1846
Charter of 1846 endorses local self-government

V2

CONSTITUTIONAL & ADMINISTRATIVE LAW IN NEW ZEALAND

3RD EDITION

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THOMSON BROOKERS

(Joseph, 2007: 105-106, 733-734)

their portfolios and for the overall performance of the government. Parliament enjoys in theory unlimited powers and may legislate on any topic without restriction of any "higher law" or entrenched bill of rights.[68] The third branch of government, the judiciary, exercises powers for adjudicating disputes according to law, including disputes involving public law issues that arise between individuals and the State. The judicial system comprises the Supreme Court, the Court of Appeal, the High Court, District Courts and sundry inferior courts, such as the Employment Court, Coroners Courts, the Maori Land Court, and the Environment Court.

1.5.3 Responsible government

Responsible government is a defining feature of Westminster constitutionalism that transported to all of the major Commonwealth countries. It evolved in Britain through a process of historical accretion during the 18th and early 19th centuries, and distinguishes Westminster systems from those founded on a paper separation of powers (such as the constitution of the United State of America).[69] Responsible government exists today as a combination of law, convention and political practice.[70] It promotes the principle of the parliamentary ministry, under which the political arm of the executive ("the government") is recruited from and located within Parliament.[71] In New Zealand, it is customary for the Prime Minister to recommend the appointment of 19 cabinet Ministers and around five Ministers outside Cabinet. However, the latter figure may vary, given the vagaries of government-formation under MMP. Following the 2005 elections, there were six Labour Ministers outside Cabinet and two non-Labour Ministers (Winston Peters and Peter Dunne), who each committed their respective parties to support the government under confidence and supply agreements.[72] Responsible government implies the convention of ministerial responsibility to Parliament. Ministers are collectively responsible for the overall performance of the government, and individually responsible for the performance of their portfolios.

Responsible government facilitates democratic decision-making in a constitutional monarchy. The Crown acts always on and in accordance with ministerial advice. This convention requires that there must always be a government that can advise the Crown and accept responsibility for the advice tendered.[73] The persons appointed as the Crown's advisers ("the government") must be members of Parliament and collectively retain the confidence of the House of Representatives.[74] Under the convention of collective

68 But compare Sir Robin Cooke's common law rights dicta at para 14.5.2(2).

69 See ch 8.

70 See *Egan v Willis* (1998) 195 CLR 424 at 660 (HCA). See also *Egan v Chadwick* (1999) 46 NSWLR 563 at 568-573 (NSWCA).

71 Constitution Act 1986, s 6.

72 See PA Joseph, "Constitutional law" [2006] NZ Law Review 123 at 124-130 for analysis of the governmental arrangements.

73 See the reports of the Officials Committee on Constitutional Reform, *Constitutional Reform: first and second reports released by the Minister of Justice*, Wellington, Department of Justice, 1986, particularly paras 3.1-3.3 of the first report.

74 Constitution Act 1986, s 6.

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responsibility, the government must resign if it is defeated in the House on a vote of no confidence.

Until the introduction of MMP, party discipline in the House virtually foreclosed the possibility of a government defeat on a confidence issue. However, MMP politics have made forced resignation a distinct possibility. The first coalition Government appointed under MMP collapsed in August 1998, following which incumbent Prime Minister Jenny Shipley had to submit to a confidence vote to demonstrate that she retained the confidence of the House. Shipley won the vote with the support of non-government members and continued in office as leader of a minority government.[75]

1.5.4 Representative government

Responsible government implies representative government, but the reverse does not necessarily follow. During the first 2 years of the New Zealand Parliament, Executive Council members were permanent officials appointed by the Crown to advise and assist the Governor. The first House of Representatives assembled in May 1854 but it was only in May 1856 that the colony's first responsible ministry was appointed.[76] A representative legislature is a prerequisite of a modern liberal democracy. General elections are held every 3 years under the Electoral Act 1993, based on universal adult suffrage (the right to vote) and the secret ballot.[77] A general election realises the people's choice of government from among the contesting political parties. New Zealand's electoral boundaries are redrawn every 5 years in accordance with demographic trends.[78] The MMP Parliament has 120 members (subject to an "overhang" as occurred at the 2005 elections),[79] comprising 62 electorate seats, 51 list seats, and seven Maori seats. The ratio of electorate, list and Maori seats will change with each redistribution and Maori electoral roll. The Parliament elected in 2005 had an "overhang" of one (121 members in total) owing to the Maori Party winning one more electorate seat than its national share of the party vote warranted.

1.5.5 Coalition government

Coalition government is the norm under MMP. It would be exceptional for a political party to win an outright majority of seats to enable it to govern in its own right. In a coalition government, the ministry comprises Ministers from two (or more) political parties. The number of Ministers from each coalition party will normally reflect the relative voting strengths of the parties in the House. Coalition government alters the dynamics of decision-making but it does not alter the conventions of cabinet government. Under collective responsibility, all Ministers must support cabinet decisions, regardless of party divisions in Cabinet, and must take responsibility for the government's overall performance. Party differentiation represents the only exception to the rule. The *Cabinet Manual*[80] sanctioned the right of unpopular government decisions Minister advises the Governor-G whether or not a Minister is a mer Prime Minister Jenny Shipley adv warrant of the Deputy Prime Mir First Ministers clashed over the s Shipley was the leader of the Nat First Party.[81]

Coalition governments usually c government (1996-1998) negoti frustrated the parties' coalition c agreement comprised 74 pages administration. The Labour-Allia coalition agreement that establisl for agreements to run to less tha management processes without a

The Clark Government (2005-) p under MMP. Coalition governm a coalition in name only. It is forn Progressive parties, holding 51 se — Jim Anderton. It is supported the New Zealand First and Unite Peters and Peter Dunne) holding Peters and Dunne are members coalition that formally constitute United Future) remain in opposi leader's portfolio responsibilitie (Labour or National) might for support of one or more minor p posts outside Cabinet.

1.5.6 Minority government

A minority government lacks a "v of confidence by non-governmer but is the norm under MMP. T Government, appointed followi

75 A P Stockley, "Constitutional law" [1999] NZ Law Review 173.
76 See paras 1.5.3 and 19.7.2.
77 Electoral Act 1993, ss 60, 74 and 168. Sections 74 and 168 are protected under s 268 from legislative amendment or repeal in the ordinary way.
78 Electoral Act 1993, s 35, which is also protected under s 268 from amendment by simple majority of Parliament.
79 See para 10.9.4.
80 *Cabinet Manual*, Wellington, Cab 8.5.1(7)(b). See also Joseph, above exception.
81 Stockley, above n 75, at 176-177.
82 P A Joseph, "Constitutional la "Constitutional law" [2000] NZ I
83 See Joseph, above n 72, at 124-13

> "The laws of England as existing on [14 January 1840], shall, so far as applicable to the circumstances of … New Zealand, be deemed and taken to have been in force therein on and after that day, and shall continue to be therein applied in the administration of justice accordingly."

The courts have held that s 1 was a statutory adoption of the common law principle that British law accompanied British settlers to a new land.[122] However, the statutory proviso "so far as applicable to the circumstances of New Zealand" left doubts as to which British statutes applied. As at 1928, Butterworth's *Annotation of New Zealand Statutes* listed 274 English, British, and United Kingdom Acts "apparently" in force by direct enactment or through inheritance. This list was not exhaustive since it was unknown whether a good many British statutes applied as law in the absence of a High Court ruling. The index to the *Laws NZ*, published by the Government Printer in 1926, scheduled some 300 Imperial Acts "apparently" in force but also warned of the uncertainty of some Acts applying in the absence of judicial confirmation. In *Falkner v Gisborne District Council*,[123] the High Court laid down a two-stage test for applying the former statutory proviso. It was necessary to ascertain, first, the mischief to which the British statute was addressed and, secondly, whether the situation that gave rise to the mischief existed or was likely to exist in New Zealand. If the situation did exist, then the British statute was held to be applicable.

Iconic English constitutional statutes were presumed to apply through inheritance from 1840. These included the Magna Carta and its confirmations under the Statutes of Westminster,[124] the Petition of Right 1627,[125] and the Bill of Rights 1688.[126] Dedicated British statutes enacted for New Zealand from 1840 left no doubt as to their application. The New Zealand Constitution Act 1852 (UK)[127] granted the colony representative government and ongoing amendments to this Act charted New Zealand's transition from Crown colony to dominion to independent realm of New Zealand. This statute ceased to have effect as New Zealand law when the Constitution Act 1986 came into force on 1 January 1987.[128] Post-colonial British statutes, the Statute of Westminster 1931 (UK)[129] and the New Zealand Constitution (Amendment) Act 1947 (UK),[130] likewise applied as law but ceased to have effect in New Zealand from that date. The first-mentioned statute applied as law through legislative adoption by Parliament[131] and the second pursuant to Parliament's request and consent under the procedure provided by the Statute of Westminster 1931.[132]

122 *Fuller v MacLeod* [1981] 1 NZLR 390 at 415; *Falkner v Gisborne District Council* [1995] 3 NZLR 622 at 626 (citing the first edition of this text (1993) at 13).
123 *Falkner v Gisborne District Council* [1995] 3 NZLR 622 at 626.
124 Statute of Westminster 1351, 25 Edw 3 St 5 c 4; Statute of Westminster 1354, 28 Edw 3 c 3; Statute of Westminster 1368, 42 Edw 3 c 3.
125 Petition of Right 1627, 3 Cha 1 c 1.
126 Bill of Rights 1688, 1 Will & Mar Sess 2 c 2.
127 New Zealand Constitution Act 1852 (UK), 15 & 16 Vict c 72.
128 Constitution Act 1986, s 26. Parliament did not repeal the New Zealand Constitution Act 1852 (UK) as it lacks power to repeal statutes of the British Parliament.
129 Statute of Westminster 1931 (UK), 22 Geo V c 4.
130 New Zealand Constitution (Amendment) Act 1947 (UK), 11 Geo VI c 4.

The Imperial Laws Application Act 1988 is a definitive instrument that resolved the uncertainty over the inheritance of Imperial statutes. Three Imperial Laws Application Bills were drafted: the first in 1981, the second in 1985, and a third prepared by the Law Commission in 1987.[133] The final version of the legislation mirrors closely the Law Commission's draft bill. The enacted statute is a much less intricate measure than the Imperial Laws Application Bill (No 2) 1985 which proposed not only to codify the application of British statutes but also to revise and re-enact several antiquated British statutes that continued to apply in New Zealand. Under s 3 of the Imperial Laws Application Act 1988, only the statutes and subordinate legislation listed in the First and Second Schedules to the Act are now part of New Zealand law. By virtue of s 4, no other Imperial legislation is deemed to apply to or affect New Zealand.

The First Schedule, under the heading "Constitutional enactments", lists 10 statutes for preserving fundamental elements of New Zealand's constitutional heritage. These commence with the famous words of the Statute of Westminster the First 1275: "The King willeth and commandeth … that common right be done to all, as well poor as rich, without respect of persons."[134] The First Schedule then lists the Magna Carta as adopted in 1297 by 25 Edw 1 c 29, and three statutory confirmations of 1351, 1354 and 1368 guaranteeing liberty of the individual and due process of law.[135] Other statutes under the heading "Constitutional enactments" established much of the legal framework of government: the Petition of Right 1627 (outlawing extra-parliamentary taxation and affirming due process),[136] the Bill of Rights 1688 (changing the succession to the throne and prohibiting taxes by presence of prerogative and the suspending and dispensing of statutes),[137] and the Act of Settlement 1700 (the Title and preamble and ss 1-2 and part of s 3 securing the succession to the throne).[138] The Habeas Corpus Act 2001 superseded the English Habeas Corpus Act 1640, Habeas Corpus Act 1679 and Habeas Corpus Act 1816 that were formerly retained as law, guaranteeing release from arbitrary or unlawful imprisonment.[139] More prosaic constitutional statutes are continued in force under the heading "Enactments relating to boundaries". These include the preamble and s 2 of the New Zealand Boundaries Act 1863 (UK)[140] and the British British Settlements Act 1887 and British Settlements Act 1945.[141] The Supreme Court Act 2003 repealed 10 English Acts that were formerly retained to preserve the right of appeal to the Privy Council.[142]

132 New Zealand Constitution Amendment (Request and Consent) Act 1947.
133 Law Commission, *Imperial Legislation in Force in New Zealand*, NZLC R1, Wellington, 1987. For the background to the legislation, see J Finn, "The Imperial Laws Application Act 1988" (1989) 4 Canta LR 93.
134 Statute of Westminster 1275, 3 Edw 1 c 1.
135 Statute of Westminster 1351, 25 Edw 3 St 5 c 4; Statute of Westminster 1354, 28 Edw 3 c 3; Statute of Westminster 1368, 42 Edw 3 c 3 (referred to as the Statutes of Westminster).
136 Petition of Right 1627, 3 Cha l c l.
137 Bill of Rights 1688, 1 Will & Mar Sess 2 c 2.
138 Act of Settlement 1700, 12 & 13 Will 3 c 2.
139 Habeas Corpus Act 2001, s 22(2).
140 New Zealand Boundaries Act 1863 (UK), 26 & 27 Vict c 23.
141 British Settlements Act 1887, 50 & 51 Vict c 54; British Settlements Act 1945, 9 Geo 6 c 7.

ıce and advice, unless it was impractical
rnor retained the prerogative to initiate
also move matters for consideration.

thority of the British Parliament.[2] The
thorised the crown by Letters Patent to
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were not to be repugnant to the laws
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lay 1841. It passed six ordinances: an
s to be in force in New Zealand from
for commissioners to investigate land
an ordinance imposing customs duties;
e; an ordinance prohibiting distillation
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for administration of justice) were
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ʼs) was repealed in the second session,

rter did not achieve all that had been
:d that: "For all the talk of systematic
:ars after 1840 New Zealand exhibited
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directly from Maori. The settlers railed
ınd bitterly opposed the autocracy of
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g, leaving his superiors in London to
utive and Legislative Councils met
ts agitated over their powerlessness to
ention. Friends of the New Zealand
in the British Parliament, lobbied on
ıd local self-government. In February
ɔetitic the British Parliament and,
her Provision for the Government of

see para 2.4.

:nguin Books, 1980, at 73.

4.2.2 Charter of 1846

The constitution enacted in 1846 replaced the autocratic rule imposed in 1840 to protect Maori. The Charter of 1846 granted the settlers representative institutions. Financial pressures persuaded the Colonial authorities to endorse the principle of local self-government. Dwindling land sales and a shrinking Treasury grant from Britain had placed the colony in an acute financial position. A representative legislature with power to levy taxes would alleviate the financial burden.

The 1846 Charter was, Sinclair observed, "a most intricate Constitution".[6] It proposed a hierarchy of representative institutions with direct and indirect elections. The colony was divided into the provinces of New Ulster (the North Island north of the Patea River mouth) and New Munster (the remainder of the colony), each with a Governor and Lieutenant-Governor. Municipal corporations were to be local bodies and part of the machinery of indirect election. Each province would elect councillors; the councillors would elect mayor and aldermen; the mayors, aldermen and councillors would elect the lower houses of provincial legislatures; and these would elect from their own number the Lower House of the General Assembly. The Upper Houses of these assemblies were appointed. Royal Instructions issued with the Charter provided for the settlement of waste lands, the establishment of executive councils, and the quadrennial election of members to the General Assembly.

The settlers had won representative government under the Charter but they faced a further obstacle. It fell to Governor-in-Chief Captain (later Sir George) Grey to bring the new system into operation. He issued a proclamation bringing the Charter into force on 1 January 1848 but he did nothing to constitute the representative institutions provided. Instead, he petitioned the Secretary of State in London for legislation to suspend the Charter. In March 1848, the British Parliament passed a statute suspending those parts of the 1846 Act that related to the provincial and central assemblies.[7] The Act revived in their stead the old Legislative Council constituted under the Charter of 1840. The suspension was effective for 5 years unless the Queen in Council sooner directed the full implementation of the Act.

Grey was assailed for his part in postponing representative government. He preferred retaining his autocratic powers but he also believed the settlers should not be entrusted with such generous powers of self-government as would give them dominion over Maori. He believed the settler community would legislate to acquire Maori lands even at the cost of war. He also had misgivings whether Maori would acquiesce in the confiscation of their wastelands which he, as Governor-in-Chief, was instructed to effect. In 1851 Grey finally relented and invoked his power under the suspending Act to establish a Legislative Council in each of the provinces.[8] Initially appointed bodies, the Legislative Councils were reconstituted so that two-thirds of their members were to be elected. However, while New

5 Government of New Zealand Act 1846 (UK), 9 & 10 Vict c 103.
6 Sinclair, above n 4, at 88.
7 Government of New Zealand Act 1848 (UK), 11 & 12 Vict c 5.
8 Government of New Zealand Act 1848 (UK), 11 & 12 Vict c 5.

Ulster elections were in progress, word arrived of a third constitution for New Zealand, which became law on 30 June 1852.[9]

4.3 Representative government

4.3.1 New Zealand Constitution Act 1852 (UK)

The New Zealand Constitution Act 1852 (UK) provided a more workable plan for representative government than its predecessor — the Charter of 1846. This Act established a central legislature (the General Assembly) and provided institutions suitable for the scattered settlements of the colony.[10] Section 2 divided the colony into six provinces relative to the main areas of settlement: Auckland, New Plymouth (later Taranaki), Wellington, Nelson, Canterbury and Otago. Later subdivisions created four further provinces: Hawke's Bay, Marlborough, Southland and Westland. A superintendent, elected for 4 years upon a propertied adult male franchise, headed each province.[11] Each superintendent was assisted by a Legislative Council elected upon the same franchise for the same term.[12] Provincial legislation could be vetoed by the Governor,[13] who could also disallow the election of a superintendent, dissolve the council or remove a superintendent upon an address from members of the council.[14]

Section 32 established the General Assembly. It comprised the Governor, a Legislative Council of appointed members enjoying life tenure, and a House of Representatives elected for 5 years on the same franchise as for provincial councils. Section 53 empowered the General Assembly "to make laws for the Peace, Order, and Good Government of New Zealand, provided that no such laws be repugnant to the Law of England". Section 56 provided that the Governor might refuse his assent to a bill or reserve bills for signification of the Queen's assent. Under s 58, the Queen in Council could disallow any Act within 2 years.

The institutional arrangement has been described as federal but it was not genuinely so for three reasons. First, the provinces were withheld any exclusive jurisdiction. Section 19 reserved 13 subjects exclusively for the General Assembly. In all other areas, the General Assembly and the provinces shared legislative power concurrently, unless central and provincial legislation conflicted. In that event, central enactments prevailed over and superseded provincial enactments. This alone meant the system was not federal, as federal and state governments enjoy exclusive and independent spheres of jurisdiction.[15] Secondly, the 1852 Act excluded the provinces from the process of constitutional amendment. Section 68 vested the power to amend the Act in the General Assembly, subject to signification of the Queen's assent. In a federation, any change to the federal

9 New Zealand Constitution Act 1852 (UK), 15 & 16 Vict c 72.
10 See J L Robson (ed), *New Zealand: The Development of its Laws and Constitution* (2nd ed), London, Stevens & Sons, 1967, at 6-7. See also Hight and Bamford, above n 1.
11 New Zealand Constitution Act 1852 (UK), 15 & 16 Vict c 72, ss 3, 4 and 7.
12 New Zealand Constitution Act 1852 (UK), 15 & 16 Vict c 72, ss 7 and 13.
13 New Zealand Constitution Act 1852 (UK), 15 & 16 Vict c 72, s 29.
14 New Zealand Constitution Act 1852 (UK), 15 & 16 Vict c 72, s 4.
15 Sir Kenneth Wheare, *Federal Government* (4th ed), Oxford, OUP, 1967, at 14.

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Jennings' test accurately depicted the questions but he presented them as establishing, in effect, *alternative* tests for the establishment of convention. He wrote:[34]

> "A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, *unless it is perfectly certain that the persons concerned regarded them as bound by it.*"

Each of Jennings' questions (b) and (c) must be answered in the affirmative to establish the existence of a convention. No convention could be asserted if the rule thought to be binding furthered no constitutional purpose, or if it frustrated rather than served constitutional ends. The minority judgments in *Reference re Amendment of the Constitution of Canada* rightly observed: "The essential condition for [the] recognition [of a convention] must be that the parties concerned regard it as binding on them [and] it must play as well a necessary constitutional role."[35] The six-member majority adopted in principle Jennings "either/or" test,[36] but found that the putative convention satisfied each of Jennings' criteria. The issue was whether the consent of the Canadian provinces was needed before the federal authorities could request the United Kingdom Parliament to pass legislation to "patriate" the Canadian constitution. The majority held: (a) the rule requiring provincial consent was based in precedent; (b) the actors regarded themselves as bound; and (c) there was a reason for the rule found in Canada's federal-provincial compact.

Usage is the main source of convention. The longer a usage, the more likely a binding convention will crystallise. However, conventions may also be sourced in rule-constitutive precedents. A single precedent may establish a convention if the action is unequivocally acknowledged. The last occasion that a British Monarch refused the royal assent to a bill was in 1708, when Queen Anne refused to agree to a Scottish militia. A century later, refusal of the royal assent was no longer an option. In 1829 George IV opposed the removal of disabilities attaching to Roman Catholics but he assented to the bill under protest. This action established a rule-constitutive precedent that confirmed a shift in the balance of the constitution.[37] Although no one could say whether the granting of the royal assent had already hardened into a constitutional obligation, George IV's acceptance of *a duty* to assent conclusively established the convention.

Other conventions have been established in the same way. The last dispute over a Governor's powers was in 1892. The Governor, the Earl of Glasgow, refused to act on Premier Ballance's advice to appoint several new Legislative Councillors. The Secretary of State for the Colonies instructed the Governor that he must accept his premier's advice in all matters not touching Imperial interests. The Governor's accession established a rule-constitutive precedent. Similarly, following the 1984 elections the Attorney-General Jim McLay advised his Prime Minister on the constitutional obligations upon an out-going Prime Minister, and this advice established a precedent for future occasions. The *Cabinet Manual* adopted McLay's advice as comprising the first limb of the caretaker

34 Jennings, above n 6, at 136 (emphasis added).
35 *Reference re Amendment of the Constitution of Canada* (1981) 125 DLR (3d) 1 at 114 (SCC) (emphasis added).
36 *Reference re Amendment of the Constitution of Canada* (1981) 125 DLR (3d) 1 at 90 (SCC).
37 See de Smith and Brazier, above n 5, at 40.

confidence on matters of supply. "A denial of supply at any point at which a debate ranging over the whole field of Government activity can arise, automatically raises a question of the confidence of the House in the Government."[62] In addition, a government may, of its own motion, declare that a vote on an issue before the House is to be treated as a confidence matter. A government may exercise this option as a tactic to enforce discipline in its ranks, by placing its survival "on the line".

A distinction must be drawn between confidence votes and ordinary votes in the House. The above situations exhaust the obligation to resign. Minority coalition governments infrequently suffer defeats when prosecuting their legislative programmes, without any calls for resignation.

(6) *Caretaker government*

MMP politics create potential for periods of political uncertainty, when it may not be clear which party or group of parties in the House has a mandate to govern. During these periods, the government must, of necessity, remain in office and attend to the business of government. The Governor-General must not be left without responsible advisers. The incumbent government is the lawful executive authority, with all the powers and responsibilities of office. However, governments in this position must act in accordance with the convention on caretaker government. Ministers are constrained in their actions until the political situation is resolved.

The caretaker convention has two limbs. The first limb applies where it is clear on election night who will form the next government. It is customary for the new ministry to be sworn in 10-14 days following the elections. During this period, the outgoing government must continue to discharge the responsibilities of office, subject to the caretaker convention. The rules were clarified following the July 1984 elections, when defeated Prime Minister Robert Muldoon refused the incoming Prime Minister's immediate advice to devalue the New Zealand currency.[63] Muldoon capitulated when his Attorney-General, Jim McLay, publicly advised that:[64]

> "(1) [A defeated Government] will undertake no new policy initiatives; and
>
> "(2) It will act on the advice of the incoming Government on any matter of such constitutional, economic, or other significance that it cannot be delayed until the new Government formally takes office — even if the outgoing Government disagrees with the course of action proposed."

McLay's exposition of the constitutional position established a rule-constituent precedent. The *Cabinet Manual* adopted verbatim his formulation of the obligations on an out-going Prime Minster.[65] Situations to which those restraints apply will not usually extend beyond

61 See D McGee, *Parliamentary Practice in New Zealand* (3rd ed), Wellington, Dunmore Publishing, 2005, at 95-99.

62 McGee, above n 61, at 98.

63 See para 5.3.1.

64 Attorney-General's press statement, 17 July 1984, reproduced by F M Brookfield, "The constitutional crisis of July '84" [1984] NZLJ 298.

(2) Admission to or expulsion from partnerships (s 36);

(3) Admission to or loss of membership of industrial, professional or trade associations, or of professional qualifying and vocational training bodies (ss 37-41);

(4) Access to places, vehicles and facilities (ss 42-43);

(5) Provision of goods and services (ss 44-52);

(6) Sale, occupation and use of land, housing and accommodation (ss 53-56); and

(7) Access to educational establishments (ss 57-60).

The Human Rights Commission Act 1977 prohibited discrimination on grounds of colour, race, sex, ethnic or national origins, marital status, and religious or ethical belief. Section 21 of the Human Rights Act 1993 re-enacted those grounds and added the following six new grounds: disability, age, political opinion, employment status, family status, and sexual orientation. Under the heading "Other forms of discrimination", the Act also outlaws sexual harassment, racial harassment, and inciting racial disharmony.[123] Sexual or racial harassment is unlawful if it occurs in any of the areas of activity to which the s 21 grounds relate. Inciting racial disharmony is not "context-specific" but is unlawful per se.

The legislation acquired new public law significance under the Human Rights Amendment Act 2001. For the Minister who promoted the Act, it heralded "a new era in public sector accountability."[124] The Act did three things: it extended the anti-discrimination apparatus to cover the public sector, it introduced a new institutional framework for promoting human rights, and it bolstered the processes for resolving discrimination disputes. The new institutional framework and dispute resolution services transformed the Human Rights Commission from a predominantly anti-discrimination body to one aimed at promoting respect for human rights. A further major change was the bringing of all government activity under the umbrella of the Human Rights Act 1993.

From its inception in 1977, the legislation had applied only in the private sector in the seven enumerated areas of activity. Section 151 had exempted the Act's application to the public sector until 31 December 1999, pending completion of a human rights audit of government legislation, practices and policies (the project that became "Consistency 2000").[125] That audit encountered difficulties from perceived, widespread non-compliance with the Human Rights Act 1993 in the public sector, and the 1999 expiry date was extended until 31 December 2001. This timing coincided with the coming into force of the Human Rights Amendment Act 2001, which extended the human rights regime to the public sector. The object was to promote a cultural shift within government — to sensitise politicians and officials to human rights standards when formulating and implementing government policy. Previously, the Human Rights Act 1993 and the New Zealand Bill of Rights Act 1990 had operated along parallel lines, without intersecting.

123 Human Rights Act 1993, ss 61-63.

124 (2001) 597 NZPD 13,759 per Hon Margaret Wilson (Associate Minister of Justice).

125 See para 9.3.7(1) for the problems the "Consistency 2000" audit encountered..

Section 19 of the Bill of Rights
grounds of discrimination in th
Act's institutional framework.
unlawful public-sector discrimi

The number of complaints lod
the year ended 30 June 1999, t
319 allegations of unlawful disc
complaints totalling 754 allega
30 June 2005, the commis
complaints.[129] Complaints have
reflect an altered method of cl
human rights epidemic. The
relatively constant: in 2004-0
(58 percent in 1998-99), 26
(17 percent in 1998-99), 10 p
1998-99), and 10 percent arose
discrimination have also remai
23 percent of complaints (26
9 percent (24 percent in 1998-
and age accounted for 9 perce
for the year 2004-05, accounti
commission's annual reports t
category "other".

9.3.2 Philosophical dime

The Human Rights Act 1993 is
a State proceeds from encoura
its observance. There are practi
legislative intervention. These
interests — enforced social e
choice. The controversial *Sides*
the limitations. Critics argued
bigotry on the one hand, and
Equal Opportunities Tribunal
evangelical Christian's employ

126 *Quilter v A-G* [1998] 1 NZLR 5
of Appeal held that the Marri
s 19 of the Bill of Rights which

127 *Report of the Human Rights Comm*

128 *Report of the Human Rights Comm*

129 *Report of the Human Rights Com*
2005 [2005] AJHR E.6 at 10.

130 *Human Rights Commission v En*
9.3.8(1)). See M Jones, "Quest
Motor Company Ltd and Others"

the right of a Commonwealth government in domestic matters, including the choice of the Sovereign's personal representative.

Following the 1930 conference, New Zealand continued to recruit its Governors-General from the British aristocracy. In time, this practice was considered at variance with New Zealand's national sovereignty, which led to the appointment of the first New Zealander to the office. Aikman and Robson wrote that Lieutenant-General Lord Freyberg, Commander of the New Zealand Division during the Second World War (1939-45), was the first New Zealander to hold the office (1946-52).[15] However, Freyberg was not a New Zealand citizen, although he was educated in New Zealand and worked in New Zealand after completing his studies, before returning to the United Kingdom.

Sir Arthur Porritt was the first New Zealand-born Governor-General. His appointment in 1967 was greeted in the address-in-reply to the Speech from the Throne as "a compliment to New Zealand and a further recognition of our rise to full nationhood".[16] Porritt was domiciled in the United Kingdom but his tenure established a precedent for the appointment of the first resident New Zealander, Sir Denis Blundell. Blundell, a Wellington lawyer, was appointed in 1972 and he, in turn, was succeeded in 1977 by former National Prime Minister Sir Keith Holyoake. Further New Zealanders to have held the office include former High Court Judge Sir David Beattie (1980-85), former Archbishop of New Zealand Sir Paul Reeves (1985-90), former Auckland Mayor Dame Catherine Tizard (1990-96), former Court of Appeal Judge Sir Michael Hardie Boys (1996-2001), former High Court Judge Dame Silvia Cartwright (2001-2006), and former District Court judge and Ombudsman Hon Anand Satyanand (2006-). Dame Catherine Tizard was the first woman to hold the office, Sir Paul Reeves was the first person of Maori descent to hold the office, and Hon Anand Satyanand was the first person of Asian descent to hold the office. Satyanand was sworn in using each of New Zealand's official languages, English and te reo Maori. As appointments are governed by constitutional convention, no alteration in the law was needed to effect the change to resident New Zealand Governors-General.

19.4 Letters Patent

19.4.1 Current instruments

The Letters Patent Constituting the Office of Governor-General of New Zealand the dated 28 October 1983 effected the long-awaited revision of the instruments constituting the office of Governor-General.[17] Queen Elizabeth II issued this instrument at the Governor-General's request by Order in Council dated 26 September 1983. The 1983 Letters revoked the former instruments — the Letters Patent and Royal Instructions of 11 May 1917. The Royal Instructions are not re-issued, although some 1917 Instructions are carried over in the Letters Patent. The revised Letters Patent had two objects — to

15 See C C Aikman and J L Robson, "Introduction", in JL Robson (ed), *New Zealand: The Development of its Laws and Constitution* (2nd ed), London, Stevens & Sons, 1967, at 17(n 19).

16 (1968) 355 NZPD 83.

17 Letters Patent Constituting the Office of Governor-General of New Zealand 1983 (SR 1983/225) (reproduced in the appendix).

update the office and to "patriate" it.[18] Further amendments to the Letters Patent were made in 1986 and 2006. The 1986 amendment altered the qualification for membership of the Executive Council following the enactment of the Constitution Act 1986, which allowed the interim appointment of non-members of Parliament as Executive Councillors.[19] These changes were introduced following the fleeting post-election impasse of 1984.[20] The 2006 amendments became operative on 22 August 2006 the day before the swearing in of Governor-General Anand Satyanand).[21] The amending instrument had three purposes: to modernise the Governor-General's oath, to provide for meetings of the Executive Council by teleconference or video link in situations of urgency or emergency, and to relieve the Governor-General's of the need to obtain the Queen's leave when travelling overseas. The 2006 instrument offered an opportunity to modernise the Letter's Patent more generally but the opportunity passed. Much of the language in the Letters Patent is prolix and quaint, reminiscent of a former age.

19.4.2 Revision of the office

It was a matter of indifference that New Zealand waited over 60 years to effect the 1983 revision. The 1917 instruments were virtually identical to the Letters Patent and Royal Instructions of 1907, which reconstituted the office to mark dominion status from September 1907. Two changes identified New Zealand's new status from 1907: the adoption of the title "Governor-General" (which was symbolic and had no legal significance),[22] and the omission of instructions for the reservation of certain classes of bills for the king's pleasure. Apart from those changes, the 1917 Letters Patent and Instructions were as befitting a Crown colony as a dominion. These instruments remained anomalous in preserving the image of Colonial Office control. The Commonwealth conventions adopted at the Imperial Conferences of 1926 and 1930 defined a relationship of equality as between the United Kingdom and the dominions. Equality of status was enshrined in the Balfour Declaration of 1926[23] and given legislative recognition in the

18 See A Quentin-Baxter, *Review of the Letters Patent 1917 Constituting the Office of Governor-General of New Zealand*, Wellington, Cabinet Office, June 1980; F M Brookfield, "The reconstituted office of Governor-General" [1985] NZLJ 256; G A Wood, "New Zealand's patriated Governor-General", paper delivered at New Zealand Political Studies Association Conference, Auckland, May 1985. For discussion of the office, see K J Scott, *The New Zealand Constitution*, Oxford, Clarendon Press, 1962, at 72-75; Viscount Cobham, "The Governor-General's constitutional role" in L Cleveland and A D Robinson (eds), *Readings in New Zealand Government*, Wellington, Reed Education, 1972, at 82; D Stevens, "It could happen here" [1975] NZLJ 794; F M Brookfield, "No nodding automaton: A study of the Governor-General's powers and functions" [1978] NZLJ 491; R Q Quentin-Baxter, "The Governor-General's constitutional discretions: An essay towards a redefinition" (1980) 10 VUWLR 289.

19 Letters Patent Amending Letters Patent Constituting the Office of Governor-General of New Zealand, dated 31/12/86 (SR 1987/8).

20 See paras 5.3.1-5.3.2

21 Letters Patent (2006) Amending Letters Patent Constituting the Office of Governor-General of New Zealand (SR 2006/219). For comment on the changes see T Angelo, "The Letters Patent" [2007] NZLJ 5.

22 Contrast the position in Australia, where each state has a Governor, and in Canada, where each province has a Lieutenant-Governor.

The Royal Powers Act 1983 re-enacted the 1953 provisions and provided for a Regent to perform the royal functions of the Sovereign in right of New Zealand where United Kingdom law authorises a Regent to act on behalf of the Sovereign. The Constitution Act 1986 repealed the Royal Powers Act 1983 but carried over the provisions authorising the exercise of royal powers by the Sovereign and a Regent.[38]

19.6 Seal of New Zealand

It was fitting that the Queen in her silver jubilee celebrations should assent to the Seal of New Zealand Act 1977 and proclaim it without affixing a seal — the existing one not being appropriate in her realm of the United Kingdom.[39] This further reflected New Zealand's growing constitutional self-image. The Act elevated New Zealand's new sovereignty by authorising the establishment of a seal to be known as the Seal of New Zealand. Until then certain state instruments relating to New Zealand and its territories (Niue, Tokelau and the Cook Islands) were, in some cases, sealed with the Public Seal of New Zealand and, in other cases, with the Great Seal of the United Kingdom or one of the lesser United Kingdom seals. Under the Seal of New Zealand Act 1977 instruments issued by the Sovereign or the Governor-General on ministerial or conciliar advice must be sealed with the one official seal — the Seal of New Zealand. The Seal of New Zealand Proclamation 1977 adopted the seal bearing the design and style set forth in the Queen's warrant dated 29 June 1959.[40] Judicial notice is to be taken of the Seal,[41] which is held in the custody of the Governor-General.[42] The affixing of the Seal is a matter of form rather than substance. Section 5(1) provides that no instrument shall be invalid by reason of the Seal not having been affixed, except where statute expressly requires it.

It has been queried whether the Seal of New Zealand Act 1977 imported into law the conventional rule of ministerial responsibility and participation.[43] However, this would be constitutional change by a side wind. Section 3(1) authorises use of the Seal on any instrument that is made by the Sovereign or the Governor-General "on the advice of the Minister of Her Majesty's Government in New Zealand or on the advice and with the consent of the Executive Council of New Zealand". The statutory reference to ministerial or conciliar advice is merely recognition that, by convention, the Sovereign or Governor-General acts on advice when issuing instruments to be affixed with the seal.

38 Constitution Act 1986, ss 3 and 4.

39 Section 2(3) of the Seal of New Zealand Act 1977 removed the need to seal the Queen's proclamation establishing the seal.

40 Seal of New Zealand Proclamation 1977 (SR 1977/29). The seal contains the New Zealand Coat of Arms surrounded by the inscription "New Zealand · Elizabeth the Second · Queen ".

41 Seal of New Zealand Act 1977, s 6.

42 Seal of New Zealand Act 1977, s 4.

43 F M Brookfield, "No nodding automaton: A study of the Governor-General's powers and functions" [1978] NZLJ 491 at 497.

(unless the legislative prerogative was expressly preserved).[35] In a settled colony, the Crown retained a narrower (constituent) legislative power for establishing the office of Governor and an Executive Council, appointing a Governor and issuing Royal Instructions, establishing courts of justice, and providing for the summoning of a legislature.[36] New Zealand was considered, at law, to have been established by settlement rather than through voluntary cession under the Treaty of Waitangi.[37]

The Crown's constituent legislative power may be exercised for New Zealand at New Zealand's request. The Queen exercised this power in 1983 when she issued new Letters Patent to reconstitute the office of Governor-General. The Letters Patent of 28 October 1983 superseded the Governor-General's former instruments, the Letters Patent and Royal Instructions of 11 May 1917. The Queen issued this instrument on request of the Governor-General in Council[38] and it has force of law under the Crown's legislative prerogative. The final clause states: "XIX. And We do further declare that these Our Letters Patent shall take effect as part of the law of Our Realm of New Zealand." Clause 18 expressly preserves the Crown's constituent power "from time to time to revoke, alter, or amend these Our Letters Patent".

Parliament's legislative power takes primacy over the Crown's constituent power. Although the Letters Patent have force of law, New Zealand enactment may supplement, override, or derogate from them. The Constitution Act 1986, for example, altered the law under the Letters Patent governing eligibility for appointment to the Executive Council. Clause 8 of the Letters Patent affirmed the principle of the parliamentary ministry by restricting membership of the Executive Council to sitting members of Parliament. Section 6(1) of the Constitution Act 1986 relaxed the requirement by authorising the ministerial appointment of persons who stood at the general election held immediately preceding the appointment (whether or not at the time of the appointment they were members of Parliament). This alteration to the law necessitated a further request to Her Majesty to amend the Letters Patent. Clause 8 as amended now refers to eligibility for ministerial appointment under the Constitution Act 1986. Where Parliament confers on the Crown an identical power already delegated under the Letters Patent and does not subject it to some limitation or restriction, a court may hold that the prerogative and statutory powers coexist.[39]

35 *Campbell v Hall* (1774) 1 Cowp 204; 98 ER 1045. The legislative prerogative automatically revives if representative government is revoked by Act of the Imperial Parliament or under the prerogative: *Sammut v Strickland* [1938] AC 678 (PC).

36 *Kielley v Carson* (1842) 4 Moo PC 63; 13 ER 225 (PC). Apart from its constituent power, the Crown could not legislate for settled colonies: *Re Lord Bishop of Natal* (1865) 3 Moo PC (NS) 115 at 148 per Lord Chelmsford LC.

37 See paras 3.6.2 and 3.6.3.

38 Letters Patent Constituting the Office of Governor-General of New Zealand 1983 (SR 1983/225) (reproduced in the appendix).

14.3.2 Taxation

(1) *Historical precedents*

Taxation was a perennial issue in the stru
centuries, the king found it expedient to se
boroughs and shires for new taxes for the rc
king would agree to remedy some local grie
binding constitutional principle that the lev
dues, without consent of Parliament, was ille
the Statute of Westminster 1354 proclaimed
principle guided Parliament's victory over th
Crown revenues ensured the king could
summoning Parliament for supply.

In the 17th century, the Stuarts resorted to
forced loans under pretence of the prerogat
indirect taxation without consent of Parliam
of Exchequer Chamber found for the king
currants levied by James I and the judges u
royal revenue is an inseparable Crown p
Parliament and, secondly, that the impositic
within the royal prerogative in foreign affairs
of use of an admitted prerogative. The levy v
tax.

The Stuart kings continued their indulgence
continued to hold for the king. In 1627, C
four others for refusing to pay a forced loar
to the Court of King's Bench for writs of h
to the writs showed sufficient cause. The p
two members of the Privy Council, orderir
king. On the medieval precedents, the co
without stating reasons. In *Hampden*'s case

39 See *Sabally and N'Jie v A-G* [1965] 1 QB 273 (C
held that the statutory power abridged the p
Summary Proceedings Act 1957 and ss 406-4
mercy delegated to the Governor-General b
Proceedings Act 1957 and s 378 of the Crime
prosequi delegated by implication under the L
the Crown's power of assent to bills formerl
delegated by implication; but compare *Simpso*
s 18 of the Constitution Act 1986 (enacting
Parliament formerly expressly delegated und

40 *Bate's Case* (1606) 2 St Tr 371. Parts of the j
32, at 78-79, 93-94.

41 *Darnel's Case* (1627) 3 St Tr 1 (*Case of the Five*

42 *R v Hampden* (1637) 3 St Tr 825 (*Case of Ship-*