties in Parliament, limit government enough that a four-year term could be appropriate.

Early dissolution

If New Zealand moves to a four-year term, the country may also need to decide whether the Prime Minister should keep the power to decide when the term of Parliament will end and the date of the election.

Some commentators suggest the power to end the term of Parliament early is required to allow elections to be held if a government collapses. Under MMP, governments are often negotiated between different parties in Parliament. The coalitions or support arrangements resulting from these negotiations may be more likely to collapse before the end of the parliamentary term. If there is no longer a power to end the term early and call an election, New Zealand could end up with no working government.

If it is retained, the Prime Minister's power to end the term early could be limited by, for example, requiring the agreement of a majority of members of Parliament.

Other countries

All the Australian states, except Queensland, have a four-year term for their lower houses. Queensland, which has a unicameral Parliament, has a three-year parliamentary term. The Commonwealth House of Representatives has a three-year term, while the Senate has a six-year term with an election for half the Senate every six years.

In the United Kingdom the term of Parliament is now five years, since the enactment of the Fixed Term Parliaments Act 2011. An election may only be held before the statutory date if:

- Two thirds of the House of Commons agree to the motion, or
- A majority of the House agrees to a motion of no confidence in the government (and no motion expressing confidence in the government is passed within 14 days).

The conversation so far about the date of the election

Some commentators suggest that the election date should be fixed in law rather than chosen by the Prime Minister. This is a separate but

related issue to the maximum length of a Parliament's term.

They suggest that election dates can be fixed in two different ways:

- *A fixed election date* is a date prescribed in legislation, with no provision for dissolution before the scheduled date – that is, an early election is impossible. An election date can be fixed on a prescribed cycle: for example an election must be held every four years after a prescribed date. Alternatively, the parliamentary term can be required to run for at least a minimum period with no election and for no more than a maximum period.
- *A semi-fixed election date* is a date prescribed in legislation, with mechanisms to allow for early dissolution – that is, to allow for an early election in certain circumstances. Depending how they are drafted, these mechanisms could be used in a way that undermines the purpose of fixing the election date.[12]

In a semi-fixed system, the date of the election can be fixed by reference to the previous polling date or the dissolution of Parliament. This approach would entitle the incoming Parliament to sit for a full term, rather than completing the term of the previous Parliament as would be the case if a fixed cycle were prescribed.

Mechanisms for allowing early dissolution generally involve the House in the decision about the date of the election. Examples include:

- Positive motion: early dissolution allowed if a 50% or a 75% majority in the House votes in favour of a motion authorising it.
- No confidence vote: early dissolution allowed if a simple majority in the House votes in favour of a no-confidence motion, the defeat of the Budget, or the denial of supply.[13] A vote of no confidence could lead to dissolution if an alternative administration cannot be formed within a specified period, such as 14 days.
- Investiture vote: the House may pass a motion of confidence in an alternative government from the existing Parliament, without Parliament being dissolved or an election being held.[14]
- Early election allowed but only with a lengthy notice requirement, to prevent a government from capitalising on short-term political advantage.

Questions and perspectives about the date of the election

Democratic principles

Some commentators suggest that constitutional arrangements should be neutral between political parties, and should be designed to control any tendencies of parties to promote their own interest.[15] A discretionary election date may be perceived as offering an incumbent government an unfair advantage, since the Prime Minister can choose the date that is most favourable for his or her party's electoral chances, and least favourable for political opponents. In particular, governments are perceived as being able to "ride the wave" of favourable economic and political conditions.

[12] For example, a Government may be able to engineer a constructive vote of no confidence to trigger an election at the most convenient moment for the Government, by using its majority in Parliament.

[13] When Parliament votes against giving the Executive the money it seeks to implement its policies.

[14] In New Zealand, where a Government has clearly lost the confidence of the House, the Prime Minister will advise that the administration will resign. A new administration may be appointed from the existing Parliament (see Cabinet Manual (2008): paras 6.53-6.55: 83).

[15] Written evidence submitted by Professor Dawn Oliver to the Political and Constitutional Reform committee of the UK Parliament, on the Fixed-term Parliaments Bill, August 2010.

Also, an incumbent government has prior knowledge of when an election will be held and can plan accordingly.

On the other hand, other commentators say that the Prime Minister's apparently broad discretion is effectively limited by political considerations. The Prime Minister will want to ensure his or her government has adequate time to institute its policies before facing the electorate's judgement. Also, voters might view a move to dissolve Parliament and seek an early election as political opportunism or desperation.[16]

Another view is that a fixed election date may conflict with the uncertainties of government, especially minority government which is the norm under New Zealand's MMP voting system. Under MMP, governments are not elected directly but rather are often formed on the basis of negotiations between members of Parliament. The coalitions or support arrangements that result from the negotiations may be more liable to collapse before the end of the parliamentary term, leaving a vacuum of government authority. This situation could be managed by providing a mechanism for early dissolution.

Commentators note that the unfixed election dates tend to lead to relatively short periods between the Prime Minister's announcement of the election date and polling date. Election campaigns are, therefore, short and relatively inexpensive. By contrast, fixed election dates have in some jurisdictions been perceived as leading to long and expensive election campaigns.

Some commentators suggest that a longer fixed term may encourage "referendum politics." Governments might more frequently seek a mandate for controversial or significant policies through referenda or other forms of public participation rather than through a General Election.

Economic principles

A fixed election date may provide the incumbent government greater certainty about the length of time that it has in office, so it can plan accordingly. The period of uncertainty before the date of the election is set may be reduced, with potential benefits for government and the economy.

Certainty may also allow a government to time economic interventions for its own political ends (usually by increasing or decreasing money supply). If the election date is not known sufficiently in advance, the government cannot be sure that the results of these interventions will be evident at election time. An alternative view is that economies are not susceptible to such fine control.

Implementing change

A change to a longer term would require amending section 17 of the Constitution Act by replacing "three" with "four." Because section 17 is entrenched the change would require either a majority of 75% of all members of the House of Representatives, or a simple majority of valid votes cast in a national referendum. A referendum may be perceived as preferable to Parliament extending its own term.

Fixing the date of the election in legislation could require amendments to section 18 of the Constitution Act 1986. That section is not entrenched so may be amended by a simple majority in the House, unless the change affects the length of the parliamentary term.

[16] Geddis, A (2007) *Electoral Law in New Zealand: Practice and Policy*. Wellington: LexisNexis: 45.

3. Number and size of electorates

Electorates in our constitution

The process for deciding the number and size of electorates is part of New Zealand's constitutional arrangements. It supports our right to free and fair elections.

Under our current system, the number of electorates is based on two main factors:

- The South Island always has 16 electorates.
- Every electorate has about the same number of people living in it.

The geographic size of each electorate is not taken into account when deciding the number of electorates. There is a big difference in area between the smallest electorate and the largest electorate in New Zealand.

How the number and size of electorates are decided

The Representation Commission is an independent statutory body that reviews and redraws New Zealand's electorate boundaries. Its members are public officials, with two political representatives.

The Commission must decide the electorate boundaries after each five-yearly population census and the Māori Electoral Option. This means the boundaries are adjusted to reflect any changes to New Zealand's population distribution.

Firstly, the Commission divides the number of people living in the South Island by 16, which is the number set out in the Electoral Act. The result is called the "population quota."

Secondly, the Commission divides the Māori electoral population and North Island electoral population by the South Island population quota. This calculation results in the number of North Island and Māori electorates.

Finally, the Commission decides each electorate's boundaries. They ensure each electorate has about the same number of people living in it. They then use the social, cultural and geographic criteria set out in the Electoral Act 1993 to decide exactly where the boundaries will go. For example, the Commission will try and avoid putting a boundary through a particular community.

It consults with the public on the proposed electorate names and boundaries before making final decisions.

The conversation so far

Questions emerging in the conversation so far about the size and number of electorates include:

- Is the requirement of 16 general electorates in the South Island still appropriate?
- Is the significant difference in area between the smallest electorates and the largest electorates appropriate?

Questions and perspectives

Is the requirement of 16 general electorates in the South Island still appropriate?

New Zealand currently has 70 electorates in total: 63 general electorates and seven Māori electorates. The size and number of the North Island and Māori electorates is based on the number of South Island general electorates being set in law at 16.

Some commentators suggest this system is appropriate to ensure the South Island is properly represented in Parliament. The South Island has a much smaller population than the North Island, so without the quota the South Island might have fewer, larger electorates.

Other commentators suggest, on the other hand, that the South Island quota means the

The process for deciding the number and size of electorates... supports our right to free and fair elections.

North Island and Māori electorate boundaries have to change more often. Recently the North Island population and the Māori electoral population have grown faster than the South Island population. More North Island general electorates and Māori electorates have been created to ensure that electorates continue to have approximately the same population.

The increase in electorates also decreases the number of list seats, as the total number of MPs in Parliament is fixed at 120. This shift may over time reduce the ability to distribute seats according to the party vote and might also increase the possibility of an overhang occurring.

Possible changes include:

- Keeping the South Island quota of 16 seats, but allowing the total number of electorate and list MPs to increase to more than 120 MPs.
- Ending the South Island quota of 16 seats and stabilising the number of electorate and list seats (for example 70 electorate and 50 list seats).

Is the difference in area between the smallest electorates and the largest electorates appropriate?

The most important issue for the Representation Commission, when deciding the electorate boundaries, is keeping the population size of each electorate roughly the same. Under our current system, all general electorates in the North and South Islands and the Māori electorates must contain approximately the same number of people. Geographic size is not taken into account.

In 2010 the general electorates ranged from 2300 hectares (Epsom) to 3.8 million hectares (Clutha-Southland) with an average size of 440,000 hectares. Māori electorates range from 73,000 hectares (Tāmaki Makaurau) to 16 million hectares (Te Tai Tonga) with an average size of 4 million hectares. Cities have more people than rural areas, so tend to be smaller in area than rural electorates.

Some commentators suggest that the process focuses too much on each member of Parliament representing about the same number of people and not enough on people in an electorate having access to their member of Parliament. Members of Parliament in large electorates have to travel a long way to meet constituents in person or use other forms of communication.

Some commentators also suggest that the difference in size affects Māori electorates more than the general electorates. Seven Māori electorates cover the whole of the country, so Māori electorates are significantly larger in area than most general electorates. For example, Te Tai Tonga covers all of the South Island and part of the North Island.

Other commentators say that parties can assign list MPs to work in larger electorates to meet and represent constituents.

Possible changes to reduce the differences in size include:

- Allowing different electorates to have different population sizes: currently the population size can differ by plus or minus 5%. Some commentators suggest this tolerance threshold could be changed to plus or minus 10%.
- Allowing for an exception to the equality of population size if the geographic size is considered too large.

Implementing change

Depending on what changes are made, implementing changes to the way the number and size of electorates is determined is likely to require changes to the Electoral Act 1993. The provisions of the Electoral Act 1993 that determine the process are entrenched. Any amendments would require majority support in a referendum or the support of 75% of the members of Parliament.

Change may also be required to:

- Citizens Initiated Referenda Act 1993.
- Referenda (Postal Voting) Act 2000.
- Local Electoral Act 2001.

4. Electoral integrity legislation

The conversation so far

Following the first MMP election, a number of list and electorate MPs left their parties, but remained as members of Parliament. These actions, known colloquially as waka-jumping or party-hopping, were seen by some people as bringing Parliament into disrepute and undermining the proportionality voted for at the General Election.

In response, the Electoral (Integrity) Amendment Act 2001 was enacted. The Act enabled the Speaker to declare vacant the seat of an MP:

- Who has notified the Speaker that he or she ceased to be a member of the political party that he or she stood for at the last election, or
- If a leader of a parliamentary party gave written notice to the Speaker that the party leader reasonably believed that the member had acted in a manner that distorted the proportionality of representation in Parliament as determined in the preceding General Election.

The legislation did not directly affect MPs' ability to cross the floor to vote with another party on particular issues, though political party rules may provide that an MP who does so can be expelled from his or her party.

The Act had a sunset clause in recognition of the German experience which suggested defections would decline substantially as MMP became established. The Electoral (Integrity) Amendment Bill 2005 proposed to reinstate the Act following its expiry in 2005. The Bill was not passed, following the Justice and Electoral Committee's recommendation it not proceed.

Questions and perspectives

Questions emerging in the conversation so far about election integrity legislation include:

- Is the legislation necessary? Does "party-hopping" undermine the public's credibility in Parliament? Are sanctions against such actions required to protect Parliament's credibility and proportionality or do sanctions increase voter cynicism?
- Who is the right person to make the decision about whether an MP should be required to leave Parliament? Voters, the Speaker, party leaders, or the Courts?
- To what extent should an MP be able to express his or her individual conscience?
- If electoral legislation were enacted, should the provisions apply only to list MPs or include electorate MPs?

Need for the legislation

The members of the select committees that considered the 2001 and 2005 legislation disagreed about the need for and consequences of the legislation. Some concluded that the legislation was neither necessary nor appropriate and that it would have a range of unintended consequences that would lessen public confidence in the integrity of the electoral system. Others supported the legislation as being necessary and appropriate to ensure Parliamentary proportionality was maintained, and to ensure that parliamentary arrangements were stable.

Appropriate decision-maker

Some commentators say it is inappropriate to give anyone other than voters the power to decide that an MP should leave Parliament.

In particular, some commentators say that the Courts should have no role to play in determining the members of Parliament.

The Courts became involved in a decision under the 2001 Act. Donna Awatere Huata became an Independent MP following her expulsion from the ACT caucus in 2003, leaving ACT with fewer seats than its share of the party vote at the 2002 election. Ms Awatere Huata argued that she should remain in Parliament as she still voted according to ACT policies, ensuring that the public still got the policies they voted for. The Supreme Court ruled that the Act could be invoked.[17] The Speaker declared the seat vacant and the next person on the ACT list entered Parliament.

MPs' individual conscience

Some commentators say an MP should be able to leave the party they belonged to at the General Election, if the party's policies no longer reflect the member's views. This view suggests that legislation preventing MPs from expressing their disagreement with party policy would give party leaders too much power to control MPs' actions.

Some say this power amounts to a breach of the New Zealand Bill of Rights Act 1990. The Attorney-General noted that the 2005 Bill could be seen to raise issues of consistency with the right to qualification for membership of Parliament, freedom of expression, and the right to freedom of association. The Attorney-General advised Parliament that it was not inconsistent with the Bill of Rights Act. While the legislation may have raised these issues, the Attorney-General was persuaded by the Supreme Court's willingness to allow the Act to be invoked in the *Awatere Huata* judgment.

Application

One perspective is that the provisions should apply only to list MPs. On this view, electorate MPs are elected by their constituency for their personal qualities, and only partly for their party affiliation. They should, therefore, be free to exercise their individual conscience, including leaving a party whose views they no longer agree with, without the electorate losing their chosen representative. List MPs are selected by their parties, so have less of a direct link to a constituency.

Another perspective is that a vacancy in the electorate seat can affect the party vote, and therefore the proportionality of Parliament and potentially the composition of government, if an MP from another party is elected in the ensuing by-election. This perspective considers that electorate MPs are also highly dependent on their party affiliation and should be restrained from changing parties mid-term.

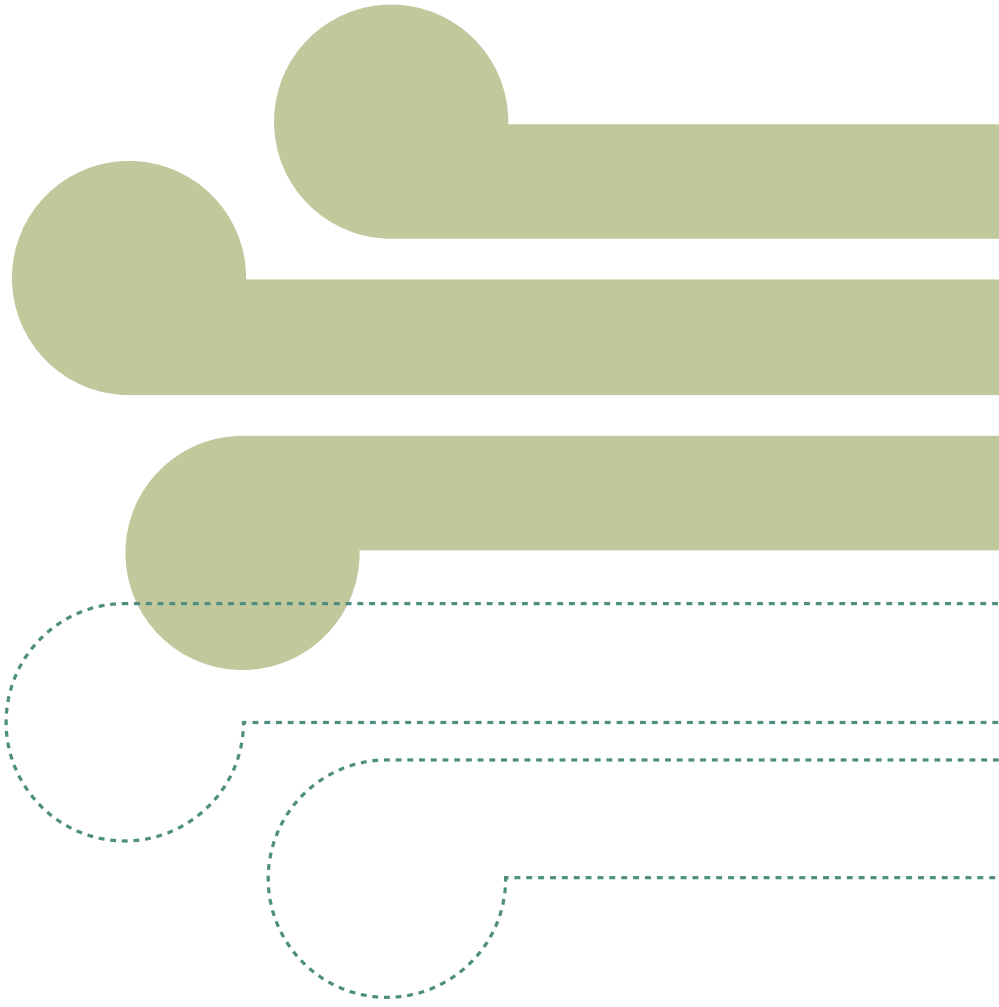
Other countries

Thirty countries place legislative sanctions on MPs who part ways with the party from which they were elected. Comparable Westminster systems, such as the United Kingdom, Australia and Canada, do not have such restrictions.

Any such legislation would now be unconstitutional in Germany (New Zealand's model for MMP) as all members, once elected, must be representatives of all the people and must be able to act in accordance with their conscience.

[17] Awatere Huata v Prebble [2005] 1 NZLR 289.

Crown-Māori Relationship Matters



1. Māori representation in Parliament

The Māori seats in our constitution

The Māori seats are a unique feature of New Zealand's system of democracy.[18] Māori representation in Parliament has been an ongoing subject of national discussion since Parliament was established in New Zealand in 1852.

The Māori seats in Parliament ensure that a guaranteed minimum number of members of Parliament can represent Māori views and perspectives in the business of Parliament. Candidates are elected to Māori seats by voters enrolled on the Māori roll. These voters choose whether to be on the Māori roll through the Māori Electoral Option.

The conversation so far

How did the Māori seats come about?

Historically, the right to vote was based on individual land ownership. Most Māori did not meet this requirement as land was held communally and so could not vote even though they paid taxes and were affected by decisions. Māori made attempts to have Māori interests represented in Crown decision-making and from the 1850s developed separate political institutions.[19] In 1867, the Māori Representation Act was passed to provide better protection for the "native race." The Act provided for the election of four Māori members of Parliament to represent Māori interests in the House of Representatives.[20]

[18] www.parliament.nz

[19] In 1858, the Waikato chief Pōtatau Te Wherowhero became the first Māori King. In 1892, the Kotahitanga or Māori Parliament was established at Waitangi.

[20] For more detailed information on the Origins of Māori seats see: www.parliament.nz

Legislative mechanisms for representation

The Electoral Act 1993 sets out the mechanisms through which Māori are represented in Parliament: the Māori Electoral Option, Māori electorates and Māori seats.[21]

Māori Electoral Option

The Māori Electoral Option, introduced in 1975, allows for electors of Māori descent to choose whether to be enrolled on the general or Māori roll. The Māori Electoral Option occurs after every census. It is the only time when Māori voters can opt to switch between the general roll and the Māori roll.

In a General Election, voters enrolled on the Māori electoral roll may only vote for a candidate standing in the Māori electorate in which they are enrolled. Voters on the General Electoral roll may vote only for a candidate standing in the general electorate in which they are enrolled. Candidates who identify as Māori may choose whether to stand as candidates for Māori electorates or for general electorates.

The next Māori Electoral Option is scheduled to be held over a four-month period in 2013 immediately following the census.

Over the years, the Māori seats have provided a voice for Māori perspectives and interests in Parliament. Commentators say the Māori seats serve as a reminder to governments of the promises made through the Treaty of Waitangi.

Māori Electorates

Four Māori electorates were established by the Māori Representation Act 1867. They were made permanent in 1876. This number remained until the Electoral Act 1993 introduced a new system for determining the number and size of Māori electorates. The

[21] Sections 3(1), 45, and 76-79 of the Electoral Act 1993 provide for the Māori Electoral Option, separate Māori electorates, and the method for determining the Māori seats.

The Māori seats in Parliament ensure that a guaranteed minimum number of members of Parliament can represent Māori views and perspectives in the business of Parliament.

Electoral Act 1993, which also implemented the MMP voting system, provided for the number of Māori electorates to be determined according to the Māori electoral population.

The number of Māori electorates now changes with changes in the Māori population. It is calculated by dividing the Māori electoral population by the population quota for South Island general electorates. After the 2012 election, there were seven Māori electorates.[22]

Questions and perspectives

The questions that have arisen during the conversation so far about Māori representation in Parliament include:

- Whether to retain or abolish the Māori seats.
- Whether to entrench the Māori seats, making them more difficult to change in the future.
- Whether there are ways of ensuring Māori views are represented in the business of Parliament, to replace or to complement Māori seats.

Royal Commission on the Electoral System (1986)

Effective Māori representation was one of the 10 criteria developed by the Royal Commission against which to judge the then current FPP voting system and to evaluate alternative voting systems.

The Commission considered that a change to MMP voting would be the best way to produce gains for Māori in terms of political representation.

Ultimately, the Commission recommended that if MMP was introduced the Māori seats should be abolished. It considered Māori representation would increase under the more proportional MMP system.

Inquiry into the Royal Commission on the Electoral System (1987)

The Electoral Law Committee considered the Royal Commission's recommendation that the Māori seats be abolished and concluded that "the present system of separate Māori representation should be retained at the present time."[23] The committee concluded that further consultation on the issues with a wide range of Māori representatives was necessary and that Māori themselves should determine the future of the seats. The committee was not convinced by the Royal Commission's position that the introduction of MMP would enhance Māori representation in Parliament.

Waitangi Tribunal – Māori Electoral Option Report (1994)

The Waitangi Tribunal considered the issue of Māori representation in its investigation into a claim (Wai 413) arising from the process of the 1993 Māori Electoral Option. The claim, filed in 1994, stated that "the Crown has an obligation

[22] Hauraki-Waikato, Ikaroa-Rāwhiti, Tāmaki Makaurau, Te Tai Hauāuru, Te Tai Tokerau, Te Tai Tonga, Waiariki.

[23] Inquiry into the Report of the Royal Commission on the Electoral System – Report of the Electoral Law Committee; pg 25.

to protect the right of Māori to be represented in Parliament and that there are special needs in promoting Māori enrolment and education on the option."[24] The claimants considered that the government funding that had been provided to "assist with these matters [was] inadequate and insufficient to properly inform Māori of their democratic entitlement and responsibilities."[25]

In its findings on the claim, the Tribunal concluded that:

> The Crown is under a Treaty obligation actively to protect Māori citizenship rights and, in particular, existing Māori rights to political representation conferred under the Electoral Act 1993. This duty of protection arises from the Treaty generally and in particular from the provisions of article 3.[26]

MMP Review Committee (2001)

The Electoral Act 1993 required a parliamentary select committee to be established to review and report on matters relating to the electoral system.

The Review Committee received submissions on a number of issues regarding Māori representation. The issue and a summary of the committee's conclusions based on the submissions received is summarised below:

Whether to retain separate Māori representation

The committee did not receive a strong message from Māori about the future of the seats. Therefore, the majority of members (from Alliance, Green, Labour, National and United Party) felt the status quo should be retained. The majority concluded that the Māori seats were a distinctive element of MMP in New Zealand and should remain until they were no longer required or seen as desirable.[27]

Whether to retain or abolish the Māori Electoral Option

The majority of committee members (from Alliance, Green, Labour, National and United Party members) considered the Māori Electoral Option to be the best means of determining the number of Māori seats. The minority view (comprising the ACT Party member) considered the "increases in registration on the Māori roll reflected the deliberate state promotion of racial distinctions ... [and that] with race tension growing it was wrong to persist with the choice that scheduled a five-yearly state- sponsored thrust for race consciousness."[28]

In absence of unanimity, the committee did not make a decision or recommendation on the issue.

Whether the seats should be entrenched

The committee was divided on this issue. The Alliance, Green and Labour members supported entrenchment. The ACT, National and United Party members agreed with Professor Philip Joseph, who said he "did not see separate Māori representation as

[24] Māori Election Option Report (1.3) – Waitangi Tribunal: www.waitangi-tribunal.govt.nz

[25] Māori Election Option Report (1.3) – Waitangi Tribunal: www.waitangi-tribunal.govt.nz

[26] Māori Election Option Report (3.8) – Waitangi Tribunal: www.waitangi-tribunal.govt.nz

[27] Inquiry into the Review of MMP – Report of the MMP Review Committee: www.elections.org.nz

[28] Inquiry into the Review of MMP – Report of the MMP Review Committee, pg 21-22: www.elections.org.nz

being critical to the integrity of the electoral system and, therefore, did not see it as legitimate subject-matter of constitutional entrenchment."[29] The National and United Parties considered that "flexibility needs to be retained to allow Māori to choose, over their own time, whether they wish to retain separate representation."[30]

Whether to waive the threshold for representation in Parliament for Māori parties

The committee unanimously agreed that there should not be a waiver of the 5% requirement for Māori parties.

Further consultation on the form of Māori representation

The committee considered a submission from Te Runānga O Ngāti Porou that called for the establishment of a Māori Representation Commission to return to first principles and new forms of Māori representation in a three-year consultation process.[31]

The committee was divided on this issue. ACT, National and United Party members did not support the proposal for further consultation, the Alliance and Labour members considered that the proposals merited further consideration and the Green member supported the proposal. In absence of unanimity, the committee did not make a decision or recommendation on the issue.

Government Response to the Report of the MMP Review Committee (2002)

The Government acknowledged that the issues of whether the Māori seats should be abolished or retained and whether the provisions of the Electoral Act 1993 that deal with Māori representation should be entrenched were major constitutional arrangements that would require a high level of public consensus to change. The Government considered that it would not be appropriate to make changes to these arrangements in the absence of consensus.[32]

[29] Report of the MMP Review Committee, pg 25

[30] Inquiry into the Review of MMP – Report of the MMP Review Committee, pg 25: www.elections.org.nz

[31] Inquiry into the Review of MMP – Report of the MMP Review Committee: www.elections.org.nz

[32] Government Response to Report of MMP Review Committee on Inquiry into the Review of MMP November 2001: www.justice.govt.nz

2. Māori representation in local government

Local government has extensive powers to manage the use and protection of natural resources, including management of rivers and lakes, some reserve land, and coastal marine areas. Local government deals with issues that are specific to local communities, while central government is generally concerned with the broader issues of importance to all New Zealanders. "Local government" and "local authority" are terms used to describe New Zealand's regional, district, city or unitary councils. Their powers and responsibilities are set out in statute passed by Parliament.

As tangata whenua, Māori have a close and direct concern with the management of natural resources. Māori, therefore, have a close interest in local government to ensure their views and perspectives are represented.

The conversation so far

Māori involvement in local government

Historically, iwi exerted kaitiakitanga[33] managing all of New Zealand's natural resources. Māori and the Crown agreed, through the Treaty of Waitangi, that Māori would maintain authority and control over their taonga, including natural resources. Now, much of the management and regulation of these resources is the responsibility of local government.

The relationship of Māori to their natural resources is currently reflected in local government legislation. When a council is making an important decision involving land or a body of water, it must take into account the relationship of Māori and their culture and traditions with their ancestral land, water, sites, wāhi tapu, valued flora and fauna, and other taonga.[34]

Three primary acts provide for Māori representation. The Local Electoral Act 2001, the Local Government Act 2002 and the Resource Management Act 1991 empower local government to make significant decisions about the management of natural and physical resources.

Local Electoral Act 2001

The Local Electoral Act 2001 is partly designed to give "fair and effective representation for individuals and communities."[35] The Act extended the Bay of Plenty model, which guaranteed a minimum number of Māori councillors to represent Māori views on the council.[36] The Local Electoral Act 2001 provides opportunities to increase Māori participation in local government decision-making through the creation of Māori wards and an option to adopt single transferable voting.

Local Government Act 2002

The Act sets out the purpose of local government and the role, powers and principles that local authorities 'must' and 'should' comply with, including providing opportunities for Māori to contribute to its decision-making processes.[37] The Act also requires local government to establish and maintain processes to provide opportunities for Māori to contribute to decision-making, to consider ways it may foster the development of Māori capacity to contribute to decision-making[38] and to be properly consulted.[39]

[33] Kaitaikitanga in a modern resource management context can be seen as Māori environmental law, policy, and practice. Its exercise has relied on tikanga and mātauranga being transmitted from generation to generation for many hundreds of years, both prior to and since European settlement. Waitangi Tribunal *Ko Aotearoa Tēnei Te Taumata Tuarua* (2011) p 237.

[34] Section 77 Local Government Act 2002.

[35] One of the principles the Act is designed to implement: see section 4, Local Electoral Act 2001.

[36] Bay of Plenty Regional (Māori Constituency Empowering) Act 2001.

[37] Section 14 Local Government Act 2002

[38] Section 81 Local Government Act 2002

[39] Section 82 Local Government Act 2002

Resource Management Act 1991

The purpose and principles of the Resource Management Act 1991 specifically required the relationship of Māori with their ancestral lands, waters, and other taonga to be recognised and provided for as matter of national importance, and for the principles of the Treaty of Waitangi to be taken into account.

The Act was amended in 2003 and 2005 to further enable iwi participation, adding the option of joint management agreements[40] and placing obligations on councils to consider ways to foster iwi capacity to engage in consultation. The 2005 amendments also clarified that councils had no duty to consult on applications for resource consents, as opposed to planning and policy documents.

The Marine and Coastal Area (Takutai Moana) Act also provides opportunities for Māori to participate in coastal resource management decisions. The specific mechanisms that provide for iwi involvement are different and individual to each iwi.

The legal mechanisms in practice

Māori wards provide Māori voters with the opportunity to vote for Māori council members. Māori wards can only be established if a majority of voters support their creation. Councils were required to make a decision on Māori representation for the 2013 council elections by November 2011.[41]

In November 2011, the Nelson City Council resolved to establish a Māori ward in time for the 2013 local body elections. The Nelson mayor considered the move "right for the future of the city" and saw the proposal as a cost-effective way to give fair representation to Māori.[42] On 19 May 2012, the council held a poll on establishing a Māori ward. The proposal was voted down, with 79% of the votes cast against establishing a Māori ward.

The Wairoa and Waikato district councils similarly polled their constituents about Māori representation. The proposal to establish a Māori ward was rejected with 51.9% of the Wairoa District Council voters and 79% of the Waikato District Council voters against the proposal.

In October 2011 the Waikato Regional Council voted to establish two Māori council seats. Constituents had until 28 February 2012 to seek a poll of voters. No request for a poll was received so the decision to establish two Māori constituencies stands for the 2013 election.

Questions and perspectives

Questions and perspectives arising in the conversation so far include:

- Whether to guarantee Māori representation in local government.
- Whether there are more effective ways of ensuring Māori views are represented in local authority decision-making.

Should Māori representation be guaranteed?

Most councils consult to some degree with tangata whenua. Iwi inclusion in local government decision-making is dependent on each individual local government. While the legislation provides opportunities for Māori to form partnerships with authorities, there is no legislative imperative to do so.

[40] Section 36B Resource Management Act 1991.

[41] Local Electoral Act 2001, sections 19ZB-19ZH.

[42] A Māori Ward for Nelson City: A Way Forward. www.nelsoncitycouncil.co.nz/a-maori-ward-for-nelson-city-the-way-forward-2/

Other ways of ensuring Māori representation

Treaty settlements

Māori have increasingly turned to central government to seek, through the Treaty settlement process, greater involvement in local decision-making about natural resource management.

Through Treaty settlement legislation, Parliament has established iwi statutory bodies to engage with local authorities. A recent example of this is the Ngāi Tāmanuhiri Claims Settlement Act 2012, which establishes a Local Leadership Body as a joint committee of the council to contribute to the sustainable management of the natural and physical resources.

Restructuring the Auckland City Council

Statutory Māori wards were widely debated during the restructuring of Auckland's local government in 2010. The debate was stimulated when the Government announced its decision that there would be an Auckland City Council made up of 20 councillors, but that there would be no statutory provision for Māori representation on the council. This decision did not follow recommendations by the Royal Commission on Auckland Governance. The Local Government (Auckland Council) Act 2009 established the Independent Māori Statutory Advisory Board members. Board members were announced on 29 October 2010, comprising seven mana whenua and two mataawaka representatives.

The Māori Advisory Board is an independent statutory board and cannot be disbanded or amended by the Auckland Council. The board's purpose is to assist the Auckland Council to make decisions, perform its functions and exercise its powers by:

- Putting forward the cultural, economic, environmental, and social issues that are significant for mana whenua groups and mataawaka in Tāmaki Makaurau.
- Ensuring that the council complies with statutory provisions that refer to the Treaty of Waitangi.[43]

The Māori Advisory Board appoints a maximum of two people to sit with voting rights as members on each of the Auckland Council's committees that deal with the management and stewardship of natural and physical resources.

[43] www.aucklandcouncil.govt.nz/EN/AboutCouncil/representativesbodies/Maori_relations/Pages/independentmaoristatutoryboard.aspx

3. The role of the Treaty of Waitangi

The Treaty of Waitangi in our constitution

The Treaty of Waitangi has a rich and complicated history in New Zealand. Its accepted position as the founding document of government in New Zealand is the result of decades of "back and forth" between iwi and the Crown. This section is intended to capture the essence of that history, summarise the conversation so far and to inform a conversation about the future.

The Treaty influences the exercise of public power

It is difficult to identify significant constitutional questions that do not touch on the Treaty to a material extent[44], but for it to place binding and enforceable limits on the exercise of public power it must be referred to in legislation. For example:

- Parliament has referred to the Treaty in specific legislation, placing obligations on the Executive and local government to consider Māori Treaty rights in specified circumstances, particularly in decisions relating to the natural environment.
- Parliament has provided for guaranteed representation of Māori in the House and has provided a mechanism for local government to decide whether to establish Māori wards.
- The Waitangi Tribunal[45] was established by Parliament to hear and make recommendations about claims that state actions have breached the Treaty.
- The Courts and the Waitangi Tribunal enforce statutory references to the Treaty, explaining the principles of the Treaty and how they should be applied in particular circumstances.

Successive governments have acknowledged that the Treaty's guarantees have not been consistently honoured, and have taken responsibility for redressing breaches of the Treaty through the settlement process. They have also accepted that the principles of the Treaty must be considered when making decisions, if future breaches are to be avoided.

International context – Declaration on the Rights of Indigenous Peoples

In 2010, the New Zealand Government made a Statement of Support for the United Nations Declaration on the Rights of Indigenous Peoples. The Statement of Support:[46]

- Acknowledged that Māori hold a distinct and special status as the indigenous people of New Zealand, reaffirming the importance of the Treaty of Waitangi as a unique feature of indigenous rights in New Zealand.
- Reaffirmed the legal and constitutional frameworks that underpin New Zealand's legal system, noting that those existing frameworks define the bounds of New Zealand's engagement with the aspirational elements of the declaration:
  - The aspirations in the declaration regarding rights to and restitution of traditionally held lands and resources does not alter New Zealand's established approaches to the resolution of grievances through the Treaty of Waitangi settlement process.

[44] Report of the Constitutional Arrangements Committee: *Inquiry to review New Zealand's Constitutional Arrangements* (2005) p23.

[45] For more information about the Waitangi Tribunal's establishment, role or for reports go to: www.waitangi-tribunal.govt.nz

[46] 20 April 2010, New Zealand Parliamentary Debates, Vol 668, p 10229.

- Redress offered in Treaty settlements is constrained by the need to be fair to everyone and by what the country as a whole can afford to pay.
- Where the declaration sets out principles for indigenous involvement in decision-making, New Zealand has developed, and will continue to rely upon, its own distinct processes and institutions that afford opportunities to Māori for such involvement.

- Recognised Māori have an interest in all policy and legislative matters.
- Acknowledged the determination of Māori that custom, world views and cultural heritage should be reflected in the laws and policies of New Zealand, and that Māori continue to be active in developing innovative responses to issues.

The declaration is an aspirational document that does not bind the Government.

The Treaty principles

Because of the differences between the two texts of the Treaty and the need to apply the Treaty to changing conditions, attempts have been made to distil a set of principles from the Treaty. The term "principles of the Treaty of Waitangi" is sometimes used in legislation, but the principles are not defined.

The Courts and the Waitangi Tribunal have played key roles in defining the meaning of the Treaty, using principles to express the mutual responsibilities of the Government and Māori. The principles have been described as the underlying mutual obligations and responsibilities which the Treaty places on the parties. The principles reflect the intent of the Treaty, but are not confined to its express terms.[47] The list of Treaty principles is not definitive and continues to evolve as the understanding of what it means to be a Treaty partner evolves. While the lack of a finite list of principles provides flexibility for the Crown-Māori relationship to develop in line with the Treaty, it can be the cause of frustration for those who seek clarity and certainty of meaning.

The most commonly referenced principle is the principle of partnership.[48] The principle of partnership encapsulates the spirit in which the Treaty was signed, recording for future generations the relationship of mutual respect and good faith.

It is possible to view the principles as a pragmatic way of enabling decision makers to give effect to the spirit and intent of the Treaty and to take care of the relationships established by the Treaty, without being limited by the differences in the wording of the Treaty.

The principles in legislation

Between 1840 and 1975, some minor references were made to the Treaty in legislation. Since 1975, legislative references to the Treaty have increased.

The State-Owned Enterprises Act 1986 was the first statute to refer to the principles of the Treaty prevented the Crown from acting "in a manner that is inconsistent with the principles of the Treaty of Waitangi."[49]

The extent to which the Treaty principles can be enforced by the Courts depends on its placement in, and the specific wording of, the statute. The principles are sometimes referred to in the Preambles. Preambles describe the purpose and origin of the legislation (for example, the Māori Language Act 1987, and the Te Ture Whenua Māori Act 1993) and are not directly enforceable.

[47] *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 517, at 517 per Lord Woolf (Privy Council).

[48] For more detailed information on the principles expressed by the Waitangi Tribunal and the Courts refer to www.teara.govt.nz

[49] Section 9 State-Owned Enterprises Act 1986.

Other Treaty references in legislation require decision makers to exercise public power in accordance with the Treaty principles, to:

- *Give effect* to the Treaty principles.[50]
- *Give particular recognition to* the Treaty principles.[51]
- *Take into account* of the Treaty principles.[52]
- Ensure *full and balanced account* of the Treaty principles.[53]
- *Have regard to* the Treaty principles.[54]
- *Acknowledge* the Treaty principles.[55]

Who decides what the Treaty principles are?

Since it was established in 1975, the Waitangi Tribunal has been the body responsible for defining what the Treaty means in a modern context. As obligations on decision makers to take account of the Treaty principles increase through reference in legislation, the Courts were also relied on to give a legal definition to the Treaty principles.

The first modern interpretation of the meaning of the Treaty of Waitangi by New Zealand judges[56] came in 1987 when the New Zealand Māori Council challenged the transfer of assets from the Crown to State-Owned Enterprises (SOEs).[57] The judges of the Court of Appeal:

- Declared it would be unlawful to transfer the assets to SOEs without establishing any system to consider whether the transfer would be inconsistent with the principles of the Treaty of Waitangi.
- Commented on the differences between the English and Māori versions of the Treaty affirming the right of the Crown to govern, subject to the balancing of duties of good faith and partnership. They noted that "the Treaty principles require the Pākehā and Māori Treaty partners to act towards each other reasonably and with the utmost good faith. The duty is not a light one. It is infinitely more than a formality."[58]

Between 1987 and 1990, Māori legally challenged Crown proposals to transfer coal[59], forestry assets[60], and broadcasting assets[61] to SOEs, and to create new forms of property rights in fisheries[62] and radio frequencies.[63]

More recently, in the *Attorney-General v Ngāti Apa*[64], the Court of Appeal held that the Māori

[50] For example, section 4 of the Conservation Act 1987, stating that This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi.

[51] For example, section 10 of the Royal Foundation for the Blind Act 2002, stating that one object of the Foundation is to "give particular recognition to the principles of the Treaty of Waitangi and their application to the governance and services of the Foundation".

[52] For example, section 8 of the Resource Management Act 1991, requiring that the exercise of functions and powers under the Act "take into account the principles of the Treaty of Waitangi."

[53] The Preamble to the Environment Act 1986, stating that one purpose of the Act is to "Ensure that, in the management of natural and physical resources, full and balanced account is taken of ... (iii) The principles of the Treaty of Waitangi."

[54] For example, section 4 of the Crown Minerals Act 1991, requiring that the exercise of functions and powers under the Act "shall have regard to the principles of the Treaty of Waitangi."

[55] For example, section 181 of the Education Act 1989, stating that one duty of a council of an institution in exercising its functions and powers under the Act will be to acknowledge the Treaty principles.

[56] Palmer (2008: 123).

[57] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 - the "Lands" case.

[58] Ibid 641, 663.

[59] *Tainui Māori Trust Board v Attorney-General* [1989] 2 NZLR 513 – the "Coal" case.

[60] *New Zealand Māori Council v Attorney-General* [1989] 2 NZLR 142 Forests (CA).

[61] *New Zealand Māori Council v Attorney-General* [1992] 2 NZLR 576 Broadcasting (CA).

[62] *Te Rūnanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 – the "Fisheries" case.

[63] *New Zealand Māori Council v Attorney-General* [1991] 2 NZLR 129 and 147 No 2 (CA) – the "Radio Frequencies" case.

[64] *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA).

Land Court had jurisdiction under the Te Ture Whenua Māori Act 1993 to determine whether the foreshore and seabed had the status of Māori customary land. This case led to the passage of the Foreshore and Seabed Act 2004, which was followed by the Marine and Coastal Area (Takutai Moana) Act 2011.

Treaty settlements

Since the signing of the Treaty in 1840, Treaty settlements have played an essential role in resolving breaches of the Treaty by the Crown. The settlements acknowledge the Crown's historical acts or omissions that have resulted in loss of land and access to and use of Māori taonga, including forests, waterways and other natural resources. The settlements also provide opportunities for iwi secure their involvement in decision-making on natural resources.

Who is responsible for considering and negotiating settlements?

Once a historical Treaty settlement has been filed with the Waitangi Tribunal[65], two avenues are open to Māori to settle their historical Treaty grievances. The first involves a hearing in the Waitangi Tribunal. As has been discussed, the Waitangi Tribunal has the jurisdiction to inquire into contemporary[66] and historical Treaty breaches. The focus of this section of the paper, however, is the Tribunal's role in settling historical Treaty breaches.

The Tribunal aims to facilitate the settlement of claims by conducting a robust inquiry, and positioning the parties to be ready to negotiate a settlement.[67] If the Waitangi Tribunal finds a claim to be well-founded, it may recommend to the Crown that action be taken to compensate or remove the prejudice or to prevent others in future from being similarly affected. Except for recommendations about memorialised lands[68] or former Crown forestry lands, the Tribunal's recommendations are not binding on the government.

The second avenue allows Māori claimants to enter into direct negotiations as well as having claims heard by the Waitangi Tribunal. The direct negotiation of a claim can start by either a request from the claimants or a recommendation for negotiation from the Waitangi Tribunal. Direct negotiation needs agreement from both claimants and the Crown.

In 2006 Government issued a set of guidelines for Treaty settlements.[69] The Office of Treaty Settlements follows these guidelines to negotiate the settlement of historical Treaty claims on behalf of the Crown. Once negotiations are concluded successfully and approved by Cabinet, a draft deed of settlement will be agreed. Once the settlement deed and post-settlement governance entity[70] are ratified by the iwi, the Executive introduces enacting legislation. Following the legislation, the Executive and claimants implement the transfer of settlement assets and cultural redress.

[65] All historical Treaty claims had to be filed with the Waitangi Tribunal by 30 August 2008.

[66] Contemporary breaches of the Treaty of Waitangi relate to Crown acts and omissions occurring after 21 September 1992.

[67] See www.waitangi-tribunal.govt.nz/about/frequentlyaskedquestions.asp

[68] Lands owned, or formerly owned, by a state-owned enterprise or a tertiary institution, or former New Zealand Railways lands, that have a memorial (or notation) on their certificate of title advising that the Waitangi Tribunal may recommend that the land be returned to Māori ownership. Section 27B State-Owned Enterprises Act 1986.

[69] Office of Treaty Settlements (2006) *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*, Wellington: Ministry of Justice, p28.

[70] A Post Settlement Governance Entity (PSGE) is an entity (for example a Trust) established to hold and manage the Treaty settlement assets for the benefit of the iwi.

Questions and perspectives

The questions arising in the conversation so far about the Treaty include:

- What will happen once all historical Treaty grievances are settled?
- Should the Treaty be entrenched?

What happens once the historical Treaty grievances are settled?

Treaty settlement legislation establishes formal relationships between iwi and the Crown (government agencies). However, relationships are not dependent on, or limited to, those negotiated through the Treaty settlements. Fruitful relationships have developed between iwi and local authorities or individual government agencies outside of the settlement process.

During the Treaty settlement process, protocols and social accords[71] are also negotiated between iwi and government departments and are an important instrument for the maintenance of healthy, enduring Crown and iwi, and Crown and Māori relationships.

Once the historical Treaty grievances are settled, the Treaty will continue to impact the Crown actions. The principles of the Treaty must be considered when making decisions, if future breaches are to be avoided.

Review of New Zealand's constitutional arrangements 2005

In 2004, Parliament established a select committee to review New Zealand's existing constitutional arrangements. With specific regard to the Treaty, the committee identified "the relationship between the constitution and the Treaty of Waitangi, including whether it should and how it might form a superior law" as a significant and topical constitutional issue. The committee also reported that:

> 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 committee 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.[73]

Recent Waitangi Tribunal reports

The Waitangi Tribunal flora and fauna report is titled *Ko Aotearoa Tēnei* meaning both "This is Aotearoa" and "This is New Zealand." The intended ambiguity in the title serves as a "reminder, if one is needed, that Aotearoa and New Zealand must be able to co-exist in the same place."[74] The report is future-focussed and considers the relationship of Crown policy and Māori identity and culture, now and in the future.[75]

[71] The protocols particularly set out how government agencies will act toward iwi and describe how iwi will have input into decision making processes. Social accords form a relationship with a government agency or range of government agencies care designed to address social and economic concerns.

[72] Constitutional Arrangements Committee (2005: 23).

[73] Constitutional Arrangements Committee (2005: 7).

[74] Waitangi Tribunal (2011) *Ko Aotearoa Tēnei: Te Taumata Tuatahi*, Wellington: Legislation Direct, p xvii.

[75] Ibid, p xix.

The Tribunal sets out building blocks for a constructive and positive post-Treaty relationship between Crown and Māori based on mutual respect. It proposes a framework around which government agencies can address Treaty requirements, where those agencies have custody or control of Māori taonga.

At the time of writing, the Waitangi Tribunal concluded its first stage inquiry into National Fresh Water and Geothermal Resources. On 30 July 2012, the Tribunal issued a memorandum-direction stating the "Crown ought not commence the sale of shares in any of the Mixed Ownership Model companies until [the Tribunal has] had the opportunity to complete [its] report on stage one of this inquiry." In response to a direct request from the Government, the Tribunal, on 24 August 2012, released an interim report on the National Freshwater and Geothermal Resources Claim.

Should the Treaty be entrenched?

In 1985, the Minister of Justice issued a discussion paper with a draft Bill of Rights. Included in the draft bill was a clause declaring: "The rights of the Māori people under the Treaty of Waitangi are hereby recognised and affirmed." It also provided that the Treaty of Waitangi "shall be regarded as always speaking and shall be applied to circumstances as they arise so that effect may be given to its spirit and true intent." The discussion paper proposed the Bill of Rights would be entrenched.

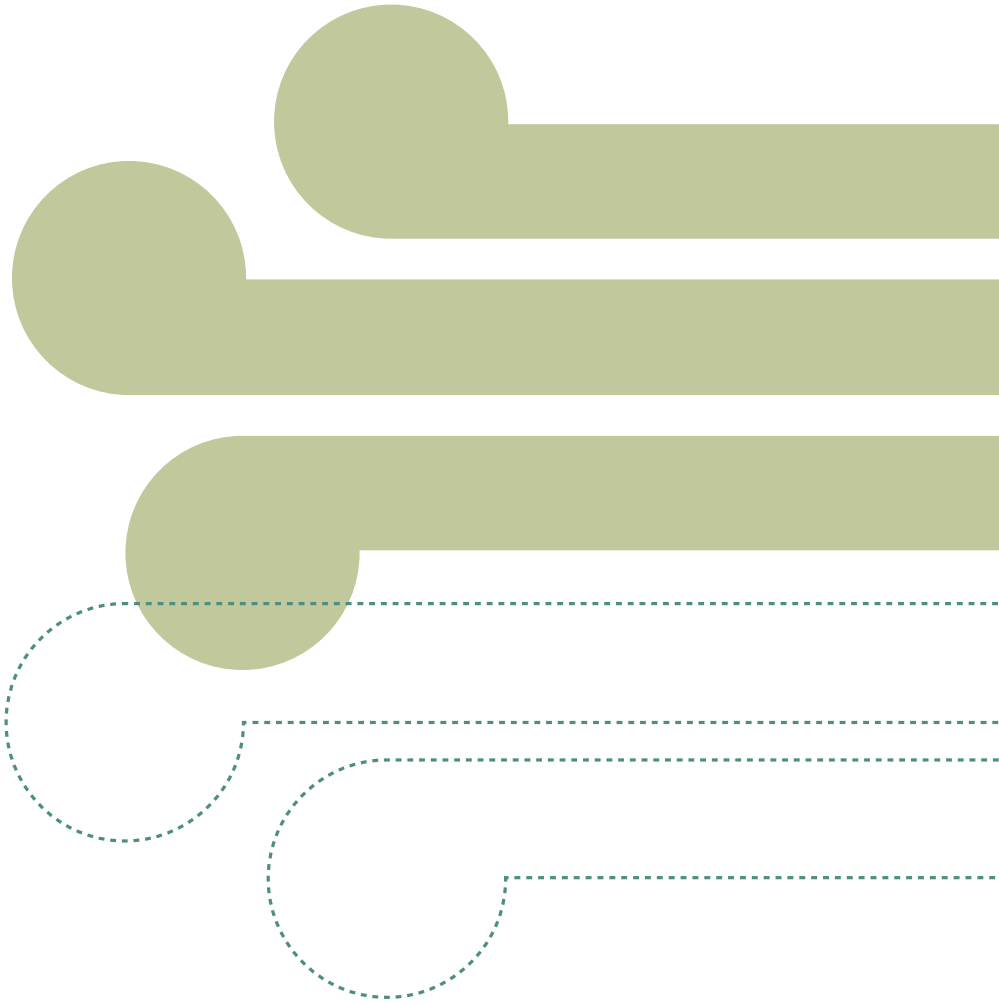
If the draft Bill of Rights had been enacted as proposed, any legislation found by Courts to be inconsistent with the Treaty of Waitangi would have no effect, to the extent of the inconsistency. Courts would have been able to scrutinise actions by the Executive, Judiciary or Parliament for consistency with the Treaty of Waitangi.

When the draft Bill of Rights was before Parliament, some Māori expressed concern that unless the Bill of Rights was entrenched or recognised as higher law, including the Treaty would demean it and make the Treaty susceptible to amendment.[76]

The New Zealand Bill of Rights Act 1990, which was ultimately enacted, is not entrenched and is not recognised as supreme law. The Treaty clause was removed before it was passed, as a result of the concerns expressed.

[76] Jones, Shane (2006) *Cornerstone of the Nation State in Waitangi Revisited: Perspectives on the Treaty of Waitangi*. South Melbourne: Oxford University Press, p22; and Joseph, Philip (2007) *Constitutional and Administrative Law in New Zealand*. Wellington: Thomson/Brookers, p 1141.

Other Constitutional Matters



1. Bill of Rights issues

The New Zealand Bill of Rights Act 1990 in our constitution

The New Zealand Bill of Rights Act 1990 (the Act) sets out New Zealanders' fundamental rights and freedoms. It contains important rules about the relationship between the state and the people in New Zealand. It helps us to know what our rights are and to decide whether the state has protected our rights properly. We can go to Court if we think the government has acted contrary to our rights set out in the Act. Parliament has to think about our rights in the Act when it makes new laws.

How the Act works

Protection of rights

Many of the rights in the Act already existed in common law and statute in New Zealand. The Act affirmed New Zealand's commitment to the International Covenant on Civil and Political Rights (ICCPR).

The Act sets the minimum standards all public decision-making must follow: Parliament must have regard to the rights when making laws, the Executive must observe these rights in their actions and policy decisions and, where reasonably possible, the Judiciary must apply laws consistently with the Act.

The protected rights include:

- The right to life and security of the person.
- Democratic and civil rights, such as electoral rights, freedom of expression, and freedom of religion.
- Non-discrimination and minority rights.
- Search, arrest and detention rights, such as the right to be free from unreasonable search and seizure.
- Fair hearing rights, particularly in the criminal trial process.

The Act recognises, like other modern Bills of Rights, that not all rights are absolute, so sometimes limits on rights might be justified. But the rights can be limited only to the extent demonstrably justifiable in a free and democratic society (section 5).

Ultimately, Parliament can choose to legislate in a way that is contrary to the Act, and is accountable to voters for that choice.

Enforcing the Act

The Act is enforced in two key ways: by the Judiciary and by the Attorney-General.

Judiciary

A judge can decide complaints that actions by the state breached the Act. When deciding whether an action has breached the Act, the judge is required if possible to interpret existing legislation in a way that is consistent with the Act (section 6). This requirement means state actions can be assessed by the standards set in the Act, even if the state actions were done under legislation enacted before the Act.

If the judge finds the Act was breached, the Court can order remedies. For example, the Court can exclude evidence obtained in breach of the Act or grant financial compensation for a breach of the Act.

New Zealand judges cannot *strike down* or invalidate any law found to be inconsistent with the Act. Judges can note their view that a statute is inconsistent with the Act, but must uphold and apply the law if it cannot be interpreted in a way that is consistent with the Act (section 4). This means that the state can act in a way that is inconsistent with the Act, but only if there is a clear power in law to do so.

The Human Rights Tribunal has a limited power, under the Human Rights Act 1993, to declare that legislation is inconsistent with the right to freedom from discrimination. The Government must respond in the Parliament to the Tribunal's declaration.

We can go to Court if we think the government has acted contrary to our rights set out in the Act. Parliament has to think about our rights in the Act when it makes new laws.

Attorney-General

The Attorney-General, a Minister in government, must tell Parliament if he or she believes a proposed law (a bill) is inconsistent with the Act (section 7). This report does not stop Parliament from passing the bill into law but it does have the practical effect of ensuring Bill of Rights issues are drawn to Parliament's attention while it considers the proposals. The reporting requirement also creates an incentive for the government to consider the impact of proposals on rights in the Act before the proposed legislation is written, and to avoid unnecessary limitations.

Other legislation

Human rights in New Zealand are protected in other laws too, including the Human Rights Act 1993, which deals with discrimination by and against private citizens, as well as by the state. Certain historical English statutes which are now part of New Zealand law also contains basic rights, for example the Bill of Rights 1688 and the Magna Carta, applied as part of New Zealand law by the Imperial Laws Application Act 1988. Some social and economic rights are provided for, including the right to free education and social security. Other legislation implements or supplements rights, including the Privacy Act 1993, the Code of Health and Disability Services Consumers' Rights, the Crimes Act 1961, and the Electoral Act 1993.

Questions and perspectives

Questions emerging in the conversation so far about the New Zealand Bill of Rights Act include:

- Does the Act provide appropriate mechanisms to protect rights? If not, what additional mechanisms could be developed?
- Should the Act include additional rights, and if so which rights?

Does the Act provide for appropriate mechanisms to protect rights?

Some commentators say the Act does not adequately protect our rights, because Parliament can make laws that are inconsistent with the Act and the Act does not give us a way to challenge Parliament's decision. These commentators often suggest we should be able to seek judicial review of legislation.

Other commentators are of the alternative view that members of Parliament are elected by the people of New Zealand, so it is appropriate for them to make these difficult decisions. These commentators often suggest voters influence Parliament's decisions at election time.

Some commentators who support a judicial role in enforcing the Act suggest the Act should be *supreme law*. They generally mean the Judiciary should have the power to *strike down* legislation, or in effect invalidate legislation or parts of legislation it finds to be inconsistent with the Act.

Supreme law is usually entrenched, making it more difficult to change.

Alternatives to making the Act supreme law include:

- Enabling Courts to declare that legislation is inconsistent with the Act, like the current powers of the Human Rights Tribunal, and requiring the government to respond to any declaration.
- Strengthening judges' power to interpret legislation and apply rights consistently with the Act.
- Giving judges the power to invalidate inconsistent law, unless Parliament has expressly declared in the legislation that it has to be applied even though it is inconsistent with the Act (sometimes known as a *notwithstanding clause*).

Should the New Zealand Bill of Rights Act be entrenched?

Some commentators suggest the Act should be entrenched. A special process would be required to change the Act, such as a special parliamentary majority (for example, three-quarters of the members of Parliament) or a referendum of voters. Entrenched law is itself entrenched by a special majority.

As the Act is not entrenched, in theory it can be changed with the support of a simple majority of the members of Parliament. In practice Parliament would be under considerable political pressure to get most members of Parliament to agree to any changes to the Act that significantly limited rights.

Entrenchment is said by some commentators to be based on the principle that the entrenched law expresses a public agreement about the values in the law and so should only be amended for a good reason and with wide support. In particular, entrenchment can be said to protect minorities from the "tyranny of the majority," as more than a simple majority is required to change the law.

Some commentators suggest entrenchment can ensure the stability of key constitutional provisions. Others suggest entrenchment embeds the values of the current generation and limits future Parliaments' ability to reflect significant alterations in society's values.

Should additional rights be included in the Act? If so, which rights?

The Terms of Reference gives property rights as an example of an issue that has come up in previous discussion of the Act. This section explains property rights and identifies some of the other rights that some people suggest should be included in the Act.

Property rights

Protecting personal property rights could limit the state's ability to make laws or decisions that may affect a person's property. We usually think of property as land and other property that we can see and touch. Property can also include what we can't touch, such as the value of shares, goodwill in a business, copyright, or the value of all the different ways we could use our land.

The Act does not include property rights. The Universal Declaration of Human Rights provides that "no one shall be arbitrarily deprived of his property" (Article 17(2)). The International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights do not refer to property rights.

Two provisions in the Act indirectly protect property rights from state interference: the right to justice (s 27); and the right to be secure against unreasonable search or seizure of property (s 21). The right to justice protects, in general, the rights to natural justice, judicial review and to bring civil proceedings against the decision maker whose actions are argued to be unreasonable or arbitrary. This right applies to property as well as other matters.

Parliament must have regard to the rights when making laws, the Executive must observe these rights in their actions and policy decisions and, where reasonably possible, the Judiciary must apply laws consistently with the Act.

Property rights are protected in other legislation. For example the Public Works Act 1981 requires the state to pay for any private land it takes for public purposes.

Other rights

Other rights suggested for inclusion in the Act include:

- Certain rights in the ICCPR not included in the Act, such as the right to privacy, and rights relating to the protection of children and families.
- Economic, social, and cultural rights as affirmed in the International Covenant on Economic Social and Cultural Rights, such as the rights to an adequate standard of living, to work, to social security, to health, and to education.
- Environmental rights.

2. Written constitution

New Zealand is one of only three countries in the world without a formal written document known as a *Constitution*. A key question is whether or not New Zealand would benefit from one formal written document that brings together the rules and practices that make up our constitutional arrangements.

What are the elements of a written constitution?

Generally a written constitution sets out the structure and rules for a country's government and protects the rights of the people in the country. Constitutions often contain statements about what the people of the country value and aspire to.

Constitutions set high-level rules which are implemented and reflected in laws made in accordance with the constitution and in accepted practices or conventions.

Each country's constitution is different, reflecting the situation and reasons for the development of the constitution. However, there is significant similarity in the elements that make up a constitution.

A preamble

The preamble is a statement of principles about how the country will be governed and the society it governs. It may talk about why the constitution has been developed, what kind of government it is establishing, and the values it promotes. A preamble can be inspirational and aspirational.

Preambles are not generally enforceable by Courts, but can give a context for interpretation of other sections of the constitution.

State powers

Constitutions set out the powers of each branch of the state, which commonly include:

- Powers to make laws that are consistent with the constitution.
- The authority to implement those laws.
- Powers to decide disputes about how the law applies and about the state's and people's rights and responsibilities.
- The power to raise taxes and decide how revenue is spent.
- The power to appoint people to public office.
- Powers related to keeping the peace, such as policing and the establishment and control of armed forces.
- Powers to decide international matters, such as entering into international treaties.
- Power to pardon people convicted of a crime, in special circumstances.
- Special powers during an emergency, including special legislative powers and suspension of some rights.

The institutions of the state

Constitutions set out the key institutions that will make up the state, what powers those institutions have, by what process they are appointed or elected, how they will operate, and how they relate to each other and with the people. In nearly all countries, the key institutions include:

- A head of state (such as a King or Queen, or President) – whether elected, appointed or hereditary.
- Legislature (Parliament) – the law-making branch of the state, which generally consists of one or two houses.
- Executive (government) – develops policy, proposes legislation, governs the country in accordance with the law, keeps the peace, and delivers public services.

A written constitution sets out the structure and rules for a country's government and protects the rights of the people in the country.

- Judiciary (judges and Courts) – enforce and interpret the law, and in common law countries (like New Zealand) develop the law by deciding disputes about how the law applies in particular cases.

Constitutions in federal countries (like Australia) describe the distribution of powers between the national government and the provincial or state governments. Some countries have autonomous territories, generally where a minority ethnic group exercises some powers of self-governance independently from the national government.

Protection of human rights

Most countries have a Bill of Rights as part of the constitution or as separate law.

Bills of Rights generally restrict how the state can limit individual citizens' civil and political rights. For example, a state may not unreasonably restrict an individual's freedom of speech. Some Bills of Rights also restrict how the state can limit economic, social and cultural rights, for example, the right to access education, housing and social welfare support.

Most constitutions protect individuals' rights. Many constitutions also provide for group or community rights, particularly the rights of minority and indigenous groups. Mechanisms for implementing these rights may include:

- A requirement to consult these groups about decisions that affect them.
- Providing for effective participation in decision-making and elected bodies through, for example, guaranteed representation in federal or central parliaments.

Mechanisms for enforcing the constitution

Written constitutions are generally supreme law, which means all other laws and state actions must comply with the rules in the constitution.

Written constitutions are generally enforceable by the Judiciary. Some constitutions establish constitutional courts with the final say on interpretation of the constitution and on whether state actions are consistent with the constitution. In other countries the highest court of appeal has the final say about constitutional issues.

Examples of judicial powers include a power to strike down or invalidate legislation found to be in breach of the constitution or a power to declare legislation inconsistent with the constitution without invalidating it.

Mechanisms for changing the constitution

Written constitutions are usually entrenched. This means a special procedure has to be used to change the constitution, for example, a special majority in the legislature or a referendum of voters. Entrenched constitutions always set out the process by which they can be changed.

Questions and perspectives

Questions emerging in the conversation so far about a written constitution in New Zealand include:

- Is there any need for change?
- What are the implications of a written constitution?
- Should our constitution be entrenched?
- What issues might arise?

Is there any need for change?

Major constitutional change is usually triggered by internal upheaval. In the absence of such a driver, or public demand for change, some commentators suggest there is no reason to change the current arrangements.

Other commentators say a period of stability can be an ideal time to undertake an in-depth constitutional review. They suggest waiting for a crisis or an urgent need for change might not result in constitutional arrangements that last.

What are the implications of a written constitution?

Some commentators suggest New Zealanders would benefit from all or some elements of New Zealand's *unwritten constitution* being gathered into a single document. One possible advantage noted is that reorganising and bringing together elements of the constitution could make it easier for New Zealanders to access and understand the constitution.

On the other hand, drafting and reaching agreement about a single document that simply records the current arrangements is seen by some commentators as being of little benefit. They note that much of New Zealand's constitutional framework is already in legislation or in well documented and uncontested common law rules and conventions.

Yet another view is that moving to a written constitution would in itself affect our constitutional arrangements, for example, by limiting the flexibility and ability to adapt that is part of current arrangements.

The process of putting in place a written constitution may also affect the public's perception of our political culture. Given some form of public agreement or ratification is likely to be necessary, some commentators suggest the process of developing a written constitution of the current arrangements may reinforce the principle that government power derives from the will of the people. They see the development of a written constitution as potentially strengthening New Zealanders' sense of national unity, ownership of the constitution, and willingness to participate in government.

A different view is that the process of developing a written constitution could amplify existing differences of opinion among New Zealanders and require us to confront issues on which there may be no existing consensus.

Should our constitution be entrenched?

Entrenched law can only be changed by following a special process, such as a 75% majority vote in Parliament or a referendum of voters. Few of New Zealand's current constitutional arrangements are entrenched. This means most of our constitutional arrangements could be changed by a majority vote in Parliament. In practice, Parliament is likely to be under significant political pressure to follow special processes if it proposed to make any significant changes.

The argument for entrenchment of a written constitution is that it may provide stability and protection against constitutional change for short-term purposes. Entrenchment is also seen as a way of removing important values and features of a constitution from political argument.

On the other hand, entrenchment is seen by some commentators as preventing a constitution from evolving in response to emerging situations and changing social values. Entrenchment of the constitution can also be seen as limiting what laws future parliaments can make.

Other issues that might arise when considering a written constitution

A move to a written constitution would be a significant change for New Zealand. The process of developing it may inspire people to think about broader constitutional issues. Some issues that might arise in developing a written constitution include:

- How would a written constitution reflect the Treaty of Waitangi and the future position of iwi and hapū?
- Should the constitution be supreme law? What effect would the change have on Parliament's full power to make laws? What role should the Judiciary have in enforcing the constitution?[77]
- Should we reintroduce a second legislative chamber (upper house) in Parliament? How would members be elected or appointed to that upper house?
- Should the head of state continue to be a hereditary monarch, or should New Zealand become a republic with a President as head of state? Would such a President be elected or appointed, and what powers should that President hold?
- How would the constitution reflect the relationship between central and local government, and the delegation or devolution of power to local government?

Implementing change

New Zealand's constitution is not entrenched, so as a matter of law no special procedures are required to change it (with the exception of some entrenched provisions of the Electoral Act 1993 and the Constitution Act 1986). Some commentators say the adoption of a written constitution requires a different process from the ordinary legislative process. Commentators stress that the change process must be sound and include time and resources for public education, proper consultation with all New Zealanders, and public buy-in.

Some commentators suggest that the process should be run by an independent group, at arm's length from the government and Parliament. Politicians may be seen as having a vested interest in the outcome of the process. An alternative view is that a constitution is ultimately a political document, and that political actors have a legitimate role to play in its development.

[77] See discussion on pages 43-44.

Further Information

www.legislation.govt.nz

All of New Zealand's legislation.

www.gg.govt.nz

Information about the Governor-General's role and functions.

www.parliament.govt.nz

Information about the role and functions of Parliament.

www.cabinetmanual.cabinetoffice.govt.nz

An authoritative source of information about of the role and functions of the Executive, including constitutional conventions.

www.courtsofnz.govt.nz

Information about the role and functions of the Judiciary.

www.waitangi-tribunal.govt.nz

Information about role and functions of the Waitangi Tribunal and the claim process, and Tribunal reports.

www.justice.govt.nz

Cabinet papers about the Consideration of Constitutional Issues.

www.elections.org.nz

The Electoral Commission's website, which includes descriptions of the MMP voting system and New Zealand's electoral history.

www.mmpreview.org.nz

The website of the review of MMP, including submissions and reports.

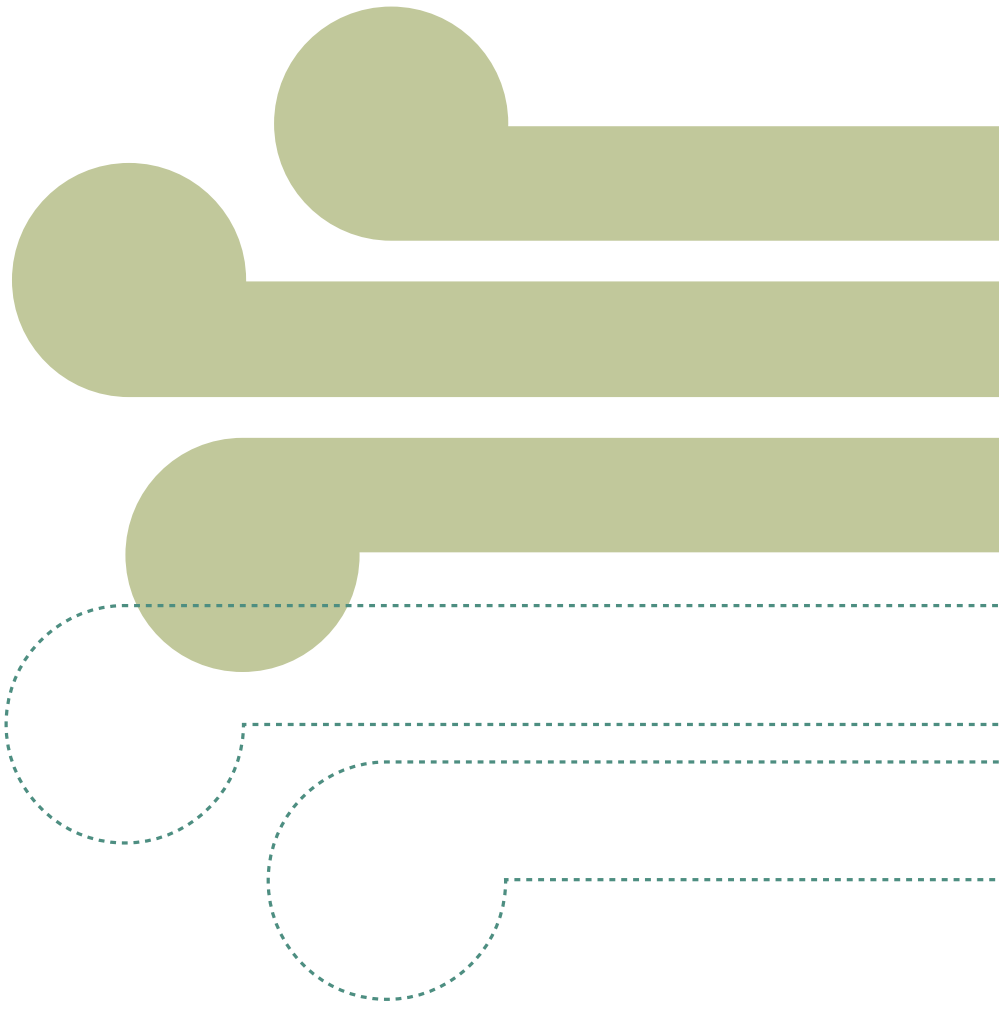
www.teara.govt.nz/en/constitution

The Encyclopaedia of New Zealand.

www.treaty2u.govt.nz

A history of the Treaty of Waitangi.

Terms of Reference



Consideration of Constitutional Issues

Background

1. The Relationship and Confidence and Supply Agreement between the National Party and the Māori Party (16 November 2008) agreed to establish a group to consider constitutional issues, including Māori representation.

Ministerial responsibilities

2. The Deputy Prime Minister and the Minister of Māori Affairs will jointly lead a Consideration of Constitutional Issues. They will consult with a Cross-party Reference Group of Members of Parliament on major findings and reports before reports are made to Cabinet.
3. The Deputy Prime Minister and the Minister of Māori Affairs will oversee a programme of engagement with the public. That programme will include the appointment of one or more advisory panels to provide expert and community perspectives on matters of substance and process.
4. The Deputy Prime Minister and the Minister of Māori Affairs may also receive and consider research and recommendations from officials, experts and the public on New Zealand's current constitutional arrangements, and possible areas for reform.
5. The Deputy Prime Minister and the Minister of Māori Affairs will report to Cabinet on the Consideration of Constitutional Issues and will be supported by a senior officials group including the Ministry of Justice (leading the Secretariat), Treasury, the Department of the Prime Minister and Cabinet (including the Cabinet Office), Te Puni Kōkiri, Department of Internal Affairs and Crown Law. Support will include administration services and policy advice.
6. The Deputy Prime Minister and the Minister of Māori Affairs will submit a final report to Cabinet by early 2014, with advice on the constitutional topics, including any points of broad consensus where further work is recommended.

Programme of engagement

7. Engagement and information sharing are important precursors to any discussion on changes to New Zealand's constitutional arrangements. Public understanding and acceptance is needed for enduring constitutional arrangements that reflect the values and aspirations of New Zealand as a society.
8. To facilitate the Consideration of Constitutional Issues, the Deputy Prime Minister and the Minister of Māori Affairs will oversee a programme of engagement with New Zealanders.
9. The purpose of the programme of engagement is to inform and engage New Zealanders on constitutional issues. In particular, it is to stimulate public debate and awareness of constitutional issues by providing information about New Zealand's constitutional arrangements.
10. The programme is intended to provide the Deputy Prime Minister and the Minister of Māori Affairs with an understanding of New Zealanders' perspectives on this country's constitutional arrangements, topical issues and areas where reform is considered desirable. The Deputy Prime Minister and the Minister of Māori Affairs will then recommend to Cabinet whether any further consideration of particular issues is desirable.

Subject matter of the Consideration of Constitutional Issues

11. The Consideration of Constitutional Issues will include the following topics:

    Electoral matters

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

    Crown-Māori relationship matters

    - Māori representation, including Māori Electoral Option, Māori electoral participation, Māori seats in Parliament and local government
    - The role of the Treaty of Waitangi within our constitutional arrangements

    Other constitutional matters

    - Bill of Rights issues (for example, property rights, entrenchment)
    - Written constitution.

12. Other issues are likely to arise during public engagement. The Deputy Prime Minister and the Minister of Māori Affairs will report to Cabinet on these matters, advising whether the issue appears to be of widespread interest and merits further consideration.

13. The Deputy Prime Minister and the Minister of Māori Affairs will be mindful of other Government initiatives with constitutional implications, and will aim not to duplicate or undermine these initiatives. The Deputy Prime Minister and the Minister of Māori Affairs will also keep their ministerial colleagues informed on progress with the Consideration of Constitutional Issues with the aim of ensuring wider Government initiatives with constitutional implications are cognisant of progress.

Constitutional Advisory Panel

14. The Constitutional Advisory Panel (Panel) is an independent group established to implement the initial stage of the Consideration of Constitutional Issues. The initial stage will involve:

    a. preparing and commissioning opinion pieces on the topics within the scope of the Consideration of Constitutional Issues; and

    b. establishing a forum for sharing information and ideas on those topics amongst New Zealanders.

Responsibilities

15. The specific responsibilities of the Panel are to:

    a. report, by December 2011, to the Responsible Ministers on a proposed strategy for implementing the initial stage of the Consideration of Constitutional Issues;

    b. report, by December 2011, to the Responsible Ministers on a proposed strategy to manage interaction with other government projects;

    c. establish a forum for developing and sharing information and ideas on the topics within the scope of the Consideration of Constitutional Issues, to seek the views of all New Zealanders including Māori, in a manner that is reflective of the Treaty of Waitangi relationship and responsive to Māori consultation preferences;

d. report, in the period September 2013 to 14 December 2013 (depending on the level of demand for engagement), to the Responsible Ministers with advice on the constitutional topics, including any points of broad consensus where further work is recommended;

e. provide regular updates (at least every 6 months) to the Responsible Ministers and the Cross-party Reference Group of Members of Parliament throughout the Consideration of Constitutional Issues; and

f. provide input to monitoring and evaluating the Consideration of Constitutional Issues.

16. The Panel will report through the Panel co-chairs to the Deputy Prime Minister and Minister of Māori Affairs.

17. The Māori co-chair of Panel is responsible for ensuring that the Panel undertakes appropriate consultation processes with Māori, and will report to the Deputy Prime Minister and the Minister of Māori Affairs (the Responsible Ministers) about that process on an ongoing basis.

Form

18. The Panel will comprise a maximum of twelve members, including the two co-chairs, chosen and appointed by the Responsible Ministers on the basis of their knowledge of the constitutional topics and their ability to articulate the issues to a wide audience.

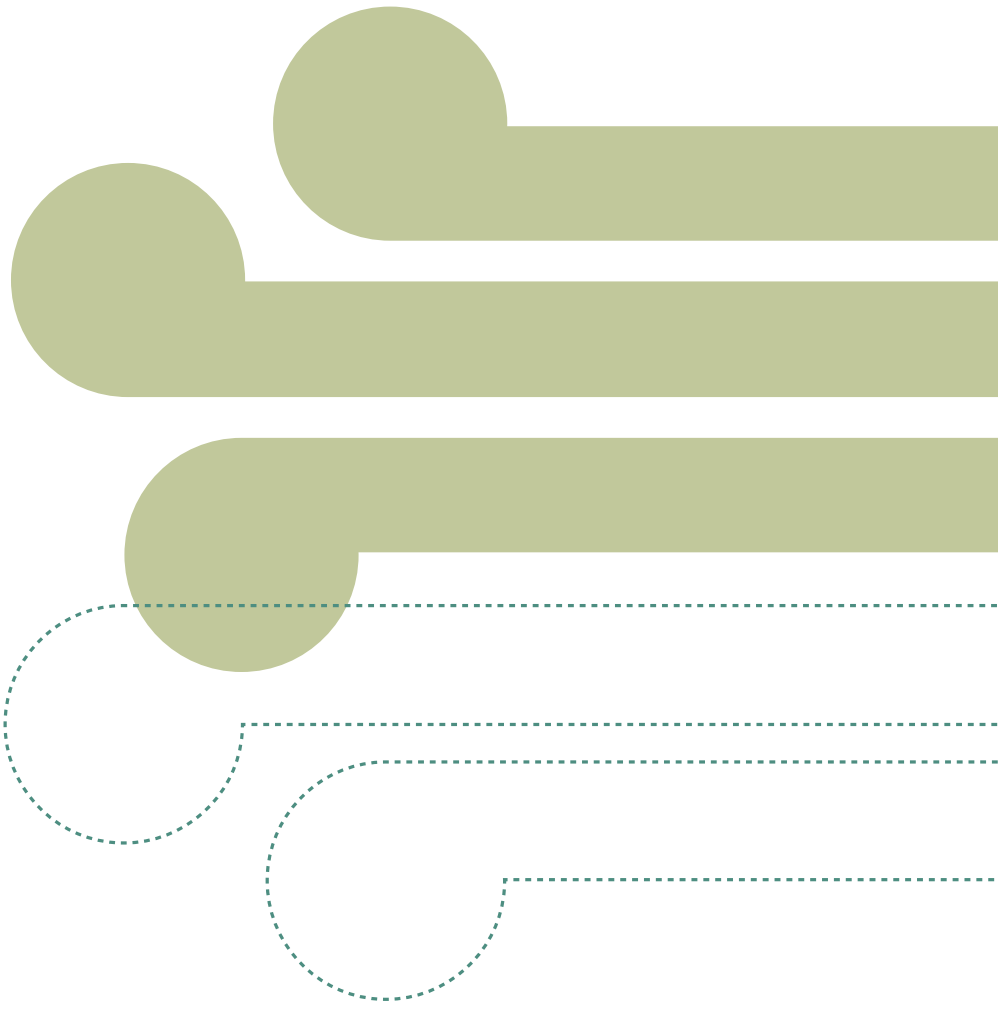
19. The Panel is convened by the Responsible Ministers and its Terms of Reference and deliverables have been determined by Cabinet. The Panel is not a legal entity and does not have the power to contract in its own name.

Support

20. The Panel will be supported by a secretariat based in the Ministry of Justice which will provide project management support including budget management, and manage access to governmental and external expertise.

Amendment to terms of reference

21. These terms of reference may be amended only with the agreement of the Responsible Ministers and the Co-chairs. The Responsible Ministers may need to seek Cabinet agreement to any proposed change.



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