



Submission to the New Zealand Constitutional Advisory Panel:

EmpowerNZ Written Submission

Prepared at an EmpowerNZ workshop: 4–6 July 2013

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Executive Summary

Underlying themes

As a group of fifteen interested and engaged young New Zealanders, we feel that the constitutional status quo fails to prevent the potential abuse of public power. We all agree that strengthening the current constitutional structure is necessary.

Both within the general public and our group, we note a disturbing lack of understanding of constitutional issues. The group unanimously agrees that civics education in schools is essential.

The group also agrees that environmental protection is an issue of constitutional importance. The absence of any environmental focus in the consideration of constitutional issues and in our current constitutional arrangements is a matter of significant concern to the group.

We are concerned about the potential abrogation of the New Zealand Bill of Rights Act 1990 (BORA). The status quo offers insufficient protection of human rights. There was consensus from the outset that protection of rights requires strengthening.

The group had polarised views on many issues. Everyone felt their views were heard throughout the consensus decision making process and the group's different views are reflected in our recommendations. The extent to which we were able to achieve consensus on particular issues is indicated alongside those recommendations. The deliberation process was valuable as it allowed us to challenge our own views, consider alternate views and create new ideas and solutions.

Interestingly, many issues that have been hotly debated in the public sphere were issues that the group managed to reach consensus on relatively quickly.

Recommendations

We recommend that:

- Effective civics education be given the same priority as other core skills in the New Zealand curriculum. (consensus)
- Teachers are provided with the resources to deliver that curriculum. (consensus)
- Environmental protection be made a fundamental part of any constitutional discussion. (consensus)
- Any constitutional reform includes a mechanism for the protection of the environment. (consensus)
- The constitutional status of the Te Tiriti o Waitangi be strengthened. (near consensus)
- New Zealand retain the Māori seats and that any change to the Māori electorate seats should be mandated by a simple majority of voters from the Māori roll in a referendum. (near consensus)
- The New Zealand Bill of Rights Act 1990 be entrenched. (consensus)
- New Zealand adopt a four-year parliamentary term. (consensus)
- Discretion be taken away from the executive in determining the date of the general election. (consensus)
- The process for determining the size of parliament and the size of electorates remain the same. (consensus)
- Greater limitations be placed on the use of urgency. (consensus)

Some members of the group also support:

- Creating a Constitutional Commission to oversee constitutional issues, educate the public and potentially review and challenge the constitutionality of legislation (a majority).
- Making the New Zealand Bill of Rights Act 1990 supreme law. (50-50)
- Adding rights to those contained in the New Zealand Bill of Rights Act 1990. (minority view)

1.0 Introduction

The ultimate success of this constitutional conversation will rest on the extent to which the different groups across New Zealand society have been engaged and had their voices heard. One such voice, which perhaps is not often heard in constitutional debates, is that of young people.

This submission contains the thoughts and aspirations of fifteen young New Zealanders on our constitutional future. Without trying to speak for all young New Zealanders, we feel that our demographic has the most significant stake in the constitutional future of our country. Aside from this, we do not have any particular rallying point or represent any kind of interest group. A majority of us have received some form of tertiary level education, though we come from a broad spectrum of political opinions and personal experiences.

We were fortunate to be brought together for this task by the McGuinness Institute as a follow up to the *EmpowerNZ* initiative. This was a workshop that took place in August 2012, where 50 young people came together for two days from all over New Zealand to draft a constitution fit for the twenty-first century.

It is important to note from the outset that this submission is wholly independent from that of the Institute. The views contained are those of the participants who took the opportunity to reconvene on the weekend 4–6 July 2013.

Our starting point for preparing this submission was the results of a June/July 2013 survey of the 50 *EmpowerNZ* participants. These results are summarised in a separate document appended to this submission. This survey covered a broad range of constitutional issues, with many similarities to the Constitutional Advisory Panel's Terms of Reference. The survey results were available to our group throughout the submission writing process, and were helpful in identifying initial areas of consensus and disagreement.

There was no set agenda for this task and we were all prepared to listen and respect each other's viewpoints. We came to our recommendations by discussion, compromise and frequently dissenting views, and the end product represents an evolution of views in an attempt to reach consensus where possible. The discussion was enriched by the differing viewpoints, and where it was not possible to reach consensus, the dissenting views are highlighted in the submission. We think this approach gives weight to the areas where consensus was reached.

We are conscious of the unique nature of this Constitutional Advisory Panel and the political processes that surround it. Given the differing viewpoints even within this microcosm of *EmpowerNZ* participants, we appreciate the challenge of the Panel's task, and are aware of the heated public debates about these issues.

Given this, we have tried to draft recommendations which are useful in the political status quo, bearing in mind the future challenges that our generation will be faced with. We have brought to this task a strong commitment to reasoned analysis and careful consideration of the issues, and we see real value in a consensus-based approach to resolving constitutional questions.

2.0 Underlying Themes

2.1 Education

As the Constitutional Advisory Panel is aware, there is a deficit in civics education among New Zealand's young people. Recognising that such education gives New Zealanders ownership of their democratic system and the outcomes it produces, the group found that the implementation of civics education at both a primary and secondary school level was a matter of importance and urgency.

In particular, the group felt that students ought to know about such subjects as: what a constitution is, what the Treaty of Waitangi/Te Tiriti o Waitangi are, what the New Zealand Bill of Rights Act is, and how the democratic process operates in New Zealand.

Often young students (Years One to Six) are overlooked and assumed to lack an interest in or ability to understand these issues. The group saw this as an underestimation of those students and thought that these were the best ages to introduce them to New Zealand's constitutional arrangements.

We wish to see civics education become an explicit and compulsory part of the New Zealand curriculum and teachers equipped with the ability to deliver that curriculum, in the same manner as basic literacy and numeracy skills.

Effective engagement by students is contingent on innovative and accessible forms of educational resources and tikanga and te ao Māori. As discussed below, this may be a task for a future Constitutional Commission. Consultation with Māori is needed when developing the content of the curriculum.

Recommendation: That effective civics education is given the same priority as other core skills in the New Zealand curriculum and teachers are provided with the resources to deliver that curriculum.

2.2 Environment

Although the Constitutional Advisory Panel has not made environmental issues a specific area for discussion, the consensus view of the group is that environmental issues are of constitutional significance. The absence of any environmental focus in this review and in our current constitutional arrangements was a matter of significant concern to the group that we believe requires significant and urgent attention.

The health of the environment is an issue that affects all New Zealanders, but as future stakeholders in New Zealand's physical and economic landscape the participants were particularly conscious of the impacts of environmental degradation and climate change.

Any codified constitutional document must include recognition of fundamental environmental principles. In addition, the group recognised that an environmental charter, such as that introduced in France in 2005, was an effective vehicle for such recognition. There was also some interest in the concept of the government holding the environment in public trust, such as that employed in the United States. This gives the public a stake in environmental efforts, increasing the likelihood of effective environmental protection.

Recommendation: That environmental issues are made a fundamental part of any constitutional discussion and any resulting reform includes a mechanism for the protection of the environment.

2.3 Treaty of Waitangi/Te Tiriti o Waitangi

The group acknowledged the constitutional and historical significance and importance of Te Tiriti o Waitangi as a founding document of New Zealand. There was near consensus that this constitutional status needed to be strengthened, although the group did not express a view on what form that might take. Any reform should not be undertaken without consultation with Māori.

There was a dissenting view that the status quo was sufficient.

The group agrees with the principles-based interpretation of the Te Tiriti, but did not agree upon what that should mean in practice when implementing further reform. However, a clear distinction was made between including the Te Tiriti and including its principles, both of which were considered as viable options for reform.

Recommendation: That the constitutional status of Te Tiriti be strengthened.

2.4 Māori Representation

The only Māori representation issue considered in depth by the group was the Māori electorates. Our consensus view on this issue was that any change to the status quo should be mandated by a simple majority of voters from the Māori roll in a referendum.

There was a dissenting view that the Māori seats should eventually be abolished by parliament.

Iwi consultation was seen as important, but was seen as more a political rather than a constitutional issue.

The group was not familiar enough with the status quo of Māori representation at a local government level to feel comfortable expressing an opinion.

Recommendation: Any change to the status quo should be mandated by a simple majority of voters from the Māori roll in a referendum.

2.5 Republic

There were strong views about this issue on both sides of the debate.

There is an acknowledgement New Zealand will eventually become a republic, prompted by a desire for change by the public. While there was general consensus that this was a positive development, it was not seen by the group to be as pressing as other issues discussed in this submission.

There was also an acknowledgement that national identity is not necessarily contingent upon the question of New Zealand becoming a republic.

2.6 New Zealand's Constitutional Arrangements

Codification of the constitution

The question of whether our constitution should be codified was an issue that the group had strong arguments on both sides and no consensus was reached on this issue. In light of the importance of other constitutional issues, there was not a strong push towards either side of the debate.

The key benefit of a codified constitution that was identified by the group is its accessibility to the public. Conversely, some of us believe that the status quo ensures flexibility. This is seen as a key strength of our

constitution – the pragmatic, evolutionary approach. Furthermore, some of us feel that codifying our constitution would involve a significant amount of work that may be disproportionate to the benefits.

Supremacy of New Zealand's constitution

We had a variety of views on the merits of making some parts of our constitution supreme law, but no consensus was reached on this issue. Discussion around supreme law mostly involved the BORA and this is discussed in more detail below.

Those who were not supportive of our constitution being supreme law feared that this would give the judiciary (an unelected body) the ultimate decision-making capacity to decide issues of constitutionality and this lacked democratic mandate to do so.

Entrenchment

Once again, there were a variety of views on this issue. We reached consensus that some degree of entrenchment was important. There was, however, division on the extent of that entrenchment. Both single and double entrenchment were considered during this discussion. Much of this conversation depended upon the future form and content of our constitutional arrangements. For example, there was a concern raised by some that entrenching rights additional to those already in the BORA would be a step too far.

Constitutional Commission

The creation of a Constitutional Commission was proposed. Possible roles for this Commission include:

- Declaring existing legislation inconsistent with the constitution and therefore invalid.
- Reporting on the consistency of proposed legislation with the constitution in a manner similar to the Attorney-General's current duties under s7 of the BORA.
- Contributing to the appointment of the judiciary (replacing the Attorney General's function in this regard).
- Contributing to the maintenance of adequate levels of civics education in the school curriculum.

Another point discussed was the structure and make up of the proposed Commission. Possible options include:

- Political appointment by a 75% majority of parliament;
- A representative board, for example with representation from parliament, the Law Society and constitutional experts; and
- Educational experts to assist with the Commission's educational function.

2.7 Bill of Rights

Operational structure

There was consensus that the BORA is of fundamental constitutional significance. However, there was disagreement as to whether its current operation is satisfactory.

While some thought that the status quo was sufficient, others thought that the current operations were insufficient to protect rights in a meaningful way. The group agreed that statutory interpretation by the Courts was an effective way of upholding the rights in the BORA, but that this process was undermined by the Court's inability to declare the invalidity of legislation that runs contrary to those rights.

An innovative solution proposed was the Canadian concept of deferred invalidation. This would mean that New Zealand Courts would have the ability to declare a statute inconsistent with the BORA, and remit that statute back to parliament for reconsideration. Parliament would then have the choice of reaffirming that rights-inconsistent legislation with a 75% majority or amending the statute to make it more rights consistent, which would only require a normal majority.

A minority of the group felt that in the case of egregious breach of a right the Court ought to have the ability to strike down that legislation without referring it to parliament. Others vehemently disagreed. The group acknowledges that there was robust discussion without any definitive consensus reached on this issue.

Separate to the issue of supremacy of the BORA, there was near consensus that entrenchment of the BORA was desirable to prevent the risk of the erosion of fundamental rights. That view was contingent on which rights were included in the BORA (discussed below).

The group acknowledges that the reporting function of the Attorney-General under s7 of the BORA is an insufficient check on legislative process. Its circumvention through the use of Supplementary Order Papers was of particular concern to the group.

One suggestion by the group was that this function was removed from the Attorney-General and instead given to the Constitutional Commission (referenced earlier in this submission). A minority thought that this Commission (rather than the Courts) ought to have the role of declaring existing legislation inconsistent with the BORA.

Throughout this conversation we acknowledged the risks associated with entrenching the BORA and making it supreme law. Many had particular concerns that this left the judiciary vulnerable to politicisation.

Additional rights

We could not reach consensus as to which additional rights, if any, should be included in the BORA. We acknowledge that this is an issue worthy of further consideration.

Some of the potential rights discussed include economic, social and cultural rights, indigenous rights, and privacy rights particularly those designed for the internet age.

2.8 Electoral Matters

Size

A significant majority of the group considered the current method of deciding the size of parliament to be adequate and appropriate.

Electorates

The group considered the current method and factors involved in deciding the size, shape and number of New Zealand's electorates to be appropriate.

Length of term

Subject to increased safeguards ensuring that parliament remains democratically accountable to the electorate, the group was largely supportive of a four year term to allow parliament more time between elections campaigning, elections and its subsequent readjustment to develop legislation.

Upper House

One option suggested for debate was whether an Upper House should be considered if a four year parliamentary term was adopted.

Election date

The date of general elections should be fixed in some way by a neutral body with discretion taken away from the executive. Our proposal is that the Electoral Commission or some other body should set the presumed date, and that the Prime Minister then advise the Governor-General accordingly. The Electoral Commission should adopt a fixed date, for example the second Saturday of a calendar month, on which elections are presumed to occur. If there is some national inconvenience, then the Electoral Commission could change this presumed date for general elections.

We believe the Governor-General should retain their reserve powers and role in calling and dissolving parliament, and we recognise that the Governor-General must exercise the power, but we would prefer that the dates for regular elections be set by the Electoral Commission or some other neutral body.

We are conscious that a prime minister could still call an early election under this arrangement. We think that placing the expectation on the Electoral Commission or other body will help to make this process a more neutral one, although obviously the Prime Minister could still request the Governor-General to dissolve parliament. If an early election is called, then the Electoral Commission should assess whether to adjust the date for the next general election to ensure the next Parliamentary term is four years.

Urgency

We are concerned about the recent excessive use of urgency to pass legislation and to avoid national debate on big policy issues. We are uncertain how to remedy this, but we think it is a deeply worrying trend and that the use of urgency should be limited.

Currently, Standing Order 54(3) only requires that a Minister “inform the House with some particularity why the motion is being moved”. One option would be to follow the recommendations of Chen Palmer and the Urgency Project. This would mean that the House would have to agree that the Select Committee stage could be omitted and also that urgency would be reserved for situations where there are genuine reasons for expediting the passage of a law:

- To minimise the potential for speculative behaviour from market participants that might follow the announcement of a change to fiscal policy;
- To respond to an unexpected event such as a civil emergency, an economic crisis, the failure of a financial institution or an unexpected court decision;
- To correct a pressing anomaly, oversight or uncertainty in existing legislation; and
- To comply with a deadline created by, for example, a forthcoming event. (Geiringer, Higbee and McLeay (2011). *What's the Hurry? Urgency in the New Zealand Legislative Process*, 1987-2010, p144. Wellington: Victoria University Press)

In particular, we felt that where the Attorney-General reports a bill is inconsistent with the BORA under s7, then urgency should not be available, due to the importance of thorough legislative debate on that inconsistency.

Electoral integrity and proportionality

We could not reach a consensus on the issue of ‘waka-jumping’ in relation to list MPs. We believe that electorate MPs should stay in parliament even if they leave the party as they have been elected by the population, rather than indirectly through the party as list MPs have been.

As regards list MPs, we are concerned about the power that is given to parties and their leadership if, when a list MP leaves a party, the MP must also leave parliament. However, we also recognise that list

MPs have not been directly elected by the public, and instead they have elected their party. Based on this, if they leave the party it seems they should not be in parliament.

We feel there is a distinction between three categories of MP. If MPs behave illegally then we assume they would already be required to leave parliament. If MPs simply disagree with the party line, then we consider this a legitimate reason for them to leave the party but stay as a MP. We believe that MPs expressing dissent and having the option of leaving the party but staying in parliament helps them to serve the public in debate, and the ability to do this should be protected. If MPs leave the party because of misconduct (falling short of illegal behaviour), then it seems harder to justify why they should remain in parliament. This distinction would be difficult to draw in practice though, hence why we could not reach a firm recommendation on this issue.

Supplementary order papers

We are also concerned about the use of Supplementary Order Papers to amend bills so that provisions which might have been inconsistent with the BORA are not subject to a s7 report, which is carried out when the bill is introduced. Whether intentional or not, such papers pose constitutional issues.

Online voting

Although this is not strictly constitutional, the majority of the group felt that online voting was a valuable tool for increasing civic participation. Any constitutional conversation should include, not just the formal legal tools, but also the mechanisms for creating a lively and healthy relationship with the constitution and with New Zealand democracy. Online voting might help with this, and we think this could also apply to referenda.

3.0 Next steps

It has been nearly a year since we first came together with the ambitious task of drafting a youth constitution. It has taken us all of that time to come to terms with many of the issues and to be able to reach a consensus on some of them. No doubt it will take us even longer to come to terms with other elements of the constitutional conversation.

We see some of our recommendations as relatively simple procedural issues. However there are also some serious questions about who we are and what we value as a country that have been raised. Even after the Constitutional Advisory Panel issues its report, we strongly feel there is a need for on-going consultation and engagement with the wider New Zealand public.

Many of these issues do not have a single answer. However, opening up the institutions of government for analysis and inviting New Zealanders to take ownership of the conversation about how our country is run can be a transformative process. Even when our opinions have not changed, we have deepened our understanding and begun to see these as live issues.

This highlights the importance of civics education in encouraging young people to begin the lifelong process of being engaged and active citizens. We think that we have begun that process ourselves, and we are grateful for the opportunity.

Acknowledgements

We would like to acknowledge the contribution of the McGuinness Institute in providing the space and resources that enabled these discussions to take place. Furthermore, we are indebted to Mihiata Pirini and Marcelo Rodriguez Ferrere who patiently facilitated the creation of this submission, and whose expertise and strength of character deserves recognition in getting us to this point. Finally, we were fortunate to have the input of and feedback from Steven Sutton, Bernie Napp, and a member of the Constitutional Review Secretariat, who “stress-tested” our ideas and were a useful sounding board to keep us on track.

About EmpowerNZ

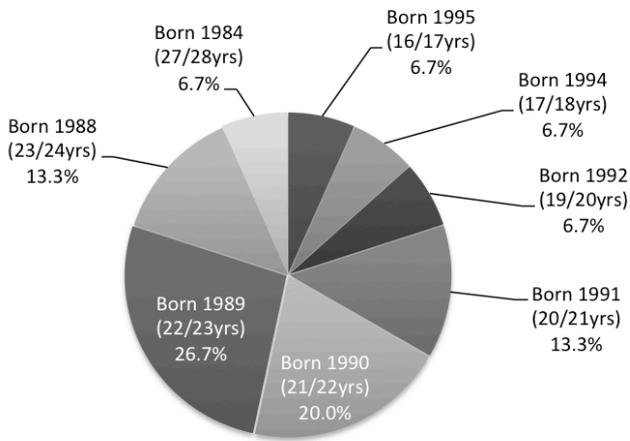
The McGuinness Institute, formerly the Sustainable Future Institute, was founded in 2004 and is a non-partisan think tank working towards a sustainable future, contributing strategic foresight through evidence-based research and policy analysis. The Institute has a flagship project, called *Project 2058*. The project aims to explore New Zealand’s long-term future with a view to producing a National Sustainable Development Strategy (NSDS) for New Zealand.

To this end, the Institute has undertaken three workshops. The first workshop was held in March 2011. *StrategyNZ: Mapping our Future* involved over 100 New Zealanders; outputs included strategy maps, designs for new coats of arms and covers of the New Zealand Listener in 2058. It also identified a number of underlying themes. *EmpowerNZ: Drafting a Constitution for the 21st Century* was the second workshop and embodied two of these themes: the need for a conversation about our constitution and the need to create opportunities for youth to engage with long-term issues. Held in August 2012, this workshop involved 50 participants and eight facilitators. A further workshop was held in December 2012 at Treasury, *LongtermNZ: Exploring our long-term fiscal position*. This workshop brought together 27 economics and politics students to prepare a *2012 Youth Statement on New Zealand’s Long-term Fiscal Position*.

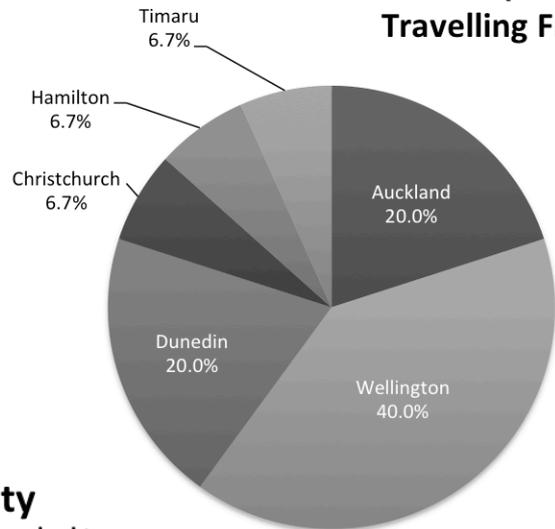
In all cases these workshops aim to create a national conversation, bringing people together from throughout the country to discuss long-term issues with a particular output in mind. The Institute aims to create a place and space for the conversation and the resources necessary to produce a high quality output. The primary goal is always to give participants the opportunity to have their voice heard. In doing so, the Institute aims to provide a non-partisan space where the opinions of the participants takes precedence; the aim is that any output is the output of the participants, not that of the Institute, the facilitators, or any of the speakers.

Statistics on the 15 participations who attended the July 4-6 Workshop

Age

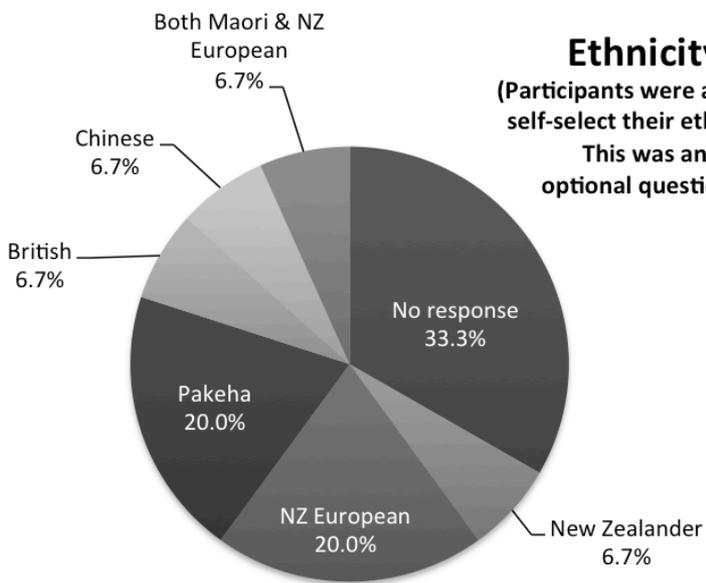


Participants Travelling From



Ethnicity

(Participants were asked to self-select their ethnicity. This was an optional question.)



Gender

