

1 Constitution Aotearoa— the essential message

A constitution is a human habitation. Like a city, it may preserve its life and its beauty through centuries of change. It may, on the other hand, become either a glorious ruin from which life has departed, or a dilapidated slum that no longer knows the great tradition of its builders.

—Professor Robert Quentin-Baxter, 1980¹

The proposal in a nutshell

We propose a written, codified Constitution for New Zealand. That Constitution aims to set out in an accessible form and a single document the fundamental rules and principles under which New Zealand is to be governed. It defines the powers of the basic institutions of government and the rights of individuals. It deals not with individual elements of the constitution in isolation, but sets out the constitutional world as a coherent whole.

Constitution Aotearoa identifies the bedrock principles by which public power is to be exercised in New Zealand. It sets out and protects the basic institutions of the State. The State has great powers to force people to do things. How that power is ordered, distributed and used is of vital concern to everyone who lives here.

While Constitution Aotearoa makes some important changes, it is at pains to preserve the sound elements of our past and our unique constitutional culture. Constitution Aotearoa anchors the core branches of government: parliamentary, executive and judicial. It formally recognises and sets out the rules around cabinet government. It affirms the central importance of free, fair and democratic elections. It guarantees the fundamental civil and political rights, already long recognised in our constitutional tradition. It preserves and enhances the rule of

1 RQ Quentin-Baxter “The Governor-General’s Constitutional Discretions: An Essay towards a Redefinition” (1980) 10 VUWLR 289 at 290.

law and the position of the Treaty. At the same time, however, it acknowledges that change is a significant feature of our constitutional history. It provides, therefore, mechanisms for ongoing 10-yearly reviews of the Constitution and, importantly, enables the Constitution to be amended by Parliament where there is broad cross-party support, or by a referendum of the people.

Process

Changing a nation's constitution is no easy endeavour. There is a journey to be travelled and there will be sharp disagreements. Our Constitution requires majority support in a referendum of the people in order to confer democratic legitimacy upon it. It is the people of New Zealand who are the true owners of the Constitution and it is they who are to be protected by it. We seek to engage the public and so we have set out the proposals in as simple and clear a manner as we can, shorn of technical points and excessive details.

We have discussed this draft Constitution with a number of experts in New Zealand and the United Kingdom. Although we have both spoken at numerous public meetings in New Zealand, we have not yet had the opportunity to discuss our ideas with the public at large. As a result, some of our proposals may not find ready public acceptance, or we may have missed something that the public wants included.

Constitution Aotearoa must be the people's Constitution. So, interested people should be able to tell us what they think of what we have drafted. We want to share our ideas and get feedback on them by providing the opportunity for interested people to make their views known to us. We can then make revisions in light of those comments. Comments and suggestions can be made up to a year after the publication of the first draft—that is, up until 30 September 2017. Then we shall prepare and publish a final proposal in light of the comments received. We shall at that time also express our views on what should happen next.

What is a constitution?

New Zealand has a constitution. But it is neither well known, nor well understood.

A constitution is “[t]he system or body of fundamental principles according to which a nation, state, or body politic is constituted and governed”.² Typically a constitution sets out:

- How government institutions are structured and governed:
- What powers the government has and defines the limits on the exercise of those powers:
- How government institutions interact with one another and how they relate to the public:
- Most constitutions also contain protections for fundamental human rights and protections for individuals against the possibility of the arbitrary or wrongful use of governmental power.

British political scientists put it well when they said:³

A written—more properly, a codified—constitution provides a clear, accessible and coherent account of the body of fundamental rules and principles according to which the state and society are constituted and governed. In addition, it defines the powers of the institutions of government and sets out the rights of individuals and their responsibilities.

While any constitution comprises words on a page, those who live under it and those who make public decisions give it life and substance.

Where is New Zealand’s constitution?

The current New Zealand constitution consists of a hodgepodge of rules, some legally binding, others not. It is formed by a jumble of statutes, some New Zealand ones and some very old English ones; a plethora of obscure conventions, letters

2 *The Shorter Oxford English Dictionary* (3rd ed, Clarendon Press, Oxford, 1959) at 378.

3 Vernon Bogdanor, Tarunabh Khaitan and Stefan Vogenaver “Should Britain Have a Written Constitution?” (2007) 78(4) *The Political Quarterly* 499 at 499.

patent and manuals; and a raft of decisions of the courts. There has also been much academic and professional commentary on constitutional practice. Other than parts of the Cabinet Manual, which has no legal status, no attempt has been made to bring the various segments of the Constitution together. An interested person cannot find a clear and coherent statement of the whole framework within which political decisions are made.

In short, accessing the basic material required to understand the current New Zealand constitution is both arduous and frustrating. It is unsurprising then that New Zealanders speak little of their constitution and think about it even less. Indeed, it might seem that the constitution is deliberately kept something of a mystery so people will not bother about it. New Zealand's existing constitution is so widely dispersed as to be a serious problem.⁴

Our view on the inaccessibility of the most basic rules of how we govern ourselves is neither new nor idiosyncratic. One of New Zealand's leading historians, Professor JC Beaglehole, warned as far back as 1944 of the New Zealand constitution being "some silk-wrapped mystery, laid in an Ark of the Covenant round which alone the sleepless priests of the Crown Law Office tread with superstitious awe".⁵ Fast-forward 70 years and that concern remains valid. Two recent official inquiries—one by a parliamentary select committee chaired by the Hon Peter Dunne in 2005 and the other by a Government-appointed panel on constitutional issues in 2013⁶—agreed that New Zealanders

4 Matthew Palmer "What is New Zealand's constitution and who interprets it? Constitutional realism and the importance of public office-holders" (2006) 17 PLR 133 at 142–145. He found the New Zealand constitution to be located in 45 Acts of Parliament, including six passed in England, 12 international treaties, nine areas of common law, eight constitutional conventions, three-and-a-half executive instruments, one prerogative instrument, one legislative instrument and half a judicial instrument.

5 JC Beaglehole *New Zealand and the Statute of Westminster* (Victoria University College, Wellington, 1944) at 50.

6 Constitutional Arrangements Committee *Inquiry to review New Zealand's existing constitutional arrangements* (10 August 2005); Constitutional Advisory Panel *New Zealand's Constitution: A Report on a Conversation* (November 2013). Two private attempts have also been made to discuss and conceptualise some of the issues facing our constitutional system, see Colin James (ed) *Building the Constitution* (Victoria University of

do not understand their own constitution.⁷ Inaccessibility is a major contributor to that sorry state of affairs.

A constitution is the foundation of law and politics in any country. It should be easy to find, so that people know the basic rules by which they are governed and public power is regulated. New Zealand is one of the few countries in the world where a citizen cannot go to a single source of those rules. In the modern age it is frankly shocking this is so. There are only two other countries in the world that have constitutions as fragmented, unorganised and uncodified as we have.⁸ This alone suggests that putting all the rules in one place is the minimum that needs to happen. As matters now stand it is not clear what is “constitutional” and what is not.

The most fundamental aim of this project is to state the Constitution in one place so that it is certain and accessible for everyone. The unfilled spaces in our constitution need to be coloured in. People should be able to know and see the rules that govern those carrying out public duties. People should know what their fundamental rights are and how to enforce them. A single basic law, accessible to all, allows that to occur. In this regard we echo the words of Professor Robert Blackburn of King’s College, London, who has been of great assistance to us in this project:⁹

The primary argument for a written constitution is that it would enable everyone to know and see what the rules and institutions were that governed and directed ministers, parliamentarians, civil servants, and all senior state officials and public office holders, in performing their public duties.

It is long since past time that we make our constitution clear and accessible. That need is now compelling in contemporary New

Wellington Institute of Policy Studies, Wellington, 2000); and Caroline Morris, Jonathan Boston and Petra Butler (eds) *Reconstituting the Constitution* (Springer, London, 2011). See also Mai Chen *Public Law Toolbox: solving problems with government* (LexisNexis NZ, Wellington, 2014) at chapter 28 for a discussion of the prospects for change.

7 Constitutional Advisory Panel, above n 6, at [9].

8 The United Kingdom and Israel.

9 Robert Blackburn “Enacting a Written Constitution for the United Kingdom” (2015) 36(1) *Stat L R* 1 at 3.

Zealand. The ethnic and cultural compositions of the people who live here are fundamentally different from what they were 50 years ago. They will change further in the future. Nowadays so many of us who call New Zealand home were born and bred overseas in very different constitutional systems. It is only right that we make our system known and knowable.

While New Zealand is exceptionally unusual compared with other nations in that it does not have a written codified constitution, many New Zealanders probably feel they have more pressing matters with which to be concerned. No public clamour exists for such a development. We aim to persuade people that while New Zealand is a successful country, it would be more successful and better governed if there was constitutional change. Our proposal is not meant as a simple restatement of our constitutional framework as it is now. This is also an aspirational and reformist project. The changes we have put forward in Constitution Aotearoa we believe are a necessary part of preserving democratic freedom in New Zealand and protecting the fundamental principles which anchor public power and strengthen government accountability.

New Zealanders are practical people; they prefer to work with the concrete, not with the abstract. The desultory nature of New Zealand's constitutional dialogue on change is caused in part, we believe, by the lack of any specific proposal with which to engage.¹⁰ That is why we have constructed a proposed Constitution for New Zealand, Constitution Aotearoa.

Many nations change their constitutions only after a constitutional moment, such as a revolution. New Zealand has suffered the upheavals of the New Zealand wars, two world wars and other conflicts. We had something approaching a constitutional crisis in 1984 over the inability to swear in a new government immediately after a general election. Yet

10 There have been several attempts made in the last 20 years to examine New Zealand's constitution, see the references in note six. None of these efforts have produced change of any sort as far as we can tell. Official reports agree on one thing however: New Zealanders do not understand the New Zealand constitution, or their own rights under it. To combat this, a national strategy for civics education was proposed, but little appears to have been done to implement it.

our Constitution has tended to meander oblivious to events around it. It was never forged under the blowtorch of political emergency. New Zealand has not had any such defining event. We do not need to wait for such an event. A time of relative harmony is a good time to have the debate. New Zealanders did a good deal of thinking about who they are in the course of the recent flag debate. We believe that debate showed there was an appetite for discussion and movement on the constitution. A constitution goes to the heart of the matter about who we are and what we believe in.

The existing constitution is too flexible

Accessibility is not the only problem with our current arrangements. New Zealand's present constitution is dangerously incomplete, obscure, fragmentary and far too flexible. It remorselessly evolves with political developments and is subject to few limits. It evolves in obscure and unpredictable ways that are not transparent. That is the trouble with such a political constitution. Our constitution is not fully fit for purpose in the political and social realities of modern New Zealand. That needs to change. New Zealand needs a constitution fit for the modern age.

Unlike almost all other countries, nearly all of New Zealand's constitutional rules can be altered easily. That is because:

- In New Zealand a simple majority of MPs in Parliament has the power to make, repeal or amend almost any law that it pleases, including any constitutional law.¹¹ Unlike the position in most other representative and participatory democracies like ours, New Zealand judges cannot invalidate any such law on the ground that it is unconstitutional.
- We have a unicameral Parliament, in that our Parliament consists of one house only, the House of Representatives. This means laws can be made at great speed as there is no second House to act as a check. There is no requirement at all for Government to consult with anyone before bringing a

¹¹ With the exception of six provisions of the Electoral Act 1993, set out in section 268.

Bill before Parliament, and it can use numbers in the House to prevent the Bill, once introduced, from being sent out for public submissions. In short, all of the usual legislative practices can be, and are, overridden where it suits the Government of the day.

So, incredible as it may sound, it would be legally possible for our Parliament to repeal the Constitution Act 1986 or the New Zealand Bill of Rights Act 1990 in a single sitting day of the House under urgency, without any public input.

This is not scaremongering; actions like it have happened. For example, in 2013 Parliament enacted the New Zealand Public Health and Disability Amendment Act in a single sitting day. Its principal effects were first to prevent anyone ever making a complaint to the Human Rights Commission or bringing a court proceeding against any Government family carer policy no matter how discriminatory, and second, to exclude retrospectively the provision of remedies for past discrimination. It followed a decision of the Court of Appeal that had upheld the human rights of some of the most vulnerable people in our community—the disabled and family members who cared for them. There was no warning that the Bill was to be introduced; there was no public consultation on it; there was no Select Committee consideration of it. By any measure, it was a shocking piece of legislation that ousted well-known constitutional protections and removed New Zealand citizens' rights to be free from discrimination in certain cases. Yet it passed in a single sitting day despite almost immediate public outcry. Only another Act of Parliament can alter or remove it. That is how fragile our constitutional system currently is.

In our view, occurrences like this are simply unacceptable. If well-known and accepted constitutional protections are to be departed from then that should only occur when the people can be persuaded to allow for that, or when there is overwhelming parliamentary support for it.

VERBAL AGREEMENTS
ARE NOT WORTH THE
PAPER THEY ARE WRITTEN
ON...

SAM GOLDWYN
ENUNCIATES
AN INDUBITABLE
TRUTH...



Tomb

The rule of law

Government should be conducted under the law. And the rule of law needs to be strengthened in New Zealand. That law should apply to everyone, including Parliament. The rule of law is a bedrock principle. The celebrated English judge Lord Bingham said, “the law must be accessible and so far as possible intelligible, clear, and predictable”.¹² That means every person and the authority within the state, whether public or private, should be bound by and entitled to the benefits of laws publicly made, which take effect generally in the future and are publicly administered by the courts. Legislation comprises the backbone of the rule of law. The rule of law has another feature:¹³

law must, to some extent, be independent: independent of those that make the law, independent of those who apply it, independent of those to whom it is applied, and independent of the time at which it is applied.

The 19th-century notion that Parliament should be able to change any law it likes at speed with a small majority at any time has had its day. People have rights and they should be provided in a constitution that is superior law and binds Parliament. Such a step will enhance the rule of law and ensure that when the law is changed proper process is observed.

Unless most provisions of a constitution can be enforced in the courts, its features are mere window-dressing and a type of public relations programme intended to make people feel good, rather than a document that confers real rights and protections on the people. This is not to say that Cabinet should not govern, nor that Parliament should not make laws. It is just that some modest limits should be placed on those great powers. Parliamentary sovereignty needs to yield to popular sovereignty and participatory democracy.

12 Tom Bingham *The Rule of Law* (Allen Lane, London, 2010) at 37.

13 Matthew Palmer “New Zealand Constitutional Culture” (2007) 22 NZULR 565 at 587.

The essential role of politics

We do not seek to undervalue the role of elected Members of Parliament. Indeed, we think political skills are essential to the running of a representative democracy. And while people grumble about politicians and freely criticise governments, the adjustment of disputes and settling of policy directions must be done by the elected representatives of the people who have political skills. But if past experience is anything to go by, our elected MPs will not give up any power or accept any restrictions upon its use unless the public demands it.

Our hope and expectation is that the new Constitution has the capacity to restore some trust and confidence in politics and politicians, a loss of which is afflicting many western governments. The internet provides new opportunities for public engagement in the political process and in forging new attitudes to it. It allows more people to look at suggestions, make their views known, and share their opinions with others.

We are not seeking to settle the big and perennial questions of public policy such as when the market is the best solution to satisfying a need and when regulation is required or how big or small the state itself should be. These issues have to be settled through public debate and the electoral success of political parties. Political choices, not the Constitution, should determine the nature of the political economy of New Zealand.

The scope and limits within which political decisions are made need to be laid down so that everyone knows what the rules are: the public, the public servants and officers of state, the judges, the MPs and ministers. When it comes to the great powers of the State we all need to be singing from the same song book.

A firmer constitutional foundation

Constitution Aotearoa proposes the adoption of a superior law constitution with a system of checks and balances such as that found in almost all overseas participatory democracies. Among the checks and balances are:

- entrenchment of the Constitution, so it cannot be amended

on the whim of a bare parliamentary majority, as is currently the case:

- the recognition of an enhanced ability of the courts to enforce the Constitution, including by striking down Acts of Parliament that are inconsistent with it. This is a power exercised by almost all courts in overseas participatory democracies, including Australia, Canada, Ireland, South Africa, the United States, almost all Commonwealth countries, most countries in continental Europe and many Asian nations. (Note, however, that Australia lacks a Bill of Rights in its Constitution, a point that must have become evident to New Zealanders as a result of the recent spate of deportations of New Zealanders living in Australia back to New Zealand.)

While we do not propose the reinstatement of a second house within the legislature, we do propose that the House of Representatives be elected for a fixed four-year term, not the current term of up to three years. Better legislation should result from a longer parliamentary term, as governments will not need to push it through in a rushed and hurried way as they do at present. Moving to a fixed term allows the uncertain reserve powers of the Governor-General to be abolished.¹⁴

The constitutional status of *te Tiriti o Waitangi* / the Treaty of Waitangi—already recognised in numerous statutes and court decisions—will be explicit and put on a secure footing to reflect actual practice.

The existing Bill of Rights¹⁵ will be strengthened by its inclusion in an entrenched Constitution, as well as the addition of a number of extra rights, including the right to education and the right to property. There will also be constitutional protection for the environment.

¹⁴ These are described as the personal prerogatives of the monarch in the United Kingdom and their importance is not great. Interventions by the monarch in political affairs belong to a by-gone era: Robert Blackburn “Monarchy and the Personal Prerogatives” [2004] Public Law 546.

¹⁵ New Zealand Bill of Rights Act 1990.

New Head of State

We are proposing a new Head of State, a New Zealander who lives here, in the place of the Queen reigning over New Zealand. The new Head of State would be called “The Head of State”. The person would be selected on a free vote in the House of Representatives. The Head of State would enjoy very similar, although not identical, powers and functions to those exercised by the Governor-General now. The term of office would be five years. New Zealand would remain in the Commonwealth. New Zealand has secured many advantages from its British connections over the years and these can be maintained, but we need now a more defined sense of our own national identity as an independent nation in the area of the world in which we live.

Again, there is nothing radical in our proposals on this issue. For some time now senior politicians, including at least four recent prime ministers, have said that abolition of the monarchy is inevitable and editorials have called for a home-grown Head of State once the Queen dies (see chapter three).

Judges and the Constitution

That most famous of French constitutional analysts Montesquieu warned that there would be “no liberty if the judiciary power be not separated from the legislative and executive”.¹⁶ An independent Judiciary is an essential requirement in the preservation of liberty and no democracy can be without one. It is the judges who say how the laws that have been enacted should be applied in individual cases. The separation outlined by Montesquieu constitutes a fundamental principle of how power in New Zealand is organised, a doctrine known as separation of powers.

Judges only have the power of making judgments according to law. They are not invested with anything comparable to the resources and powers of the other branches of government. They can be described as the weakest and least dangerous branch of government. The courts can, however, in constitutional terms

16 Baron Charles de Montesquieu *The Spirit of the Laws* (France, originally published in French in 1748) Bk. XI Ch. 6.

function as a useful safeguard of the liberties of the people. It needs to be remembered, however, that judges in New Zealand do not initiate or even choose which disputes go to court. They simply deal with whatever issues are taken to the courts by New Zealanders.

We propose that the Constitution should be a higher law enforceable by the courts. This is probably the most significant change we propose, at least in legal terms. Some will say that such a change will give our courts too much power and will turn our Supreme Court into something like the Supreme Court of the United States.

There are several reasons why this is not the case. The most important reason why our proposal cannot be compared to the United States' position is that Constitution Aotearoa preserves the power of Parliament to have the final say.¹⁷ Respecting the long tradition of parliamentary sovereignty in New Zealand, under which it is said that Parliament can pass any law it likes, we preserve that situation if a significant proportion of the MPs are in agreement. Under Constitution Aotearoa, Parliament would be able to decide by a 75 per cent majority to change the Constitution, or to continue to enforce an Act of Parliament that the courts have declared invalid under the Constitution. Such an approach will allow the House to override a constitutional decision of the Supreme Court of New Zealand. We hope this will not occur often. Making big constitutional changes with a bare majority in the House of Representatives should not be permitted, but when there is a significant parliamentary majority against a court decision, the safeguard needs to be

¹⁷ Under the United States Constitution, there is no power for the United States Congress to override a decision of the United States Supreme Court. Rather, any constitutional amendment seeking to override a Supreme Court decision must have the support of not only Congress but also three-quarters of the 50 individual States. Getting support from all of these constitutional actors in the United States is notoriously hard to achieve and explains why so few amendments have been made to the United States Constitution in over 225 years. As a result of the difficulty of amendment, effectively the United States Supreme Court has the last word on virtually all constitutional issues. Such a scenario would not arise under Constitution Aotearoa, since the Constitution could be amended by special parliamentary majority or by referendum.

there. Parliament, as an elected body, should have the final word. The majority must rule, but on constitutional issues that are more important and have greater consequences than ordinary legislation, the overruling should be done only by a special majority. And ultimately that special majority will be accountable to the people.

The existing operation of the doctrine of parliamentary sovereignty in New Zealand acts to protect the Parliament, Cabinet decision-makers and legislation from the possible limitations imposed by the Bill of Rights. As former Speaker of the House of Representatives Margaret Wilson has written, the doctrine “constrains the scrutiny of legislation by the courts”.¹⁸ It encourages ministers to fashion constitutional propriety for their own convenience of the political moment. To say that they do this in the name of democracy is politically naïve and neglects to explore the methods of how political decisions are made and enacted. In substance what we have is sovereignty of the executive government.

Governments act to remain in power as long as they can and they tend to try to get away with whatever they can while they're there. A government has the capacity to command resources and influence situations and outcomes to the point where it is not so much the public interest that the executive in the name of the Crown is representing, as the Government's own political interest. So softening the operation of parliamentary sovereignty, rendering it less absolute but not eliminating it, will blunt the harder edges of executive power in New Zealand. And the rule of law will be further promoted by such a change.

Popular support: tradition and change

Constitution Aotearoa aims to accomplish two objectives: a constitution must rest on a popular foundation, and facilitate the principle that majorities must have their will expressed in legislation. A constitution must prevent abuses of power, tyranny over minorities by majorities, and invasion of human

¹⁸ Margaret Wilson *The Struggle for Sovereignty: New Zealand and Twenty-First Century Statehood* (Bridget Williams Books Ltd, Wellington, 2015) at 50.

rights norms. We have not here written on tablets of stone designed to be immutable for the future. What we seek is a working framework for the exercise of public power in New Zealand on a clear and principled basis. Constitution Aotearoa therefore acknowledges that accommodating change will be a significant feature of our ongoing constitutional history, and provides mechanisms by which that change can be achieved.

We are keen to ensure that constitutional change has popular support. In the past it has simply been too easy for constitutional change to occur based on the politics of the moment supported by bare majorities. But at the same time, we recognise that unlike in other countries where constitutional change is too hard (for example Australia and the United States), we should not be shackled to the past. Change will be a significant feature of our ongoing constitutional history and where changes are needed they should be capable of being made where there is popular consensus.

Constitution Aotearoa reflects and builds upon an unbroken tradition and constitutional practice that has existed in New Zealand since 1956. Since then vital provisions of the electoral system, such as the secret ballot, have required the support of 75 per cent of the House, or a referendum of the people, to change them. The MMP electoral system was introduced by referendum. To change the Constitution will require support of either a 75 per cent majority of MPs or more than 50 per cent in a referendum of the people. In addition, so as to ensure that constitutional discussion remains fresh and deliberative, Constitution Aotearoa provides for ongoing 10-yearly reviews. Any amendments arising out of those reviews would, of course, be required to comply with the normal constitutional amendment rules. The initial adoption of the Constitution must be by referendum in order to secure for it democratic legitimacy.

When a referendum should be held as compared with a 75 per cent majority of the House, is an issue upon which we suggest no rule. We would expect, however, on major constitutional issues a referendum of the people would be required under an Act of Parliament passed for the purpose. This reflects the 1986 recommendation of the Report of the Royal Commission

on the Electoral System. In this we seek a balance between representative democracy and direct deliberative democracy.¹⁹

Avoiding decay and ensuring success

Some nations are more successful than others. It has been said that to be successful a nation needs three elements:²⁰

- a competent state—which means the administration is efficient and the authority of the state is respected and free of corruption:
- strong rule of law—which means all are subject to and equal before the law, including the law makers and enforcers themselves:
- democratic accountability—that is, accountability of those in power to the people they govern.

Without these fundamental elements underpinning it, a state would not function as it would be administratively inefficient, corrupt and subject to arbitrary and wrongful abuses of government power against the citizens of the state. The codified Constitution put forwards in this book seeks to prevent this from occurring here in New Zealand by ensuring that everyone has free and easy access to the set of rules that set out government power, so that the people can hold Government to account for any breaches of this and uphold the rule of law. It facilitates accountability and competence by strengthening the system of checks and balances or safeguards within the State which keep tabs on different branches of government and protect the interests and rights of the people.

A constitution must stand above the interests of any particular political party or political philosophy. It must belong to all of the people because it is under their will that government is conducted in a democracy. They are the ultimate authority, not the Parliament.

19 Stephen Tierney *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press, Oxford, 2014).

20 Francis Fukuyama *Political Order and Political Decay: from the Industrial Revolution to the Globalisation of Democracy* (Faras Straus and Giroux, New York, 2014).

National identity, aspiration and preservation

A constitution should contain some of the aspirations of the nation that it governs. It should tell us something about our sense of national identity. It should contain a confident statement about what we stand for as a nation and allow others to see what those values are.

New Zealanders have not always been as indifferent to their constitutional arrangements as they have been over the last 30 years. Early in our history, before the 1852 New Zealand Constitution Act was passed in London, there was great agitation among the settlers to have a say in their own government and to remove what they saw as the yoke of undemocratic control by the Governor.

Our proposal preserves the valuable features of our constitutional heritage, which has a long history and highly respectable pedigree. These days many New Zealanders do not know what our constitution is or what is in it and that is hardly surprising because they cannot find it anywhere. So their eyes glaze over when there is constitutional talk. There is insufficient interest in the machinery of government and a low level of civic awareness in New Zealand. Apathy about these issues could easily result in the whittling away of people's rights and the abuse of public power.

So, with what clarity and elegance we can muster, we have set out for the first time in one place the organisation of the New Zealand State and an indication of the locations of public power: who has it, how it can be used and what limits exist upon it.

Rather than have a constitution that is "bestowed upon us by Providence" as Mr Podsnap puts it in Charles Dickens's novel *Our Mutual Friend*, we think it better to adopt an approach that sets out clearly the rules concerning governmental authority. We set out the structures and institutions of government. We try to state the principles and machinery by which government runs in New Zealand. The primary institutions are protected by the Constitution we propose. So is the security of citizens in not having fundamental protections casually cast away.

We want to nail down the powers and limitations of

government and the divisions of power between Parliament, the Government and the courts. Further, we recognise that the Constitution is different from ordinary laws and should not be capable of being changed as easily as other laws. Constitutional changes should require a special majority in the House of Representatives or a referendum of the people.

Summary of what we hope to achieve with Constitution Aotearoa

1 Accessibility and certainty:

Set out the rules, principles and processes about government in one document so they are accessible, available and clear. Eliminate the need for significant unwritten constitutional conventions and customs which are unclear in important respects. Our Constitution will remove the mystery and provide an accurate map about how we govern ourselves.

2 Education:

Provide a Constitution that will educate people and public decision-makers on their rights and responsibilities. A new Constitution should help people participate in democratic decision-making and provide a better framework for learning about civics. This will help people not born here to understand New Zealand's system of government, and that is a significant need given the increasing ethnic and cultural diversity of New Zealand society. Such a Constitution may help to dispel the disenchantment with politics that seems to afflict us. The Constitution must be trusted by the people.

3 Rule of law:

Anchor public power in a Constitution that will contribute to the rule of law, a concept that is fundamental to a well-functioning representative democracy. Government that is beyond the law resembles tyranny. The courts in New Zealand can be relied upon to be fair and follow legal propriety. All must be equal in the eyes of the law. The Constitution embodies principles of legality and fair procedure. An important element of the rule

of law is judicial independence and impartiality on the part of judges in supervising the legality of government and promoting the freedom of its citizens.

4 Democratic accountability:

Provide clear means of holding public decision-makers accountable to the public whom they serve on a continuing basis, whether they be ministers, politicians, public servants, the police, the defence forces or the Judiciary. Elections are but one form of accountability. The features of accountability can vary from one government institution to another, depending on the subject matter and particular issues. One form of accountability does not fit all situations.

5 Transparency:

Make decision-making and law-making more transparent so that the public is better able to make judgments about the policies being carried out, and for the same reason, improve the availability of official information.

6 Protection for the rights of citizens:

Ensure that the New Zealand Bill of Rights and te Tiriti o Waitangi / the Treaty of Waitangi are better observed.

7 A New Zealander as Head of State:

Establish the functions and powers of a New Zealand Head of State.

8 National identity and the preservation of the elements of the system that have served New Zealand well:

Record important elements of New Zealand's national identity and protect basic institutions that are required to serve the public. Provide for development in the future.

9 Protections against the abuse of power:

Restrict and control the arbitrary use of government power by the provision of ample safeguards against wrongful use of that power.

10 The Constitution belongs to the people:

A constitution must stand above the interests of any particular political party. It must belong to all the people because it is under their will that government must be conducted in a democracy. The aphorism penned by the greatest of American presidents, Abraham Lincoln, in the Gettysburg Address expresses our aim here: “that government of the people, by the people, for the people, shall not perish from the earth”.

Purposes of the proposed Constitution

