12 The State of Aotearoa New Zealand

Articles 1, 2, 3 and 4

This chapter examines the roles of the State and the Crown. We believe the concept of "the Crown" is too complicated, ambiguous and mystical.

We propose:

- transferring the role of the Crown to the State:
- making the State a new legal entity in New Zealand:
- transferring all Crown assets to the State:
- the State must be bound by the Constitution and the law, its powers should not be unlimited and it must be held responsible for its actions:
- the government of the day exercises the powers of the State (much in the way that it exercises the powers of the Crown at present) and must do so within the legal framework established by the Constitution and the existing law.

What is the State?

In order to discuss this subject, two terms have to be unpacked and understood.

The first is the term "State". One useful definition of the term is that:[1] "A state or political society is an association of persons, living in a determinate part of the earth's surface, legally organized and associated for their own government." In other words, the state is a country.

This concept clearly includes New Zealand in political terms. But rather more is needed for recognition of the state in legal terms. The State requires what is known as "legal personality". Yet the State is not a person, but an abstraction. So how can we give the State legal personality? A Constitution can do this, as we shall explain.

The second concept that needs to be understood is the term the "Crown".

One of the challenges of New Zealand constitutional law is deconstructing the many meanings of the term "the Crown".

1 David M Walker *The Oxford Companion to Law* (Clarendon Press, Oxford, 1980) at 1176.

The term "the Crown" is a compendious, ambiguous and variable term in New Zealand constitutional law. The terms "Crown", "Majesty", "Sovereign", and "Governor-General" run throughout the statute book and in many different contexts. In literal terms the "crown" is what the Queen wears on her head on state occasions as a badge of office. And that is not what we mean when we use the term in relation to government. In New Zealand we tend to hear much more about the Crown than about the state. This is perhaps the most perplexing feature of our system for the people not brought up here and we would say also for many New Zealanders.

The Queen is a constitutional monarch. Government is conducted in her name and under her legal authority. In New Zealand virtually the whole of government is carried out in the name of the Queen. The Queen is part of Parliament, she is the fountain of justice so the judges are the Queen's judges. The Queen is the titular Commander-in-Chief of the armed forces. Government bodies that operate under ministerial or departmental authority are connected to the Crown. As section two of the Sector Sector Act 1988 puts it "all instruments of the Crown in respect of the Government of New Zealand" are part of the wider state sector and therefore connected to the Crown.

These great legal powers are tempered by the fact that the Queen acts upon the advice of ministers who must be Members of Parliament. Members of Parliament have to be democratically elected. The royal prerogative that comes from the Queen, is a source of power for her ministers.

We have inherited all this from English law and we have altered it very little. The Governor-General in New Zealand acts here on behalf of the Queen and in her name. He or she is the Queen's representative. There are complications involving multiple Crowns in different jurisdictions but these cause few practical problems for us here in New Zealand. She is Queen of New Zealand, separate from her role as Queen of the United Kingdom.

The Queen is also Head of the Commonwealth, although no legal powers attach to this position. The meanings given to the Crown have shifted over time. Sometimes the Crown has been

employed as a means of protecting the Government from legal liability by using "Crown immunity", a concept based on the oft repeated, mystical principle of English law that "the Queen can do no wrong". Clearly, no matter what one's view on the performance of the monarch, this principle makes no sense when all of her powers in New Zealand are exercised on the advice of others.

In some ways the term "Crown" is equivalent to the "State" but in some respects there are important differences. In most European countries public administration is carried out in the name of the state but in New Zealand it is under the legal authority of the Crown. English law has traditionally seen the Crown as a corporation sole, although in recent times there has been a tendency to describe the governmental concept of the Crown as a corporation aggregate. It is our view that the wide use of the term "the Crown" in New Zealand is confusing and obscures many different realities concerning the use of public power. Matters would be much more straightforward legally and politically if we used the term "state."

New Zealand Law Professor Janet McLean has written the leading work in English law on this subject.[2] She sums it up in this way:

> There is a state tradition in British legal thought. It is contested, adaptable and complex. These features have given it the flexibility to adjust to changes in state institutions and functions. At times, though, we have been at risk of losing useful intellectual resources which could help us face contemporary challenges.

Our proposals

Our first point is that the whole idea of the Crown is too complex and needs to be simplified. Realism requires we remove the mystery and the confusion. The second point is that we should not run the risks to which McLean points. We can include the "State" as an entity in the Constitution without losing the Queen as constitutional Head of State if that is what we wish

2 Janet McLean *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (Cambridge University Press, Cambridge, 2012) at 310.

to do. We also argue in chapter three that New Zealand should have its own Head of State and therefore become a republic. The two ideas are related but not necessarily connected. You could do the first without doing the second.

With this change from the Crown to the State we would secure clarity. We would develop less confused public law. The relations between the State and the citizen would be direct and transparent. We would be clearer about how to develop our ideas of nationhood and identity that are referred to in the Preamble of the proposed Constitution. The State must be bound by the Constitution and the law, its powers should not be unlimited or above the law.

The State must be made into a new legal entity in New Zealand. It must be understood as capable of doing wrong and be able to be held responsible for those actions. The government of the day exercises the powers of the State and must do so within the legal framework established by the Constitution and the existing law that is binding until it is changed by constitutional processes.

The State inherits all the assets the Crown had immediately prior to the coming into force of the Constitution attached to the realm of New Zealand. But the change will not alter anything in that respect compared with the present position. Thus, land law will remain the same, with an estate in fee simple as the highest estate a person can hold in land. But in the future the change will have beneficial effects, we believe.

Legal provisions

So the key legal provisions of the State and the source of powers of government are set out in the proposed Constitution as follows:

2 The State and nation of Aotearoa New Zealand

(1) The nation known as New Zealand in the English language or Aotearoa in te reo Māori is referred to in this Constitution by the composite name of Aotearoa New Zealand.
(2) Aotearoa New Zealand is an independent, democratic

state that functions under the rule of law and is committed to the task of building a successful nation.

(3) The State of Aotearoa New Zealand (in this Constitution referred to as "the State") is a legal entity with a legal personality and has the rights, powers and capacities of a natural person of full age and capacity.

(4) The rights, powers and capacities of the State that flow from the legal personality of the State conferred by paragraph (3) may be exercised only for the purpose of doing anything that is required for, or that is incidental to, or consequential on, the performance of a function conferred by law on the Government.

(5) The exact boundaries of the State territory are determined from time to time by or under Act of Parliament.

3 Source and exercise of governmental powers

(1) All powers of government vested in the State, legislative, executive and judicial, derive from the people of Aotearoa New Zealand.

(2) The State is bound by this Constitution and the law for the time being in force, except to the extent it is inconsistent with this Constitution.

(3) The powers of the State may be exercised only by or on the authority of an institution of State established or recognised by this Constitution or by or under an Act of Parliament.

There has been academic and judicial controversy in New Zealand about the so-called "third source of power". The essence of the controversy is whether the Crown, or now the State, can do anything that a natural person can do. There is a division of judicial opinion on this issue in New Zealand.

In an important judgment the Chief Justice of New Zealand took the position that had been approved in England, initially enunciated by Justice Laws:[3]

> For private persons, the rule is that you may do anything

3 *Hamed v R* [2011] NZSC 101 at [26], [2012] 2 NZLR 305 at 324.

> you choose which the law does not prohibit. It means that the freedoms of the private citizen are not conditional upon some distinct and affirmative justification for which he must burrow in the law books. Such a notion would be anathema to our English legal traditions. But for public bodies the rule is opposite, and so of another character altogether. It is that action to be taken must be justified by positive law.

Justice McGrath in an earlier case thought the approach in the passage above was restricted to local authorities and he endorsed the view that the Crown has the powers of a natural person that could then be relied upon by the police.[4] There have been three appellate cases in New Zealand in 2014 analysed by Professor Bruce Harris of the University of Auckland. He takes the view that the third source of power exists, that allows the Executive Government to act without explicit authority in some situations.[5] He argues there is a growing, but not unanimously supported, momentum of judicial recognition in New Zealand and the United Kingdom of the Executive having a residual freedom to take some actions that are not authorised by positive law.

Professor Philip Joseph from the University of Canterbury argues that such a source of power is dangerous to the values of the rule of law and that all public action must be positively authorised by law, that is to say legislation, the royal prerogative or the common law.[6]

This state of affairs raises some difficult issues for constitution drafters in New Zealand. The State is one thing; the Government is another. The model that was most influential in our thinking has been the third of three models put forward, called *A New Magna Carta?* This project was done for the House of Commons Political and Constitutional Reform Committee under the

4 *Ngan* [2007] NZSC 105.

5 B V Harris "The 'Third Source' of Authority for Government Action Revisited" (2007) 123 LQR 225; "Government 'Third Source' Action and Common Law Constitutionalism" (2010) 126 LQR 373; "Recent Judicial Recognition of the Third Source of Authority for Government Action" (2014) 26 NZULR 60.

6 Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed., Thomson Reuters, Wellington, 2014) 652.

supervision of Professor Blackburn.[7] The third model proposed that the Government received the powers of a natural person. So we adopted that in early drafts:[8]

> The Government has all the rights, powers and capacities of a person of full age and capacity, in addition to the rights, powers, and capacities conferred by this Constitution and by or under Act of Parliament, subject to the terms of this Constitution, any Act of Parliament and the judicial principles of public law.

We have taken in our most recent draft a more qualified position as can be seen in the drafted text. We have given the State the powers of a natural person but not the Government and under our present proposal the power could only be exercised to engage in functions authorised by law or to do things that are incidental to those functions. In particular, we think Parliament has to authorise the powers received by the police. This is an issue that will need to be further considered and we would value the views of the public upon it.

7 House of Commons Political and Constitutional Reform Committee *A New Magna Carta* (Second Report of Session 2014-15, 10 July 2014).
8 At 290.