

# **New Zealand's constitution – past, present and future**

## **Introduction and summary**

- 1 This briefing note provides information on the following matters:
  - 1.1 the evolution of New Zealand's constitutional arrangements, and in particular the evolution of links with the United Kingdom;
  - 1.2 the relationship between national identity and constitutional evolution;
  - 1.3 the place of the Treaty of Waitangi in New Zealand's constitutional arrangements.

## **Constitutional evolution in New Zealand**

### ***Historical***

- 2 Attached as appendix A is a chart showing constitutional evolution in New Zealand to date, and in particular the evolution of New Zealand's links with Britain.
- 3 The following constitutional developments have already taken place:
  - development of institutions to represent the three branches of government (Parliament, the executive and the courts) in New Zealand;
  - severance of ties with the United Kingdom with regard to those institutions (including Britain's ability to legislate for New Zealand and the location of the United Kingdom for New Zealand's final court of appeal);
  - conduct by New Zealand of its own foreign policy and defence;
  - development of New Zealand's systems and processes of government in ways that are unique to New Zealand (e.g. abolition of Legislative Council, the introduction of the Official Information Act, the establishment of the Waitangi Tribunal, the move to MMP);
  - with regard to some of the various symbols or institutions of nationhood (citizenship, official language, honours system, national anthem), replacement by or supplementation with New Zealand equivalents.

### ***Current arrangements***

- 4 New Zealand is an independent state. It is a democracy and a constitutional monarchy. The term "constitutional monarchy" means that the Queen, as head of state, is the source of legal authority in New Zealand, but that she and her representative, the Governor-General, act on the advice of the democratically elected government, in all but the most exceptional circumstances. The state of New Zealand is also part of a wider Realm of New Zealand, which includes the Cook Islands, Niue, Tokelau and the Ross Dependency.
- 5 New Zealand has inherited a Westminster system of government, which it has modified in some areas (most significantly through the introduction of MMP). There is a complex and delicately balanced web of relationships between the institutions of government

(head of state, executive, legislature and judiciary). The institutions and the relationships between them are governed by the New Zealand constitution.

- 6 New Zealand is one of only three countries in the world without a full and entrenched written constitution (the others are Britain and Israel). The sources of the New Zealand constitution include the prerogative powers of the Queen, various statutes with constitutional significance (e.g. the Constitution Act, the Electoral Act, the New Zealand Bill of Rights Act), relevant English and United Kingdom statutes that have been incorporated into New Zealand law (such as the Magna Carta), the decisions of the courts and, many would say, the Treaty of Waitangi.
- 7 These formal, legal aspects of the constitution are complemented by unwritten conventions, which dictate how the institutions and relationships actually work. Constitutional conventions are based on democratic principle. For example, the Constitution Act provides that Bills passed by the House of Representatives do not become law until they are assented to by the Governor-General, but constitutional convention dictates that the Governor-General will not refuse assent. It should be noted that unwritten constitutional conventions are not peculiar to New Zealand. They are important even in countries with written constitutions, such as Australia and Canada.
- 8 In New Zealand, as in other countries, therefore, the complete constitution can be described in terms of the following equation:

constitutional law + constitutional conventions = the constitution

- 9 New Zealand's constitution is not contained in an entrenched document, so (with the exception of some provisions of the Electoral Act) there are no special procedures that must be undertaken in order to change it. Significant constitutional reforms are likely, however, to affect fundamental institutions and relationships. For this reason, it is important for a process of change to involve a sound process, public education, proper consultation with affected parties, public buy-in and plenty of time.

#### ***Possible future developments***

- 10 Some links and institutions inherited from the United Kingdom remain. Some are "core" to our current system of government:
  - 10.1 the Queen as head of state of New Zealand;
  - 10.2 New Zealand's status as a Realm, including the Cook Islands, Niue, Tokelau and the Ross Dependency;
  - 10.3 appointment of the Governor-General by the Queen;
  - 10.4 in general terms, the constitutional role and powers of the Crown, including the role of the Governor-General;
  - 10.5 use of the prerogative power of the Crown for certain actions (e.g. appointment of the Governor-General and Executive Councillors, establishment of Royal Commissions, the conduct of foreign affairs, and the prerogative of mercy); and
  - 10.6 various statutory references to the Queen and the Crown.

- 11 Reform in any of these areas would involve significant constitutional change. There would be consequential changes to the New Zealand institutions of government and the relationships between those institutions.
- 12 Other links are more symbolic, for example:
  - 12.1 Queen’s Counsel (reforming legislation introduced, but not yet passed);
  - 12.2 inclusion of the reference to the Queen on the Seal of New Zealand;
  - 12.3 the union jack on New Zealand’s flag;
  - 12.4 the appearance of the Queen on New Zealand notes and coins; and
  - 12.5 “God save the Queen” as one of New Zealand’s anthems.
- 13 These links could be reformed without changing New Zealand’s constitution in any fundamental way. They are, however, important in reinforcing New Zealand’s national identity as a constitutional monarchy. For this reason, any change to these links may evoke strong feelings in the community.
- 14 It is important to note that a constitution is not an end in itself – it is simply the means by which a nation state is structured and ordered. Constitutional arrangements reflect a nation’s sense of identity. For that reason, a change to any of the elements listed in paragraphs 10 and 12 above – whether the change is large or small – is likely to require a lot of time, public involvement, education and discussion.

### **The significance of the Treaty of Waitangi**

- 15 The Treaty of Waitangi is a significant element in our constitutional arrangements because it agreed the terms on which New Zealand would become a British colony. In formal terms, it was an agreement between various Maori tribal representatives and the Queen.
- 16 The Treaty contains two key concepts:
  - 16.1 **balancing the respective interests** of Maori and the Crown;
  - 16.2 **expressing an ongoing relationship** between Maori and the Crown.
- 17 For this reason, the Treaty is important regardless of whether New Zealand retains its current constitutional arrangements or not.
- 18 Attached as appendix B is a chart that shows the relationship between the various institutions of government with the web of possible Treaty-related institutions and relationships superimposed on it. The chart shows that Treaty rights and obligations are intertwined in every aspect of our constitutional arrangements.
- 19 The focus in the 1970s, 1980s and 1990s, understandably, has been on addressing past grievances. Now that the treaty claims settlement process is well established, the focus is shifting to the constitutional and practical significance of the Treaty now and in the future. The kinds of questions that arise are:

- who are the parties to the Treaty now?
- what are the fundamental principles of the Treaty?
- how should those principles be implemented in practice?

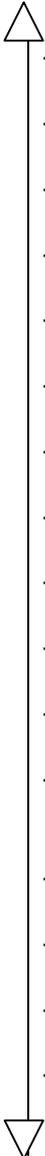
- 20 A lot of work has already gone into answering these questions within government. Much thinking has also been done by the courts, academia, the media and Maoridom. There is no clear consensus about the answers. The lack of consensus has caused some inconsistencies of approach within government, and considerable discussion in the community.
- 21 If answers to those questions could be reached that were largely acceptable to the majority of Maori and Pakeha New Zealanders, it would help enormously to inform any thinking about constitutional developments. Until thinking on the place of the Treaty in the New Zealand constitution is clarified, any significant constitutional reform is likely to be difficult.
- 22 The importance of information and education about the Treaty has recently been recognised by the establishment of the Treaty of Waitangi Information Unit within the State Services Commission.

### **Process issues**

- 23 Against this background – of the close links between national identity and the constitution, the need for substantial public involvement, the significance of the Treaty of Waitangi, and the importance of a lengthy process – one possible way forward is to have a “stocktake”. The stocktake could review New Zealand’s historical and constitutional development, analyse our current arrangements, and review other countries’ experiences of constitutional reform. It could also look at a possible process for approaching constitutional reform.

Cabinet Office  
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## A timeline of New Zealand's constitutional evolution to 2004

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- 1840: Treaty of Waitangi; British sovereignty established
  - 1852: Westminster institutions of government established in New Zealand
  - 1870: NZ government becomes responsible for defence and Maori affairs
  - 1907: NZ proclaimed a dominion
  - 1945: NZ begins to conduct independent foreign policy
  - 1947: NZ adopts Statute of Westminster
  - 1949: NZ citizenship established
  - 1951: Abolition of Legislative Council
  - 1974: Royal Titles Act
  - 1975: Treaty of Waitangi Act; Waitangi Tribunal established
  - 1977: God Defend New Zealand becomes 2<sup>nd</sup> national anthem
  - 1986: Constitution Act removes residual ability of UK Parliament to legislate for NZ
  - 1987: Maori becomes an official language
  - 1996: NZ Royal honours system instituted
  - 1996: First MMP election
  - 2004: Abolition of appeals to Privy Council, establishment of Supreme Court.

Relationship between government institutions and Maori/Treaty interests

- = Core Institutions of government
- = Relationships with Maori/Iwi
- = Maori/Treaty-related institutions of government

