

Constitutional Advisory Panel,  
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# Constitutional Advisory Panel

Te Ranga Kaupapa Ture

## New Zealand's Constitution

A Report on a Conversation

He Kōtuinga Kōrero mō Te Kaupapa Ture o Aotearoa

NOVEMBER 2013

3rd

Zealand Government

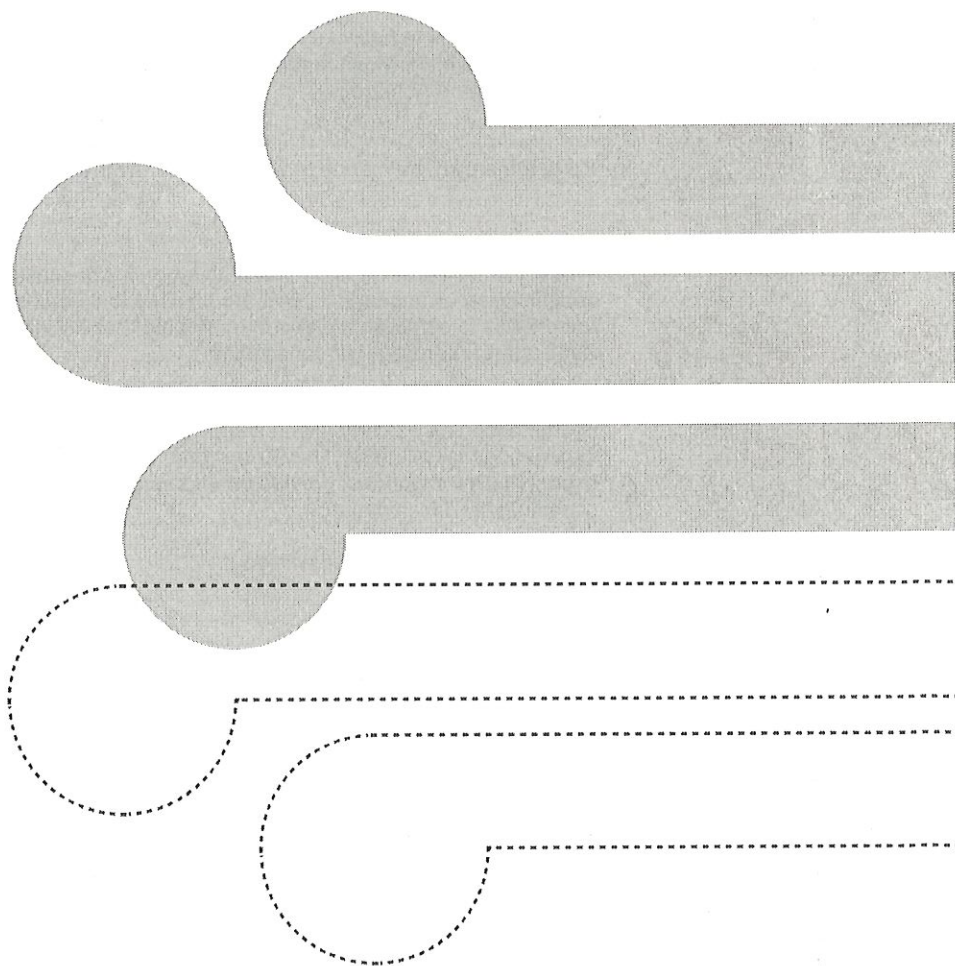




# New Zealand's Constitution

A Report on a Conversation

He Kōtuinga Kōrero mō  
Te Kaupapa Ture o Aotearoa



## Ministers responsible for the Consideration of Constitutional Issues

### Hon Bill English

MP for Clutha-Southland  
Deputy Prime Minister



### Hon Dr Pita R Sharples

MP for Tāmaki Makaurau  
Minister of Māori Affairs

29 AUG 2011

Tēnā koutou and welcome

Kei te mihi ki a koutou

He wero kei te haere mō koutou, ngā  
kaihautu me ngā kaihoe o tēnei waka.  
He waka tēnei me eke i te moana  
pukepuke.

Kei a koutou te hanga me te hoe i te  
waka. Mā te tika o te tārai me ngā  
pūkenga o ngā kaihoe, ka pai te tere o  
te waka i ngā moana katoa.

Ahakoia he uaua te haere, e whakapono  
ana māua he mahi whaihua tēnei ki ngā  
tāngata katoa o Aotearoa.

Ko te tūmanako, he marino te wai.

Warm greetings to you all

Like the waves which must be navigated  
by a canoe, there will be many  
challenges that you as the advisory panel  
will face.

It is for you to decide the best form the  
canoe should take to be able to navigate  
these waters. By designing and shaping  
the keel of the waka to perfection, your  
canoe will overcome obstacles.

Although this will be a demanding  
journey, we believe that it will also be  
both fruitful and rewarding for all New  
Zealanders.

May the water that precedes your waka  
be smooth.

Thank you for agreeing to be part of this significant consideration of New Zealand's constitutional arrangements. We are pleased that you have accepted this opportunity to establish a platform for debate that will inform and stimulate New Zealanders' interest in our constitution.

The history and evolution of New Zealand's constitutional arrangements has been characterised as a "long conversation." Each of you brings valuable skills and experience that will assist New Zealanders to contribute to that conversation. We expect that your work will provide an enduring reference point for New Zealand's constitutional development.

We look forward to working with you.

Hon Bill English  
Deputy Prime Minister

Hon Dr Pita R Sharples  
Minister of Māori Affairs





**Constitutional  
Advisory Panel**

/ C/o Ministry of Justice  
DX SX10088, Wellington

The Honourable Bill English  
*Deputy Prime Minister*

The Honourable Dr Pita R Sharples  
*Minister of Māori Affairs*

Tēnā kōrua e ngā Minita,  
Tangihia te pō, nau mai e te ao, tihei mauri ora.

*Nāu i whatu te kākahu, he tāniko tāku*  
Kai te mihi ki kā ringa hāro muka o neherā,  
o nāianeī.  
Kua kōtuia kā muka o te kaupapa ture o  
Aotearoa, ā, ka whakarākeitia ki kā huatau  
mō āpōpō.  
He kākahu hai tāwharu i kā tāhuhu kōrero, i kā  
tūmanako, i kā awhero mō tātou, mō kā uri ā  
muri ake nei.  
Kua whatua te kaupapa, mā tātou e tāniko.

*You wove the cloak, I made the border.<sup>1</sup>*  
Warm thanks to the people from the past and  
present who have created the foundations for  
the conversation about the constitution.  
We have woven together the strands of  
conversation from the past and adorned it with  
ideas for the future.  
A cloak of history, expectations, and aspirations  
for the generations to come.  
It is up to you, and the future generations, to  
make the final touches.

In accordance with paragraph 15 of the Terms of Reference, we enclose our report: New Zealand's Constitution – A Report on a Conversation, He Kōtuinga Kōrero mō Te Kaupapa Ture o Aotearoa. When you invited us to undertake this task you noted that as a panel we would face challenges, but ultimately believed the exercise would be fruitful and rewarding for New Zealanders. Having fulfilled our terms of reference we agree. The report provides a snapshot of a developing conversation about New Zealand's constitution. The report summarises the conversation, discusses common themes and makes recommendations on each topic.

In engaging with people on constitutional matters we focussed on collecting a range of views, reflecting the diversity within our nation. The report reflects this range of views, and the advice of the Panel to take the conversation a step further.

The conversation reflected our unique history, people and circumstances. Many people expressed a desire for a range of constitutional changes to reflect this uniqueness. Common themes woven through the topics of conversation included: a sense of belonging, fairness and justice, representation and participation, and checks and balances on power.

<sup>1</sup> Neil Grove & Hirini M. Mead, *Ngā Pēpeha a Ngā Tūpuna* (Wellington, New Zealand: Victoria University Press, 2001) p. 319

The conversations demonstrate people are still developing their ideas and want more information to support future conversations. Our key recommendations are to continue the conversation and to develop a national education strategy for education in schools and in the wider community. The purpose of the strategy would be to raise awareness and understanding of the constitution and to support a more informed conversation about constitutional issues.

The report signposts a way forward for future conversations about the constitution - a conversation that many within our nation are enthusiastic to continue.

We hope this report supports the people of Aotearoa New Zealand in having future conversations about our constitution.

Best regards



**Professor John Burrows**

Co-chair, Constitutional Advisory Panel

Heoi anō, nā



**Sir Tipene O'Regan**

Co-chair, Constitutional Advisory Panel

**Panel members**

**Peter Chin**

**Deborah Coddington**

**Hon Sir Michael Cullen**

**Hon John Luxton**

**Bernice Mene**

**Dr Leonie Pihama**

**Hinurewa Poutu**

**Professor Linda Tuhiwai Smith**

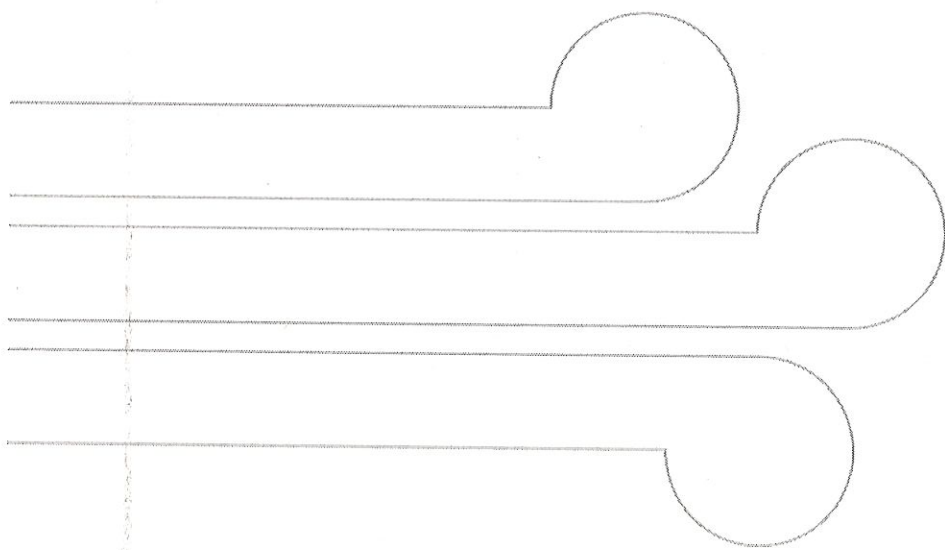
**Peter Tennent**

**Dr Ranginui Walker**



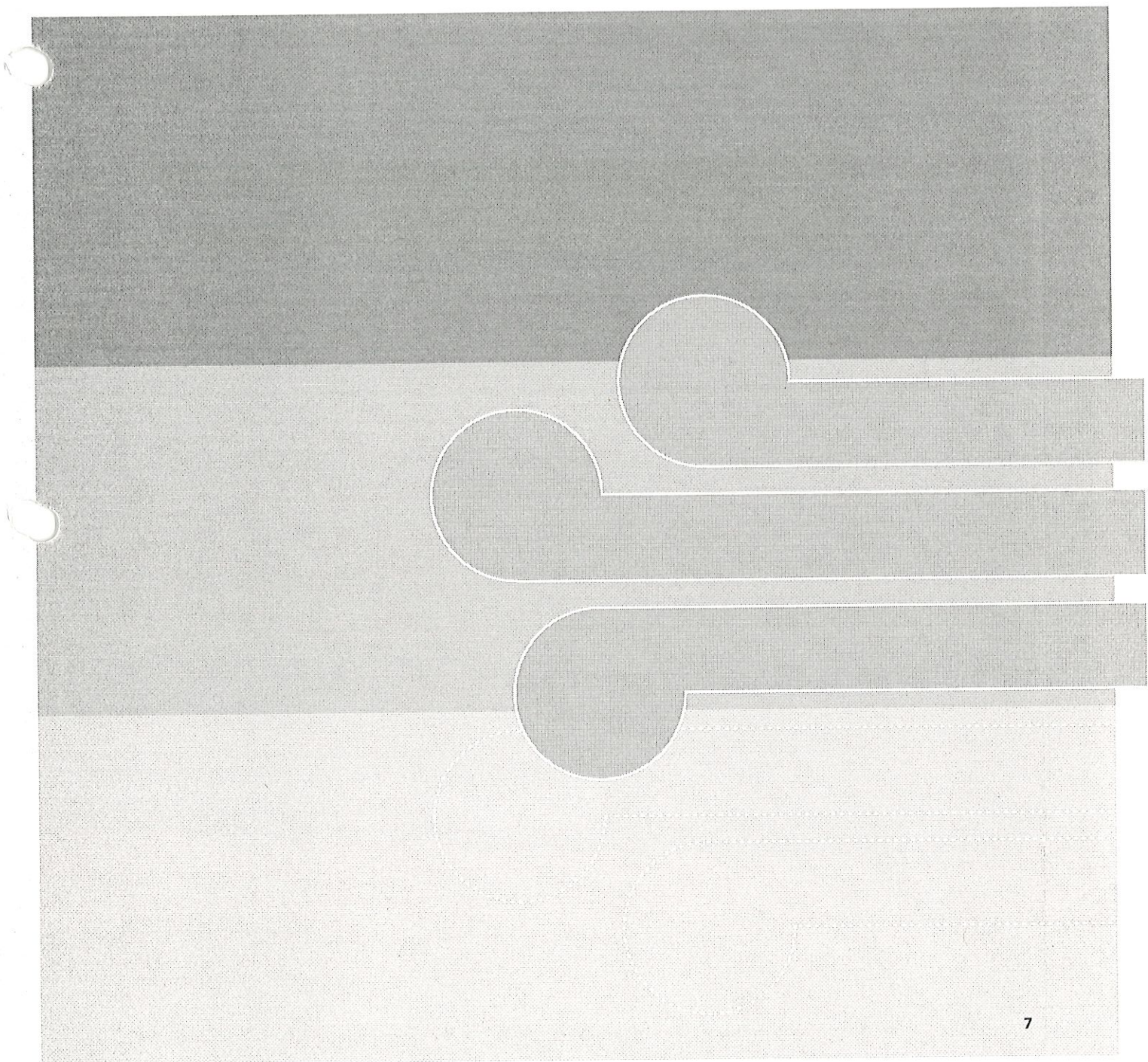
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# Overview

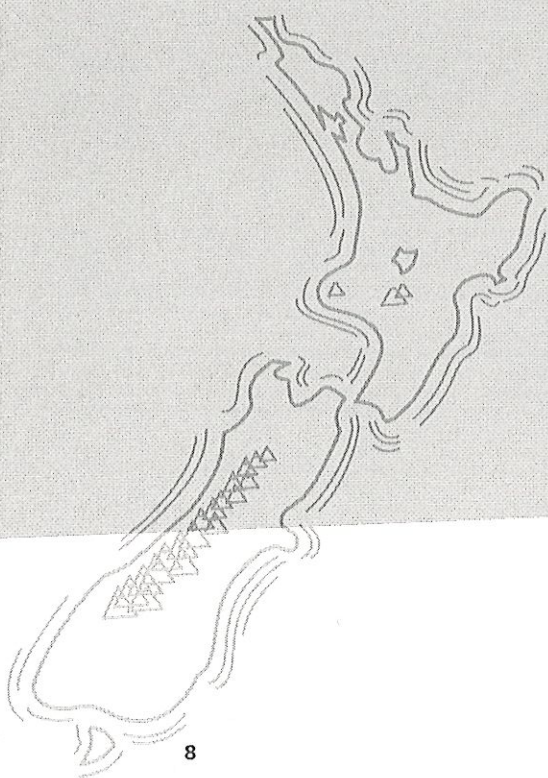




# Recommendations

## **The Panel recommends the Government:**

- invites and supports the people of Aotearoa New Zealand to continue the conversation about our constitutional arrangements
- develops a national strategy for civics and citizenship education in schools and in the community, including the unique role of the Treaty of Waitangi, te Tiriti o Waitangi, and assign responsibility for the implementation of the strategy
- note the implementation of the strategy could include the co-ordination of education activities; resource development, including resources for Māori medium schools; and professional development for teachers and the media.





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## Appendix E: Constitutional Development

### New Zealand Milestones and Overseas Examples

This appendix discusses further the notion of constitutional change. Examples of constitutional evolution in New Zealand are set out in chronological order in the first section. Several examples of other countries are also provided in the second section.

The trend is for public participation to be required to legitimate the process of constitutional change. If constitutions are indeed a 'human habitation' then it seems to follow that they must also make way for the public to determine which things need to change, and which ought to stay the same.<sup>74</sup> The same study, which found that the median lifespan of all national constitutions between 1789 and 2005 was 19 years, made the assertion that 'constitutions are more likely to endure when they are flexible, detailed, and able to induce interest groups to invest in their processes.'<sup>75</sup>

#### NEW ZEALAND

The story of New Zealand's constitutional development has been described as 'pragmatic evolution'.<sup>76</sup> The chronological list of statutes, court decisions, proposed legislation and various reviews tries to tell some of that story. The list is not exhaustive, and there is a much richer story still to tell. It does track, however, some of New Zealand's major constitutional milestones and the Panel hopes that it will be a useful resource in supporting future conversations.

#### Declaration of Independence (1835)

On 28 October 1835 James Busby, the British Government's official Resident in New Zealand, called a meeting at Waitangi. Thirty-five chiefs gathered to sign the Declaration of Independence of New Zealand which Busby had drafted, seeing it as a mark of Māori identity and a means to prevent other countries from making formal deals with Māori.<sup>77</sup> These chiefs came to be known as the Confederation of United Tribes of New Zealand.<sup>78</sup> By 1839 a total of 52 chiefs had signed the Declaration which was acknowledged by the British Government.

The Declaration consisted of four sections: the first proclaimed the Independent State of the United Tribes of New Zealand, the second stated that sovereign power in New Zealand resided exclusively in the chiefs, the third said that the chiefs would meet annually in autumn to pass laws, and the fourth asked the King of England to be the parent of their 'infant state' and to protect it from any threats to its independence.<sup>79</sup>

<sup>74</sup> R.Q. Quentin-Baxter, 'The Governor-General's constitutional discretions: an essay toward a redefinition' *Victoria University of Wellington Law Review*, Vol. 10, No. 4, 1980, p. 290.

<sup>75</sup> Zachary Elkins, Tom Ginsburg & James Melton, *The Endurance of National Constitutions* (New York: Cambridge University Press, 2009), p 89.

<sup>76</sup> Constitutional Arrangements Committee, '2005 Report of the Constitutional Arrangements Committee', p 37.

<sup>77</sup> The Waitangi Tribunal, *The Kaipara Report* (Wellington, New Zealand: Legislation Direct, 2006) p. 348; Ministry of Culture & Heritage, 'The 1835 Declaration of Independence', *New Zealand History Online* (<http://www.nzhistory.net.nz/>).

<sup>78</sup> Ministry of Culture & Heritage, 'The 1835 Declaration of Independence'.

<sup>79</sup> Matthew Palmer, 'Constitution - Constitutional Relationships Between the Crown and Māori', *Te Ara - The Encyclopedia of New Zealand* (<http://www.teara.govt.nz/en/zoomify/35910/the-declaration-of-independence-1835>); Ministry of Culture & Heritage, 'The 1835 Declaration of Independence'.

## Treaty of Waitangi (1840)

In 1839 the British Government decided to formally acquire sovereignty of New Zealand, appointing naval captain William Hobson as Consul.<sup>80</sup> The European population in New Zealand had been rising swiftly, and increased lawlessness threatened the safety of both Māori and European inhabitants.<sup>81</sup> The New Zealand Company was also looking to secure land in order to begin settlement.<sup>82</sup> British authorities felt they could no longer justify a non-interventionist policy.

The Secretary of State for the Colonies, Lord Normanby, wrote to Hobson on 14 August 1839 providing him with instructions and guidance. In his despatch he affirmed that New Zealand had been recognised as a sovereign state and that the rights of Māori were binding on the Crown.<sup>83</sup> Hobson was instructed to negotiate for the recognition of British sovereignty over New Zealand, and to formally establish a British colony.<sup>84</sup>

On 6 February 1840, Lieutenant-Governor William Hobson representing the British Crown, and some 40 chiefs representing Māori tribes of the northern parts of New Zealand, signed Te Tiriti o Waitangi, the Treaty of Waitangi.<sup>85</sup> Copies were then taken around the North Island and South Island for signatures. In the end 512 chiefs, including men and women, put pen to paper and agreed to the terms of the Treaty.

The Treaty of Waitangi is not one large sheet but a collection of nine documents. Eight of the nine sheets signed were written in te reo Māori. Only 39 chiefs signed the English text presented at Manukau Harbour.

The Treaty is generally regarded as New Zealand's founding document and influences the relationship between Māori and the Crown. Today, the Treaty is one of the factors taken into account when Parliament makes laws or when the courts interpret laws that refer to the Treaty. It also influences public decision-making when there is a specific reference to the Treaty in legislation.

## New South Wales Continuance Act 1840 (UK)

The Act authorised New Zealand to become a colony in its own right, separating it from New South Wales.<sup>86</sup> Britain's Colonial Office had decided in January 1839 that New Zealand should be acquired as British territory, and Letters Patent had been issued in June that year to extend the territory of New South Wales to include any part of New Zealand over which British sovereignty might be acquired.<sup>87</sup>

include in  
"Charter of  
1840"  
entry

<sup>80</sup> Claudia Orange, 'Treaty of Waitangi – Creating the Treaty of Waitangi', *Te Ara – The Encyclopedia of New Zealand* (<http://www.teara.govt.nz/en/treaty-of-waitangi/page-1>).

<sup>81</sup> Constitutional Arrangements Committee (2005) p 40.

<sup>82</sup> Claudia Orange, *An Illustrated History of the Treaty of Waitangi* (Wellington, NZ: Bridget Williams Books, 2004), p 18.

<sup>83</sup> K. A. Simpson, 'Hobson, William', *The Dictionary of New Zealand Biography*, *Te Ara – The Encyclopedia of New Zealand* (<http://www.teara.govt.nz/en/biographies/1h29/hobson-william>).

<sup>84</sup> Claudia Orange, 'Treaty of Waitangi – Creating the Treaty of Waitangi'; Ministry of Culture & Heritage, 'Making the Treaty of Waitangi: Drafting the Treaty', *New Zealand History Online* (<http://www.nzhistory.net.nz/politics/treaty/read-the-treaty/drafting-the-treaty>).

<sup>85</sup> Constitutional Arrangements Committee (2005) p 37; Claudia Orange (2004) pp 13-16; Ministry of Culture & Heritage, 'Treaty of Waitangi', *New Zealand History Online* (<http://www.nzhistory.net.nz/politics/treaty-of-waitangi>).

<sup>86</sup> Constitutional Arrangements Committee (2005) pp 41-42.

<sup>87</sup> Ibid.



### Letters Patent & Royal Instructions (1840)

Letters Patent of 16 November 1840, also known as the 'Charter for Erecting the Colony of New Zealand' brought the provisions of the New South Wales Continuance Act 1840 (UK) into force and led to the official proclamation of the new colony of New Zealand on 3 May 1841.<sup>88</sup> Letters Patent are issued by a monarch granting a right, monopoly, title or status to an individual or a body corporate.<sup>89</sup> In this instance they constituted an Executive Council and a Legislative Council for New Zealand.<sup>90</sup> The Executive Council was a small group consisting of the Colonial Secretary, the Attorney-General and the Colonial Treasurer.<sup>91</sup> Those three would also sit on the Legislative Council with the Governor and three Justices of the Peace.<sup>92</sup> The Letters Patent also empowered the Governor to constitute courts and appoint judges to administer justice in the colony.<sup>93</sup>

### The Supreme Court Ordinance 1841

An Ordinance for establishing a Supreme Court was passed by the Legislative Council on 22 December 1841, providing the beginnings of a domestic legal system.<sup>94</sup> On its creation the court would be comprised of one judge, called the Chief Justice of New Zealand, with further appointments to follow as advised.<sup>95</sup> It was modelled on the higher courts in the United Kingdom, except that it had a broader jurisdiction allowing it to preside over matters of equity as well as common law.<sup>96</sup>

### Resident Magistrates Court Ordinance 1846

This Ordinance was passed in 1846, establishing a lower court system 'for the more simple and speedy administration of Justice in the Colony of New Zealand.'<sup>97</sup> Resident magistrates could decide a limited range of criminal cases and civil claims which would ease the burden on New Zealand's two judges of the Supreme Court.<sup>98</sup>

### The Constitution Act 1846 (UK)

During the 1840s, settlers to New Zealand had increasingly been demanding a say in the affairs of government. The United Kingdom Parliament passed the New Zealand Constitution Act 1846 in answer to this pressure.<sup>99</sup> The Act established two provinces of New Zealand, New Ulster (the

<sup>88</sup> Ibid.

<sup>89</sup> Ministry of Culture & Heritage, 'History of the Governor-General', *New Zealand History Online* (<http://www.nzhistory.net.nz/politics/history-of-the-governor-general/patriated>).

<sup>90</sup> A. H. McLintock (ed.), 'New Zealand Becomes a Colony', Te Ara - *The Encyclopedia of New Zealand* (<http://www.teara.govt.nz/en/1966/history-constitutional/page-2>).

<sup>91</sup> Anthony H. Angelo, *Constitutional Law in New Zealand* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2011) p 16.

<sup>92</sup> Ibid.

<sup>93</sup> Philip A. Joseph & Thomas Joseph, 'Judicial System - History of the Courts', Te Ara - *The Encyclopedia of New Zealand* (<http://www.teara.govt.nz/en/judicial-system/page-4>).

<sup>94</sup> An Ordinance for establishing a Supreme Court, 22 December 1841.

<sup>95</sup> Ibid.

<sup>96</sup> Philip A. Joseph & Thomas Joseph, 'Judicial System - History of the Courts'.

<sup>97</sup> Resident Magistrates' Courts Ordinance 1846, 10 Vict 16.

<sup>98</sup> Courts of New Zealand, 'The History of the Court System', <http://www.courtsofnz.govt.nz/about/system/history/overview> last accessed 23 October 2013. [see footnote 53]

<sup>99</sup> A. H. McLintock (ed.) 'Early Constitutions', Te Ara - *The Encyclopedia of New Zealand* (<http://www.teara.govt.nz/en/1966/history-constitutional/page-3>).

North Island) and New Munster (the South Island), as well as a complex three-tiered system of government.<sup>100</sup> Under the Act there was provision for municipal corporations, provincial assemblies, and a General Assembly.<sup>101</sup> This would have been an extremely intricate system of government, but in the end it was never fully implemented. Governor George Grey suspended the Act's introduction, successfully arguing that a population of 13,000 settlers could not be trusted to govern in the interests of the more numerous Māori population.<sup>102</sup> Legislation was passed in 1848 delaying the implementation of the provisions of the Constitution Act 1846 relating to provincial and general assemblies.<sup>103</sup>

### The Constitution Act 1852 (UK)

Twelve years after the signing of the Treaty of Waitangi, the Constitution Act 1852 established a system of representative government in New Zealand. Governor George Grey, who had delayed the implementation of the Constitution Act 1846 passed by the British Parliament, was the driving force behind the legislation.<sup>104</sup>

The legislation created six provinces with their own elected superintendents and provincial councils. This consisted of a Legislative Council appointed by the Crown and a House of Representatives, which was to be elected every five years by males aged over 21 who owned, leased or rented property of a certain value.<sup>105</sup>

Section 71 of the Constitution Act 1852 provided for the creation of self-governing Māori districts.<sup>106</sup> Māori attempts to realise this autonomy, such as the Kingitanga and the Kotahitanga movements, were not recognised by the government with the result being that section 71 was never implemented.

Responsible government in New Zealand initially had several restrictions on it. Section 53 of the Act provided for the General Assembly to make laws for the 'peace, order, and good government of New Zealand', but only where those laws were not 'repugnant' to British law. The Governor, on behalf of the Crown, retained the power under section 58 of the Act to disallow legislation. Other sections of the Act also contained the power for the Governor to reserve legislation for the Queen's pleasure rather than assent to it themselves.<sup>107</sup> Section 56 contained a discretionary formulation of the reserve power, while section 68 obliged the Governor to reserve legislation which would amend the Constitution Act 1852 itself. The Governor would also retain control of native land sales and external affairs.<sup>108</sup>

<sup>100</sup> Wendy McGuinness & Diane White, *Nation Dates: Significant Events That Have Shaped the Nation of New Zealand* (Wellington, NZ: McGuinness Institute, 2012) p 23.

<sup>101</sup> Ibid.

<sup>102</sup> Ministry of Culture & Heritage, 'NZ Constitution Act Comes Into Force', New Zealand History Online (<http://www.nzhistory.net.nz/proclamation-of-1852-constitution-act>).

<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

<sup>106</sup> W. David McIntyre, 'Self-Government and Independence – Constitution Act 1852', *Te Ara – The Encyclopedia of New Zealand* (<http://www.teara.govt.nz/en/self-government-and-independence/page-2>).

<sup>107</sup> Philip A. Joseph, *Constitutional & Administrative Law in New Zealand* (Third Edn) (Wellington, NZ: Brookers Ltd, 2007) p 114.

<sup>108</sup> W. David McIntyre, 'Self-Government and Independence – Constitution Act 1852', Joseph (2007) p 114.



### ✓ **First general election held (1853)**

Having passed the Constitution Act 1852, the institutional framework for elections was properly in place. Between 14 July and 1 October in 1853, New Zealand's first general election took place. Thirty-seven members were elected to the General Assembly, which sat for the first time on 24 May 1854.<sup>109</sup>

### **Select Committee on the Constitution Act (1856)**

New Zealand's Constitution Act 1852 had not long been in place before it was placed under review. On 9 May 1856 it was moved that a select committee 'be appointed to consider and report as to the changes which it may be desirable to make in the Constitution Act, and the best mode of effecting the same.'<sup>110</sup>

The select committee abstained from considering many issues connected to the Constitution Act 1852, but did make some recommendations concerning the regulation of elections. The first of their three main recommendations was to reform the provisions for the making up of the electoral roll which was, in their judgement, 'far from complete or accurate.'<sup>111</sup> Secondly, they recommended the introduction of voice voting instead of written voting, in order to protect against impersonation. Thirdly, a Bill titled *Purity of Elections* was appended to the select committee's report aimed at preventing bribery but it lapsed in the Legislative Council.<sup>112</sup>

### **New Zealand Constitution Amendment Act 1857 (UK)**

The Act repealed section 68 of the Constitution Act 1852, which obliged the Governor to reserve legislation for the Queen's pleasure that would amend the Constitution Act.<sup>113</sup> The General Assembly was now able to amend or repeal all but 21 sections of the Act, although the Governor retained their discretionary powers of reservation and disallowance under sections 56 and 58.<sup>114</sup>

### **English Laws Act 1858**

This law was passed to give clarification to the status of English common and statute law in New Zealand.<sup>115</sup> It stated that all English law as existing on 14 January 1840 and applicable to this country's context was inherited by New Zealand. The reservation about the applicability of laws to the New Zealand context created ongoing confusion, which would last until the passage of the Imperial Laws Application Act 1988. The Act enumerated that specific laws, such as the Magna Carta 1297 and the Act of Settlement 1701, were incorporated into New Zealand law.<sup>116</sup>

<sup>109</sup> Ministry of Culture & Heritage, 'First Sitting, 1854 - House of Representatives', *New Zealand History Online* (<http://www.nzhistory.net.nz/politics/history-of-parliament/first-sitting-1854>).

<sup>110</sup> Select Committee on the Constitution Act, 'Report of the Select Committee on the Constitution Act' (1856) AJHR D-No.28.

<sup>111</sup> Ibid.

<sup>112</sup> Ibid.

<sup>113</sup> Joseph (2007) p 114.

<sup>114</sup> Ibid.

<sup>115</sup> Lewis Evans, 'Law and the Economy - Setting the Framework', *Te Ara - The Encyclopedia of New Zealand* (<http://www.teara.govt.nz/en/photograph/25612/english-laws-act-1858>).

<sup>116</sup> McGuinness & White (2012) p 27.



### ✓ Kingitanga and the first Māori King (1858)

The Kingitanga movement is an enduring Māori political movement which emerged in the early 1850s and led to the crowning of King Potatau Te Wherowhero in 1858. Tamihana Te Rauparaha and Matene Te Whiwhi introduced the idea of a single Māori nation in 1852, and although the idea did not have the support of all iwi it did gather momentum by the late 1850s.<sup>117</sup>

### ✓ Native Land Act 1862

The Act waived the Crown's right of pre-emption and established the Native Land Court to decide the ownership of Māori land.<sup>118</sup> The Act's purpose was to attempt to formally define titles to Māori land in terms of private ownership in order to more closely assimilate ownership practices with British law. The courts were always to be presided over by a European magistrate, but otherwise left the details of membership up to the Governor.<sup>119</sup> Due to the ongoing New Zealand wars the Act was not fully implemented.<sup>120</sup> Courts operated primarily in Northland, along with a select few other areas.<sup>121</sup>

### Establishment of the Court of Appeal (1862)

Before the Court of Appeal was established, appeals from the then Supreme Court (now the High Court) were taken to the Privy Council in London.<sup>122</sup> However, this was beyond the financial reach of many people and so it was determined that a new appellate court was necessary. Originally there were no permanent sitting judges on the Court of Appeal. Justices from the Supreme Court would hear appeals on a rotational basis.<sup>123</sup>

### Colonial Laws Validity Act 1865 (UK)

The Act was passed by the British Parliament to 'remove Doubts as to the Validity of Colonial laws'. It sought to remove inconsistencies between colonial and imperial (British) legislation by providing that any law properly passed by colonial legislatures was to have full effect unless it was inconsistent with British legislation.<sup>124</sup> This confirmed that the New Zealand Parliament had the power to make its own laws, but only in so far as those laws were consistent with British law.

### ✓ Native Lands Act 1865

The Act was a much more comprehensive piece of legislation than the 1862 Act it replaced. In place of the slightly ad hoc appointment of courts, it established a formal court of record that would be presided over by the principal drafter of the Act, Francis Dart Fenton, as the first Chief Justice of the Court.<sup>125</sup>

The intent of the Act, however, remained much the same. In the preamble to the legislation it made it clear that its purpose was to consolidate laws related to land governed by Māori proprietary customs, determine who the owners were under those customs, and to 'encourage the extinction of such proprietary customs' in favour of Crown title.<sup>126</sup>

<sup>117</sup> Ibid.

<sup>118</sup> Ranginui Walker, *Ka Whawhai Tonu Matou: Struggle Without End* (Auckland, New Zealand: Penguin Books, 1990), p 135.

<sup>119</sup> Native Lands Act 1862, s. 4, 5 & 6.

<sup>120</sup> Richard Boast, 'Te Tango Whenua – Māori Land Alienation – Establishing the Native Land Court', *Te Ara – The Encyclopedia of New Zealand* (<http://www.teara.govt.nz/en/te-tango-whenua-maori-land-alienation/page-5>).

<sup>121</sup> Ibid.

<sup>122</sup> Courts of New Zealand, 'The History of the Court of Appeal' (<http://www.courtsofnz.govt.nz/about/appeal/history>).

<sup>123</sup> Ministry of Justice, 'New Zealand Court of Appeal' (<http://www.justice.govt.nz/courts/court-of-appeal>).

<sup>124</sup> Joseph (2007) pp 115-116.

<sup>125</sup> Richard Boast, 'Te Tango Whenua – Māori Land Alienation – Establishing the Native Land Court'.

<sup>126</sup> The Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim* (Wellington, New Zealand: Brooker & Friend Ltd, 1987).

### ✓ **Māori Representation Act 1867**

In the 19<sup>th</sup> century, the right to vote in New Zealand was based on individual land ownership and most Māori did not qualify. To counteract their effective exclusion from the political process, Māori sought to gain political representation in Parliament as well as advocating for political autonomy. In response to this pressure from Māori, and also from the Colonial Office in England, four Māori seats were established by Parliament under the Māori Representation Act 1867.

### ✓ **Regulation of Elections Act 1870**

Since 1858 New Zealand had used a verbal voting system. Each voter was required to state the name of a candidate out loud to a polling official, who would record the vote in a poll book that was then signed by the voter.<sup>127</sup> The Act reversed this by introducing the secret ballot which provided that ballots would be printed, each voter would record their vote in a private booth, and then they would deposit the ballot in a secure ballot box. Introduction of the secret ballot was seen as an important step in reducing undue influence over people's votes as well as in treating voting as a right rather than a matter of public trust or privilege.

### ✓ **Abolition of the Provinces Act 1875**

The Act was a major constitutional stepping stone for New Zealand where the power of central government greatly increased. Under the Constitution Act 1852, the six provincial governments had full legislative powers, forming a quasi-federal system of government.<sup>128</sup> There were some exceptions to their law-making powers including in the spheres of justice, customs, postal services, and the disposal of Crown land.<sup>129</sup>

Premier Julius Vogel was the driving force behind the change. Originally a strong supporter of the provinces he gradually changed his mind, believing that New Zealand required strong central government, largely to help further his infrastructural projects.<sup>130</sup> The Act, 'notwithstanding a very strong and persistent opposition', passed the House of Representatives 52 votes to 17 and the Legislative Council by 23 votes to four.<sup>131</sup> Most of the Act did not come into force until 1 November 1876 in order to allow for the upcoming general election to act as something of a ratification for the decision.<sup>132</sup>

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<sup>127</sup> Ministry of Culture & Heritage, 'Cleaning Up Elections', *New Zealand History Online* (<http://www.nzhistory.net.nz/politics/election-day/under-the-influence>).

<sup>128</sup> A. H. McIntock (ed.), 'Foundation of System', *Te Ara - The Encyclopedia of New Zealand* (<http://www.teara.govt.nz/en/1966/provinces-and-provincial-districts>).

<sup>129</sup> Ibid.

<sup>130</sup> Ministry of Culture & Heritage, 'New Zealand in 1870 - the Vogel Era', *New Zealand History Online* (<http://www.nzhistory.net.nz/politics/the-vogel-era/the-1870s>); Ministry of Culture & Heritage, 'Julius Vogel', *New Zealand History Online* (<http://www.nzhistory.net.nz/people/julius-vogel>).

<sup>131</sup> Governor the Most Hon. The Marquis of Normanby, 'Abolition of the Provinces Act 1875' (1876) AJHR A-2A

<sup>132</sup> A. H. McIntock (ed.), 'Foundation of System', *Te Ara - The Encyclopedia of New Zealand* (<http://www.teara.govt.nz/en/1966/provinces-and-provincial-districts>)



### ✓ Māori seats extended indefinitely (1876)

1876 provided lots of debate on the future of Māori representation in Parliament. A Bill extending the legislative provision for the Māori seats indefinitely was proposed and defeated and 400 members of the Ngāti Kahungunu iwi petitioned Parliament on the issue, effectively calling for proportional representation.<sup>133</sup> Later in the year, the provision for Māori seats in the Māori Representation Act 1867 was extended indefinitely, largely due to fears amongst European members that abolishing the seats would mean more Māori voting in the general electorates, potentially lessening those members' chances of re-election.<sup>134</sup> From this point, the statutory rules concerning the Māori seats would not be substantively altered for almost a century.

### Public Works Act 1876

*include?*  
The common law principle of due process for the taking of land dates back to at least the Magna Carta 1297, which states that 'No free man shall be ... disseised of his freehold or liberties or free customs but ... by the law of the land.'<sup>135</sup> The Public Works Act 1876 was the first comprehensive, central source of law affecting the taking of lands for public works.<sup>136</sup> It was also intended to give road boards more direct power.<sup>137</sup> Under section 40, land not needed for the purposes for which it was taken had to be offered back to the original owners, although the Crown often failed to apply this section.<sup>138</sup>

### ✓ Wi Parata v Bishop of Wellington (1877)

This case is a famous legal dispute about one piece of land on the Whitireia peninsula near Porirua which resulted in a Ngāti Toa chief, Wiremu Parata Te Kakakura, taking the Bishop of Wellington, the Rt Rev. Octavius Hadfield, to court in 1877. While the facts of the case are not well known, Chief Justice Prendergast's dismissal of the Treaty of Waitangi as 'a simple nullity' made the decision a landmark in New Zealand legal history.<sup>139</sup>

The Treaty, he believed, promised more than it could deliver, in so far as it purported to cede sovereignty of New Zealand to the British Crown. Māori tribes, he further noted, did not constitute a state capable of exercising rights of sovereignty and of entering into international treaties.

### ✓ Qualification of Electors Act 1879

This legislation was a step towards universal franchise, extending the ability to vote to all adult British male citizens aged 21 years or over, after 12 months' residence in New Zealand or six months' ownership of freehold property. The Act repealed the Miners Franchise Act 1860 and the Lodgers

<sup>133</sup> M. P. K. Sorrenson, 'A History of Māori Representation in Parliament', in *Report of the Royal Commission on the Electoral System: Towards a Better Democracy*, The Royal Commission on the Electoral System 1986, Appendix B, p B-24; Parliamentary Library (2003), p 16.

<sup>134</sup> Ibid, p 10.

<sup>135</sup> Magna Carta 1297, s. 29 (<http://legislation.govt.nz/act/imperial/1297/0029/latest/DLM10929.html>); Russell Davies, 'History of Public Works Acts in New Zealand, Including Compensation and Offer-Back Provisions, July 2000 (<http://www.nztopo50.co.nz/docs/miscellaneous/pwahistory.pdf>) p 7.

<sup>136</sup> Davies (2000) p 7.

<sup>137</sup> Ibid.

<sup>138</sup> Rāwiri Taonui, 'Te Ture – Māori and Legislation – Administering Māori Land', *Te Ara – The Encyclopedia of New Zealand* (<http://www.teara.govt.nz/en/te-ture-maori-and-legislation/page-4>).

<sup>139</sup> David V. Williams, *A Simple Nullity? The Wi Parata Case in New Zealand Law and History* (Auckland, NZ: Auckland University Press, 2011) pp 1-2 (<http://www.press.auckland.ac.nz/webdav/site/press/shared/all-books/pdfs/2011/williams-simplenullity-websample.pdf>).

Franchise Act 1875 which had extended the franchise to male miners and to ratepayers who had lived in houses valued at more than 10 pounds sterling a year for more than 12 months.<sup>140</sup>

In 1878 two alternative Bills were presented to Parliament seeking to simplify the complex system of different franchises which had proved unworkable.<sup>141</sup> Both Bills failed to pass, but when there was a change in government in 1879 Frederick Whitaker, who had proposed one of the initial Bills, managed to have the Act passed in December that year.<sup>142</sup> There was an immediate impact, with the level of registered voters increasing from 82,271 (around 71% of the adult male population) in 1879 to 120,972 (around 91%) at the next election in 1881.<sup>143</sup>

### ✓ Triennial Parliaments Act 1879

The Act amended the Constitution Act 1852 and introduced the three-year parliamentary term to New Zealand. The Constitution Act 1852 had fixed the maximum term of Parliament at five years, although in practice the terms had been more variable. Abolition of the provinces in 1875 had created some concern over the power of central government, with a reduction in the maximum term length considered an appropriate counter-measure.<sup>144</sup>

### ✓ Representation Act 1887

The Act established a Representation Commission to review New Zealand's electoral district boundaries. The duty of the Commission was to divide the colony into 91 electorates, exclusive of the four Māori seats elected under the Māori Representation Act 1867.<sup>145</sup> Each electorate was required to contain no more or less than 750 people than the average quota.<sup>146</sup>

### Royal Instructions to Governor (1892)

Pursuant to the Constitution Act 1852 the Royal Instructions to the Governor were altered in 1892. The new version restricted the powers of reserving legislation, while still preserving several grounds for the Governor-General to reserve assent for the Sovereign.<sup>147</sup> The grounds for reserving legislation were now limited primarily to imperial matters, with practically all local issues falling to the Governor-General to assent to on the advice of Ministers.

### ✓ Opening of the Kotahitanga Parliament (1892)

During the 1890s the political aspirations of many Māori crystallised into the formation of a Māori Parliament,<sup>148</sup> which consisted of 96 members representing eight districts, six in the

<sup>140</sup> Angelo (2011) p 60; Auckland Libraries, 'New Zealand Voting Rights Timelines' (<http://www.aucklandlibraries.govt.nz/EN/heritage/familyhistory/nzvoting/Pages/nzvoting.aspx>); The Lodgers' Franchise Act 1875, s. 1-3 (<http://paperspast.natlib.govt.nz/cgi-bin/paperspast?a=d&d=ODT18780322.2.17>).

<sup>141</sup> Neill Atkinson, 'Voting Rights - Male Suffrage', *Te Ara - The Encyclopedia of New Zealand* (<http://www.teara.govt.nz/en/voting-rights/page-3>).

<sup>142</sup> Ibid.

<sup>143</sup> Ibid.

<sup>144</sup> Royal Commission on the Electoral System, p 155.

<sup>145</sup> Representation Act 1887, s. 3(1)

<sup>146</sup> Ibid, s. 3(5)

<sup>147</sup> Earl of Onslow 'Colonial Secretary, Royal Instructions to Governor, 26 March 1892' (1893) AJHR A2 at 2; John E. Martin, 'Refusal of Assent - A Hidden Element of the Constitutional History in New Zealand', *New Zealand Parliament* (<http://www.parliament.nz/en-nz/about-parliament/how-parliament-works/fact-sheets/OOPLibFactsheetRefusalAssent1/refusal-of-assent-a-hidden-element-of-constitutional>).

<sup>148</sup> Ranginui Walker, *Ka Whawhai Tonu Matou: Struggle Without End* (Auckland, NZ: Penguin Books, 1990) p 165.

Same as  
'Legislative  
Council' and  
House of  
Representatives  
'Bage'?



North Island and two in the South Island. The establishment of the parliament was said to be justified by the Declaration of Independence, the Treaty of Waitangi, and section 71 of the New Zealand Constitution Act 1852.<sup>149</sup>

### **Electoral Act 1893**

The passing of the Act extended the right to vote in parliamentary elections to women, and gave New Zealand fully representative government. This event made New Zealand the first self-governing nation to enfranchise all adult women.

During the late 19<sup>th</sup> century a broad movement for women's political rights, including the right to vote, had developed in Britain and its colonies as well as the United States and in northern Europe.<sup>150</sup> The campaign in New Zealand was largely driven by the local branch of the American-based Women's Christian Temperance Movement (WCTU) which was established in New Zealand in 1885.<sup>151</sup> Kate Sheppard, who headed the franchise and legislation department of the WCTU in this country, emerged as an iconic figure in the campaign for women's suffrage. Their efforts on petitions calling for women's suffrage helped increase signatories from 9,000 in 1891, to 20,000 in 1892, to nearly 32,000 in 1893.<sup>152</sup>

From 1887 five Bills promoting voting rights for women went to Parliament.<sup>153</sup> The first two failed to pass through the House of Representatives, while the 1891 and 1892 Bills passed through it but were defeated in the Legislative Council.<sup>154</sup> Finally, on 8 September 1893 the Electoral Bill was passed by the Council (20 votes to 18) and women, including Māori, achieved the right to vote.<sup>155</sup> With only six weeks until the next election 109,461 women enrolled to vote and 90,290 turned out to do so, in what was described as the 'best-conducted and most orderly' election ever held.<sup>156</sup>

### **Māori women gain right to vote and stand for Te Kotahitanga (1897)**

Many Māori women had been active in the suffrage movements of the late 19<sup>th</sup> century. As they fought alongside organisations such as the WCTU for the right to vote for the House of Representatives, they also sought the right to vote for the Māori parliament, Te Kotahitanga.<sup>157</sup>

Women had attended Te Kotahitanga in roughly equal numbers to men, but were initially unable to vote or stand as candidates for the parliament. After less than a year after the opening of Te Kotahitanga, a motion was put to it seeking to grant women the right to vote. This initial motion was abandoned, but women gained the right to vote and stand in 1897.<sup>158</sup>

<sup>149</sup> Constitutional Arrangements Committee (2005) p 50.

<sup>150</sup> Neill Atkinson, 'Voting Rights - Votes for Women', *Te Ara - The Encyclopedia of New Zealand* (<http://www.teara.govt.nz/en/voting-rights/page-4>).

<sup>151</sup> Ministry of Culture & Heritage, 'Brief History - Women and the Vote', *New Zealand History Online* (<http://www.nzhistory.net.nz/politics/womens-suffrage/brief-history>); Neill Atkinson, 'Voting Rights - Votes for Women'.

<sup>152</sup> Neill Atkinson, 'Voting Rights - Votes for Women'.

<sup>153</sup> Ibid.

<sup>154</sup> Ibid.

<sup>155</sup> Ibid.

<sup>156</sup> Ibid; Ministry of Culture & Heritage, 'Brief History - Women and the Vote'.

<sup>157</sup> Ministry of Women's Affairs, 'Māori Women and the Vote' (<http://mwa.govt.nz/m%C4%81ori-women-and-vote>).

<sup>158</sup> Leonie Pihama, 'Tihei Mauri Ora: Honouring Our Voices. Mana Wahine as a Kaupapa Maori Theoretical Framework', *University of Auckland*, 2001, p 235.



## Representation Act 1900

The Act increased the number of seats in the General Assembly to 76, so including the Māori seats this meant total membership of 80 seats. The Act also provided that a Commission would determine how many of the six additional seats would be allocated to the North and South Islands respectively.

## Māori Councils Act 1900 and Māori Land Administration Act 1900

The Māori Councils Act 1900 established a form of local government for Māori in response to ongoing conversations concerning the Kingitanga and Kotahitanga movements. The District Māori Councils were empowered particularly to control the 'health and welfare and moral well-being' of Māori. The Councils were to operate at a regional level, with an ability to pass bylaws within their boundaries, which were designed to reflect tribal boundaries.<sup>159</sup>

Meanwhile the Māori Land Administration Act 1900 created a Māori Land Administration Department and several Māori Land Councils.<sup>160</sup> The Act allowed for Māori landowners to form committees to administer their land, and for the Land Councils to recognise some areas of Māori land as papakāinga blocks, which could never be sold.<sup>161</sup>

District Māori Councils and Māori Land Councils were under-resourced and lacked the full support of either Māori or settlers.<sup>162</sup> Both types of Councils have been viewed variously as an effort to counteract Māori exclusion from political processes, and an attempt to counteract pan-Māori movements such as the Kotahitanga Parliament and work towards assimilation.<sup>163</sup>



## Dominion status acquired (1907)

Following the 1907 Imperial Conference, the New Zealand House of Representatives passed a motion respectfully requesting that His Majesty the King 'take such steps as he may consider necessary' to change the designation of New Zealand from the 'Colony of New Zealand' to the 'Dominion of New Zealand'.

A Royal Proclamation granting New Zealand Dominion status was issued on 9 September 1907 and took effect on 26 September 1907. Complete autonomy in foreign affairs was the only substantive feature of independence that the proclamation did not grant to New Zealand.<sup>164</sup>

<sup>159</sup> Richard S. Hill, *State Authority, Indigenous Autonomy: Crown-Māori Relations in New Zealand/Aotearoa 1900-1950* (Wellington, NZ: Victoria University Press, 2004) p 50.

<sup>160</sup> Mere Whaanga, 'Te Kooti Whenua – Māori Land Court – The 'Taihoa' Policy, 1900-1920', *Te Ara – The Encyclopedia of New Zealand* (<http://www.teara.govt.nz/en/te-kooti-whenua-maori-land-court/page-4>).

<sup>161</sup> Constitutional Arrangements Committee (2005) p 52; Mere Whaanga, 'Te Kooti Whenua – Māori Land Court – The 'Taihoa' Policy, 1900-1920'.

<sup>162</sup> Ibid.

<sup>163</sup> <http://nzetc.victoria.ac.nz/tm/scholarly/tei-HillStat-t1-body-d2-d4.html>; Nan Seuffert, *Jurisprudence of National Identity: Kaleidoscopes of Imperialism and Globalisation from Aotearoa New Zealand* (Burlington, UK: Ashgate Pub, 2006) pp 65-67; Tina R. Makereti Dahlberg, 'Māori Representation in Parliament and Tino Rangatiratanga', *He Pukenga Kōrero*, Vol. 2, No. 1, 1996, p 64.

<sup>164</sup> Parliamentary Library, 'New Zealand Sovereignty: 1857, 1907, 1947, or 1987?', *Parliamentary Library Research Paper*, August 2007, p 5 ([http://www.parliament.nz/NR/rdonlyres/54A39A34-32AA-4C23-AD7B-73BAB5624651/147179/NewZealandSovereignty185719071947or1987\\_3.pdf](http://www.parliament.nz/NR/rdonlyres/54A39A34-32AA-4C23-AD7B-73BAB5624651/147179/NewZealandSovereignty185719071947or1987_3.pdf)); Peter Marshall, 'The Balfour Formula and the Evolution of the Commonwealth', *The Round Table*, Vol. 361, 2001, p 542.



✓ (in Chapter 6)

### Commissions of Inquiry Act 1908

The Act sets out the powers and functions of commissions of inquiry in New Zealand. Statutory commissions of inquiry were originally established under the Commissioners' Powers Act 1867, which was extended in 1872 and replaced in 1903.<sup>165</sup> The 1908 Act retained much of the framework of the 1903 legislation but consolidated it with amendments made in 1905.<sup>166</sup>

Commissions of inquiry are appointed by the Governor-General through an Order in Council and may inquire into the administration of the Government, the working of any existing law, the necessity or expediency of any legislation, the conduct of any officer of the Crown, any disaster or accident putting members of the public in danger and, since 1970, any other matter of public importance.<sup>167</sup> Although their findings are not binding on government, they are the most powerful and prestigious means of inquiry into matters of public importance and have contributed to significant policy changes on several occasions.<sup>168</sup>

### Public Service Act 1912

Service or services?

The Act created the broad framework for the public service which would last until the major reforms of the 1980s.<sup>169</sup> It established a unified, politically neutral public service with security of tenure and a pension on retirement.<sup>170</sup> Four distinct roles of the public service were also established: administrative, professional, general and clerical.<sup>171</sup> Public servants became the responsibility of a statutory officer, the Public Service Commissioner (now the State Services Commissioner), who was given authority over the whole public service.<sup>172</sup>

Prior to the Act, there had often been substantial interference in the public sector by members of the governing party and serious concerns about the efficiency of the service.<sup>173</sup> In 1866 a Royal Commission was appointed to inquire into the efficiency of the public service, which had led to the never enforced Civil Service Act 1866. Another Royal Commission was appointed in 1880, which also examined the efficiency of the public service, and yet again did not produce a comprehensive drive for change. Only when a third Royal Commission was established in 1912 to inquire into and report on the unclassified departments did major reform occur. This Royal Commission had the benefit of operating in an environment where the public service was becoming larger and gradually more efficient, while public and political opinion had shifted to be much more supportive of a comprehensive reform package.<sup>174</sup>

<sup>165</sup> New Zealand Law Commission, 'A New Inquiries Act', *New Zealand Law Commission Report 102*, May 2008, p 29.

<sup>166</sup> Ibid.

<sup>167</sup> Ibid.

<sup>168</sup> Ibid, p 4.

<sup>169</sup> Public Service Association, 'A Brief History of the PSA: 1913-2011' ([http://psa.org.nz/Libraries/PSA\\_Document\\_2/PSA\\_History\\_1913-2013.sflb.ashx](http://psa.org.nz/Libraries/PSA_Document_2/PSA_History_1913-2013.sflb.ashx)) p 1.

<sup>170</sup> Ibid.

<sup>171</sup> Ibid.

<sup>172</sup> Ministry of Culture & Heritage, 'Public Service Act Passed into Law', *New Zealand History Online* (<http://www.nzhistory.net.nz/page/public-service-act-passed-law>).

<sup>173</sup> Ibid.

<sup>174</sup> A. H. McLintock (ed.), 'Staffing the State Services', *Te Ara – the Encyclopedia of New Zealand* (<http://www.teara.govt.nz/en/1966/government-administrative-system/page-9>).

### Letters Patent Constituting the Office of the Governor-General (1917)

Letters Patent dated 11 May 1917 reconstituted the Office of the Governor as the Governor-General to reflect New Zealand's increasing self-governance.<sup>175</sup> This change largely brought around the modern role of the Governor-General and would be the last change of substance to the office until 1983 when the office was patriated even further. Patriation is a process of constitutional change where a country gains or regains offices and powers which make it more independent.

### Ratana movement begins (1918)

The Ratana movement was founded by Tahupotiki Wiremu Ratana who gained a reputation as a visionary and a faith healer.<sup>176</sup> The movement gained momentum throughout the 1920s and developed a distinct political dimension to add to its original religious focus. In a by-election in 1932 a Ratana candidate, Eruera Tirikatene, won one of the four Māori seats in the House of Representatives.<sup>177</sup> He was joined in 1935 by Haami Tokouru Rātana. By 1943 Ratana candidates held each of the four Māori seats available at the time.<sup>178</sup> Their alliance with the Labour party, cemented in 1936 when Wiremu Ratana presented Prime Minister Michael Joseph Savage with a series of gifts symbolising their relationship, meant that they exercised significant influence over national politics and Māori constitutional dialogue from that time.<sup>179</sup>

### Women's Parliamentary Rights Act 1919

This short piece of legislation made it possible for women to stand as candidates to become MPs. Three women contested seats in 1919 but none were successful.<sup>180</sup> It would not be until 1933 that a woman would be elected to the House of Representatives, when the Labour party's Elizabeth McCombs won a by-election in the seat of Lyttelton.<sup>181</sup>

### Electoral Act 1927

The Act was the first consolidation of electoral laws in New Zealand. Before 1927 electoral law had been contained in a variety of electoral legislation.

### Public Safety Conservation Act 1932

The Act is often cited as an example of one of the largest delegations of authority from Parliament to the Executive branch of government. The Act gave Cabinet the power to declare a state of emergency and make regulations it deemed necessary to ensure public safety during that time.<sup>182</sup> Reasons for this change included Depression-induced riots and two major earthquakes in 1929 and 1931.<sup>183</sup> These powers were used for the first time at the outbreak of World War II and, more

<sup>175</sup> Constitutional Arrangements Committee (2005) p 54.

<sup>176</sup> McGuinness & White (2012) p 68.

<sup>177</sup> Claudia Orange (2004) pp 123-124.

<sup>178</sup> McGuinness & White (2012) p 68.

<sup>179</sup> Claudia Orange (2004) pp 123-124.

<sup>180</sup> Ministry of Culture & Heritage, 'Women's Suffrage Milestones - Women and the Vote', *New Zealand History Online* (<http://www.nzhistory.net.nz/politics/womens-suffrage/suffrage-milestones>).

<sup>181</sup> Ibid.

<sup>182</sup> Matthew Palmer, 'Constitution - The Rise and Bridling of Executive Power', *Te Ara - The Encyclopedia of New Zealand* (<http://www.teara.govt.nz/en/document/35921/public-safety-conservation-act-repeal-act-1987>).

<sup>183</sup> Ministry of Civil Defence, 'Civil Defence in New Zealand: A Short History' ([http://www.civildefence.govt.nz/memwebsite.nsf/Files/Short%20Historyof%20Civil%20Defence/\\$file/Short%20Historyof%20Civil%20Defence.pdf](http://www.civildefence.govt.nz/memwebsite.nsf/Files/Short%20Historyof%20Civil%20Defence/$file/Short%20Historyof%20Civil%20Defence.pdf)) p 3.



controversially, during the waterfront dispute of 1951.<sup>184</sup> When negotiations between shipping companies and the waterside workers broke down, the Government declared a state of emergency and granted itself very broad powers, including the ability to deregister unions.<sup>185</sup>

#### ✓ **Electoral Amendment Act 1934**

The Electoral Amendment Act 1934 amended the Electoral Act 1927 by extending the parliamentary term to four years.<sup>186</sup>

#### ✓ **Electoral Amendment Act 1937**

The Electoral Amendment Act 1937 repealed the amendments to increase the parliamentary term and restored the three-year electoral cycle.<sup>187</sup> It also provided for Māori to vote by secret ballot if they could answer a series of questions to ensure their eligibility.<sup>188</sup> Secret ballot voting had been in place since 1870 in non-Māori seats. The change had an immediate impact, with an 18.3% increase in the turnout for the Māori seats in the 1938 election than in 1935.

#### **Te Heuheu Tukino v Aotea District Māori Land Board (1941)**

This is a well-known case concerning a commercial agreement. The Privy Council ruled that the Treaty of Waitangi was enforceable only when referred to in legislation. This was seen as an affirmation of a long-held position, with the Law Lords saying: 'It is well settled that any rights purporting to be conferred by such a treaty of cession cannot be enforced in the Courts, except in so far as they have been incorporated in the municipal law.'<sup>189</sup> This remains the current position in New Zealand's legal system.

#### ✓ **New Zealand joins the United Nations (1945)**

New Zealand was a foundation member when the United Nations was formally established at San Francisco in 1945.<sup>190</sup> Despite its small size, this country had played a valuable role in the establishment of the UN, with Prime Minister Peter Fraser devoting a substantial amount of attention to it. New Zealand's work with the UN represents its commitment to the principles of multilateralism, collective security, the international rule of law and dispute settlement.<sup>191</sup>

#### **United Nations Act 1946**

The Act gave the Governor-General, by Order in Council, the power to make regulations bringing into force Article 41 of the Charter of the United Nations. Article 41 provides that the United Nations Security Council 'may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the members of the United Nations to

<sup>184</sup> Matthew Palmer, 'Constitution – The Rise and Bridling of Executive Power'.

<sup>185</sup> J.F. Northey, 'The Dissolution of the Parliaments of Australia and New Zealand', *The University of Toronto Law Journal*, Vol. 9, No. 2, 1952, p 296.

<sup>186</sup> Electoral Amendment Act 1934.

<sup>187</sup> Electoral Amendment Act 1937.

<sup>188</sup> Ibid; Parliamentary Library, 'The Origins of the Māori Seats', *Parliamentary Library Research Paper*, November 2003 (updated May 2009) p 13.

<sup>189</sup> *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590.

<sup>190</sup> Ministry of Culture & Heritage, 'New Zealand and the United Nations', *New Zealand History Online* (<http://www.nzhistory.net.nz/politics/new-zealand-and-the-united-nations>).

<sup>191</sup> New Zealand Ministry of Foreign Affairs & Trade, 'The United Nations: New Zealand and the United Nations' (<http://www.mfat.govt.nz/Foreign-Relations/2-International-Organisations/United-Nations/index.php>).

apply such measures.<sup>192</sup> Section 2(2) of the Act states that regulations made under the Act cannot be deemed unlawful because of inconsistency with any other Act of Parliament.<sup>193</sup>

### **Statute of Westminster Adoption Act 1947**

The Act meant that New Zealand adopted full constituent powers which gave the ability to amend, suspend and repeal its own constitution. The Statute of Westminster 1931, passed by the British Parliament, made this possible in saying that 'No Act of Parliament of the United Kingdom passed after the commencement of the Act shall extend or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.'

### **New Zealand Constitution Amendment (Request & Consent) Act 1947**

By enacting the Statute of Westminster Adoption Act 1947 New Zealand gained the ability to request and consent to the power to amend its own constitution.<sup>194</sup> It did this via the Constitution Amendment (Request & Consent) Act 1947. The Act requested, and consented to, the United Kingdom Parliament's enacting legislation 'in the form or to the effect of' the draft Bill set out in the schedule to the Act. The New Zealand Constitution (Amendment) Act 1947 (UK) provides: 'It shall be lawful for the Parliament of New Zealand by any Act or Acts of that Parliament to alter, suspend, or repeal, at any time, all or any of the provisions of the New Zealand Constitution Act, 1852; and the New Zealand Constitution (Amendment) Act, 1857, is hereby repealed.'

### **New Zealand adopts the Universal Declaration of Human Rights (1948)**

The Universal Declaration of Human Rights (UDHR) was adopted by the United Nations General Assembly on 10 December 1948. It sets out fundamental rights and freedoms, some of which are now regarded as having achieved the status of customary international law including the right to life, freedom from slavery, freedom from torture and the right to a fair trial.

As with the founding of the UN in 1945, New Zealand had played an active role in drafting the UDHR.<sup>195</sup> Peter Fraser's government established a Human Rights Committee to consider the draft Declaration and used the Committee's work as the basis for the Government's comments on that draft.<sup>196</sup> New Zealand remains strongly committed to the protection and promotion of human rights as embodied in the UDHR and other key international human rights treaties.<sup>197</sup>

### **Legislative Council Abolition Act 1950**

The Legislative Council was New Zealand's Upper House of Parliament from 1854 to 1950. Originally it had been intended to act like the British House of Lords, but after trying to play an active role in

<sup>192</sup> United Nations Act 1946.

<sup>193</sup> Ibid, s. 2(2).

<sup>194</sup> Philip A. Joseph, 'Foundations of the Constitution', *Canterbury Law Review*, Vol. 4, 1989, p 58.

<sup>195</sup> Human Rights Commission, 'Universal Declaration of Human Rights' (<http://www.hrc.co.nz/human-rights-environment/resources-2>).

<sup>196</sup> Human Rights Commission, 'New Zealand's Contribution to the Early Post-War Development of International Human Rights' (<http://www.hrc.co.nz/human-rights-environment/resources-2/new-zealands-contribution-to-the-early-post-war-development-of-international-human-rights>).

<sup>197</sup> New Zealand Ministry of Foreign Affairs & Trade, 'Human Rights: New Zealand and Human Rights' (<http://www.mfat.govt.nz/Foreign-Relations/1-Global-Issues/Human-Rights/O-overview.php>).



the 1860s and 1870s this input had diminished significantly.<sup>198</sup> Because members were appointed rather than elected doubts about its efficacy grew. Having acquired full constituent powers to amend its constitution in 1947, the New Zealand Parliament was able to abolish the Legislative Council.<sup>199</sup> This it did with the Legislative Council Abolition Act 1950, meaning that New Zealand became a unicameral legislature. Since then, Parliament has consisted only of the House of Representatives and the Governor-General.

### **Constitutional Reform Committee (1952)**

As part of the abolition of the Legislative Council, Prime Minister Sidney Holland had promised to set up a constitutional reform committee to explore an alternative to the Council.<sup>200</sup> The committee reported in 1952, recommending a senate of 32 senators to be selected by party leaders proportional to the parties' share of the seats in Parliament. Their proposal did not include giving the senate powers to act as a final arbiter on legislation, but they were to have the ability to delay legislation for up to two months.<sup>201</sup> In the end, the proposal to establish a new second House was never implemented.

### **Parliamentary Commissioner (Ombudsman) Act 1962**

In 1962 New Zealand became the first English-speaking common law country and the fourth overall (after Sweden, Finland, and Denmark) to establish the Office of Ombudsman,<sup>202</sup> which holds the important function of scrutinising the Executive and holding it to account.<sup>203</sup> This legislation provided for a Commissioner to be appointed in the first or second session of Parliament, and would remain in that office until a successor could be appointed.

The principal function of the Commissioner would be to investigate any decision or recommendation made, or any act done or omitted, relating to a matter of administration.<sup>204</sup> Investigations could take place on the basis of a complaint or on the initiative of the Commissioner themselves. Originally, the legislation provided only for investigations into central government departments and organisations.<sup>205</sup>

### **Māori Welfare Act 1962**

The Māori Welfare Act 1962 (now the Māori Community Development Act 1962) established the New Zealand Māori Council, a national body which could provide advice on policy.<sup>206</sup> Some of the Council's general functions are to 'to consider and discuss such matters as appear relevant to the social and economic advancement' of Māori, to promote harmonious race relations, to preserve

<sup>198</sup> Ministry of Culture & Heritage, 'Legislative Council Abolished', *New Zealand History Online* (<http://www.nzhistory.net.nz/legislative-council-abolished>); New Zealand Parliament, 'Evolution of Parliament: Legislative Council' (<http://www.parliament.nz/en-nz/about-parliament/history-buildings/history/evolution/legislative-council/OOPIbHstBldgsHistoryEvolutionLCI/legislative-council>).

<sup>199</sup> Philip A. Joseph, *Constitutional and Administrative Law in New Zealand* (2nd Edn) (Wellington, NZ: Brookers, 2001) p 139.

<sup>200</sup> Jon Johansson, *The Politics of Possibility: Leadership in Changing Times* (Wellington, NZ: Dunmore Publishing, 2009) p 65.

<sup>201</sup> Ibid.

<sup>202</sup> Constitutional Arrangements Committee (2005) p 58; Office of the Ombudsman, 'History' (<http://www.ombudsman.parliament.nz/about-us/history>).

<sup>203</sup> Joseph (2001) p 139.

<sup>204</sup> Parliamentary Commissioner (Ombudsman) Act 1962 ([http://www.nzlii.org/nz/legis/hist\\_act/pca19621962n10421/](http://www.nzlii.org/nz/legis/hist_act/pca19621962n10421/)).

<sup>205</sup> Office of the Ombudsman, 'History'.

<sup>206</sup> Māori Community Development Act 1962; Ministry of Culture & Heritage, 'Treaty Events Since 1950 – Treaty Timeline', *New Zealand History Online* (<http://www.nzhistory.net.nz/politics/treaty/treaty-timeline/treaty-events-1950>).

Māori culture, and to work with various state departments and other Māori organisations.<sup>207</sup> The Act also replaced tribal committees with committees representing broader Māori groups and areas based upon Māori Land Court jurisdictions.<sup>208</sup>

### ✓ Referendum on the term of Parliament (1967) (on Chapter 7)

Legislation passed in 1967 set up a referendum on whether the term of Parliament ought to be three years or four years. This was a non-binding referendum with no provisions in the legislation which would have been triggered in the instance of a specific result.<sup>209</sup> Turnout for the vote was 69.7%, with the three-year term receiving 68.1% of the vote compared to the four-year term which received 31.9%.<sup>210</sup>

### Race Relations Act 1971

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The Race Relations Act 1971 was the first legislation to explicitly introduce anti-discriminatory principles into New Zealand's legal framework.<sup>211</sup> It prohibited discrimination on the grounds of race, nationality or ethnic origin. The Act also established the office of Race Relations Commissioner and created a formal process for laying complaints about racial discrimination.<sup>212</sup> This legislation would later be joined by the Human Rights Commission Act 1977 and would eventually be superseded by the Human Rights Act 1993.

### New Zealand Constitution Amendment Act 1973

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The Act sought to address a gap in Parliament's law-making authority. Although full constituent powers had been acquired with the passage of the Statute of Westminster Adoption Act 1947 and the New Zealand (Constitution) Amendment Act 1947 (UK) this gap was identified in a 1968 High Court case.<sup>213</sup> Specifically, it addressed the question of whether the New Zealand Parliament had the ability to make laws with effect outside of New Zealand's territory.<sup>214</sup>

Section 53 of the New Zealand Constitution Act 1852 (UK) authorised the General Assembly to 'make laws for the peace, order, and good government of New Zealand.' Following the 1968 High Court decision, a Law Reform Committee on Admiralty Jurisdiction suggested that the words 'peace, order, and good government of New Zealand' in section 53 imposed 'a legislative restraint in the absence of clear language to the contrary elsewhere.'<sup>215</sup> The New Zealand Constitution Amendment Act 1973 therefore declared the validity of legislation passed after 1947 and changed the wording of section 53 to 'The General Assembly shall have full power to make laws having effect in, or in respect of, New Zealand or any part thereof and laws having effect outside New Zealand.'<sup>216</sup>

<sup>207</sup> Māori Community Development Act 1962, s. 18.

<sup>208</sup> Basil Keane, 'Kotahitanga – Unity Movements – Kotahitanga Movements in the 20th and 21st Centuries', *Te Ara – The Encyclopedia of New Zealand* (<http://www.teara.govt.nz/en/kotahitanga-unity-movements/page-4>).

<sup>209</sup> [http://www.parliament.nz/en-NZ/AboutParl/HowPWorks/PPNZ/0/9/3/00H000CPPNZ\\_411-Chapter-41-Referendums.htm](http://www.parliament.nz/en-NZ/AboutParl/HowPWorks/PPNZ/0/9/3/00H000CPPNZ_411-Chapter-41-Referendums.htm)

<sup>210</sup> Electoral Commission New Zealand, 'Referenda' (<http://www.elections.org.nz/voting-system/referenda>).

<sup>211</sup> State Services Commission, 'The Gender Pay Gap in the New Zealand Public Service: 2.1 The Legislative Framework' (<http://www.ssc.govt.nz/node/7426>).

<sup>212</sup> Human Rights Commission, 'Chapter 18: Human Rights and Race Relations Te tika tangata, me te whakawhanaunga a iwi', *Human Rights in New Zealand Today Ngā Tika Tangata O Te Motu* (<http://www.hrc.co.nz/report/chapters/chapter18/race01.html>).

<sup>213</sup> *R v Fineberg* [1968] NZLR 119.

<sup>214</sup> *Ibid.*

<sup>215</sup> New Zealand Constitution Amendment Bill 1973, Explanatory note.

<sup>216</sup> Jerome B. Elkind, 'A New Look at Entrenchment', *The Modern Law Review*, Vol. 50, No. 2, 1987, p 158.



### **Royal Titles Act 1974**

This legislation was passed in a single sitting of Parliament, and changed the title of the New Zealand monarch to 'Elizabeth the Second, by the Grace of God Queen of New Zealand and Her Other Realms and Territories, Head of the Commonwealth, Defender of the Faith.'<sup>217</sup> Previously, the title had been 'Elizabeth II, by the Grace of God of the United Kingdom, New Zealand and Her Other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith.' This move was seen as a symbolic move to make the New Zealand Head of State more uniquely our own.<sup>218</sup>

### **Electoral Amendment Act 1975**

The Act introduced a new method of calculating the Māori electoral roll through the Māori Electoral Option,<sup>219</sup> which allows for electors of Māori descent to choose whether to be enrolled on the general or Māori roll. The Māori Electoral Option occurs after every census. It is the only time when Māori voters can opt to switch between the general and Māori rolls.

In a general election, voters enrolled on the Māori electoral roll may only vote for a candidate standing in the Māori electorate in which they are enrolled. Voters on the general electoral roll may vote only for a candidate standing in the general electorate in which they are enrolled. Candidates who identify as Māori may choose whether to stand as candidates for Māori or general electorates.

### **Ombudsmen Act 1975**

The Act sought to consolidate and extend the functions of the Ombudsman's Office, and allowed for the appointment of more Ombudsmen and extended the Office's jurisdiction to include local government agencies.<sup>220</sup>

### **Treaty of Waitangi Act 1975**

Passed in 1975, the Act established the Waitangi Tribunal to report on and suggest settlements for breaches of the Treaty of Waitangi and to ensure that future legislation was consistent with the Treaty.<sup>221</sup> Not only was this a major practical development in addressing historical grievances, it also had significant symbolic value as a means of bringing the Treaty closer into New Zealand's constitutional arrangements. The Act's opening paragraph describes the law as 'An Act to provide for the observance, and confirmation, of the principles of the Treaty of Waitangi', which has left room for an evolution of understanding of where the Treaty lives within the constitution.<sup>222</sup> Initially however, the Waitangi Tribunal had no jurisdiction to review claims of past grievances.<sup>223</sup>

### **Human Rights Commission Act 1977**

The Act established the Human Rights Commission. At the time the main functions and powers of the Commission were heavily focused on the need to promote respect for human rights through education. The Commission also had an important 'watch dog' role, which included receiving and encouraging engagement with the public on human rights and making public statements on human

<sup>217</sup> Royal Titles Act 1974, s. 2.

<sup>218</sup> Joseph (2007) p 584.

<sup>219</sup> Parliamentary Library (2003) p 16.

<sup>220</sup> Office of the Ombudsman, 'History'.

<sup>221</sup> Ministry of Culture & Heritage, 'Waitangi Tribunal Created', *New Zealand History Online* (<http://www.nzhistory.net.nz/the-treaty-of-waitangi-act-passes-into-law-setting-up-the-waitangi-tribunal>).

<sup>222</sup> Treaty of Waitangi Act 1975.

<sup>223</sup> Ministry of Culture & Heritage, 'Waitangi Tribunal Created'.

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rights matters.<sup>224</sup> Originally, the Commission also had a limited role relating to privacy consisting of enquiring and reporting, but with no investigative powers.<sup>225</sup> Its privacy role, as well as its other functions, would later be substantially amended through the Privacy Act 1993 and the Human Rights Act 1993.

### **New Zealand ratifies the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (1978)**

The United Nations General Assembly adopted the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) on 16 December 1966. Often known as the twin covenants, they both came in to force a decade later in 1976. New Zealand was signatory to both treaties in 1968 and ratified each one in 1978.

### **Cabinet Manual published (1979)**

In 1979 the *Cabinet Office Manual* (now the *Cabinet Manual*) was published, bringing together for the first time a comprehensive description of Cabinet procedures.<sup>226</sup> Since then it has come to be regarded as the authoritative guide to decision-making for Ministers and their staff, and for government departments.

### **Public Works Act 1981**

The Act provides for compensation for losses arising from the acquisition of land by the Crown.<sup>227</sup> Fair compensation may not necessarily be limited to the value of the land acquired or taken. In addition to the value of the land taken, the Public Works Act entitles fair compensation for losses including permanent depreciation in the value of any retained land, damage to any land, and disturbance resulting from the acquisition.<sup>228</sup> One of the most significant changes the Act introduced was that land could now be acquired compulsorily only if it is for an essential work. An essential work is defined in the Act, although there is also a provision enabling the Governor-General to declare any specified work to be essential.<sup>229</sup>

### **Official Information Act 1982**

The Act reversed the logic of the Official Secrets Act 1951, promoting the principle that all official information should be made public unless there is a good reason to withhold it.<sup>230</sup> In 1978 the government established the Committee on Official Information which would produce two reports in 1981 that advocated for major reforms.<sup>231</sup> The Committee's first report said that open government 'rests on the democratic principles of encouraging participation in public affairs and ensuring the

<sup>224</sup> The Hon. Justice Wallace, 'The New Zealand Human Rights Commission', *The Nordic Journal of International Law*, Vol. 58, No. 2, 1989, pp 156-157.

<sup>225</sup> Wallace (1989) p 158.

<sup>226</sup> Rebecca Kitteridge, 'The Cabinet Manual: Evolution with Time', *Annual Public Law Forum*, 20-21 March 2006, p 1 (<http://www.dpmc.govt.nz/sites/all/files/reports/the-cabinet-manual-evolution-with-time.pdf>).

<sup>227</sup> Land Information New Zealand, 'Landowner's Rights - Compensation' (<http://www.lin.govt.nz/crown-property/public-works/guide/compensation>).

<sup>228</sup> Ibid.

<sup>229</sup> The Waitangi Tribunal, *Te Maunga Railways Land Report* (1994) pp 17, 44-46.

<sup>230</sup> Constitutional Arrangements Committee (2005) p 65.

<sup>231</sup> Nicola White, 'Freedom of Official Information - From Secrets to Availability', *Te Ara - The Encyclopedia of New Zealand* (<http://www.teara.govt.nz/en/freedom-of-official-information/page-1>).



accountability of those in office.<sup>232</sup> The Act reflected this logic, outlining its purpose in section 4 as being to promote public participation and governmental accountability through the progressive increase in the availability of official information, provided that release was consistent with the public interest and personal privacy.<sup>233</sup>

The Act allows people to request information from government agencies, orally or in writing.<sup>234</sup> Those agencies are required to respond to a request as soon as reasonably practicable, but not later than 20 working days after the day the request is received.<sup>235</sup> If a person is not satisfied with the response that they receive, they can request that the Ombudsman investigate the decision.<sup>236</sup>

There is general agreement that the Act has had a major impact on the day-to-day workings of the public sector.<sup>237</sup> Large amounts of official information are made available as a matter of routine, and it is often suggested that the quality of advice and decision-making at all levels of government has improved as a result of closer scrutiny.<sup>238</sup>

### Letters Patent Constituting the Office of the Governor-General (1983)

The 1983 Letters Patent Constituting the Office of the Governor-General replaced the 1917 Letters Patent and had two objects: to update the office and to patriate it. They changed the constitution of the office to 'Governor-General and Commander in Chief who shall be Our Representative in Our Realm of New Zealand' from the 1917 Letters' designation of 'Governor-General and Commander-in-Chief in and over Our Dominion of New Zealand.' The Letters also formalise New Zealand's right to conduct its own foreign policy.<sup>239</sup>

### Officials Committee on Constitutional Reform (1984)

This review was established by the incoming Labour Government to appraise New Zealand's constitutional law. It owed significant motivation to the 1984 constitutional crisis where the outgoing Prime Minister refused to implement the advice of the incoming Government to devalue the currency to prevent a run on the dollar. The Officials Committee released two reports, the recommendations of which would lead to the enactment of the Constitution Act 1986. The White Paper on a Bill of Rights for New Zealand was also a by-product of the Committee's work.

### Select committee reforms (1985)

During the 1960s select committees had begun to take on a greater workload in legislative scrutiny, and in the 1970s they had become more open to the public and the media.<sup>240</sup> In July 1985 the Standing Orders were amended and completely reorganised the select committee system. This

<sup>232</sup> Committee on Official Information, 'Towards Open Government: Vol. 1: General Report' (Wellington, NZ: Government Printer, 1981) p 14.

<sup>233</sup> Official Information Act 1982, s. 4.

<sup>234</sup> New Zealand Law Commission, 'The Public's Right to Know: Review of the Official Information Legislation', *Report 125* (Wellington, NZ: New Zealand Law Commission, 2012) pp 18-20.

<sup>235</sup> New Zealand Law Commission (2012) pp 18-20.

<sup>236</sup> Nicola White, 'Freedom of Official information - The Official Information Act in Operation', *Te Ara - The Encyclopedia of New Zealand* (<http://www.teara.govt.nz/en/freedom-of-official-information/page-2>).

<sup>237</sup> Nicola White, 'Freedom of Official Information - What Has the Official Information Act Achieved?', *Te Ara - The Encyclopedia of New Zealand* (<http://www.teara.govt.nz/en/freedom-of-official-information/page-3>).

<sup>238</sup> *Ibid.*

<sup>239</sup> Joseph (2007) p 736.

<sup>240</sup> John E. Martin, 'Parliament - Reform, 1980s Onwards', *Te Ara - The Encyclopedia of New Zealand* (<http://www.teara.govt.nz/en/parliament/page-8>).

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include? greatly enhanced the scope of their powers and strengthened the accountability of the Executive to Parliament.<sup>241</sup> The new system established 13 subject select committees and, for the first time, allowed members of the public to be present at the hearing of evidence on a Bill or any other matter.<sup>242</sup> Not only did the amount of legislation they scrutinised increase, but they were also enabled to initiate inquiries into matters related to their subject areas.

### **Treaty of Waitangi Amendment Act 1985**

This legislation gave the Waitangi Tribunal the retrospective power to consider alleged past breaches of the Treaty of Waitangi since 1840. In introducing the Bill the Minister of Māori Affairs said that it was intended to address 'mounting tension in the community that springs from the sense of injustice that is harboured about the grievances that are outstanding'.<sup>243</sup> In 2006, the Treaty of Waitangi Act 1975 was again amended to set a closing date of 1 September 2008 for the submission of new historical claims or historical amendments to contemporary claims.<sup>244</sup>

### **Royal Commission on the Electoral System (1985-1986)**

In 1985, the fourth Labour Government implemented a two-time election promise and appointed a Royal Commission on the Electoral System. There had been growing discontent with the First Past the Post (FPP) voting system following the 1978 and 1981 elections, where the National party received less overall votes than Labour but retained a majority of seats in the House. The Royal Commission reported back in December 1986, recommending that New Zealand adopt the Mixed Member Proportional (MMP) system. It also recommended that the size of Parliament increase to 120 MPs regardless of which electoral system was chosen.

### **Constitution Act 1986**

Passed unanimously on 13 December 1986, the Act repealed the Constitution Act 1852 and removed the ability for the United Kingdom to pass laws for New Zealand without the consent of the New Zealand Parliament. It is described as the 'principal formal statement' of New Zealand's constitutional arrangements in the introduction to the *Cabinet Manual*.<sup>245</sup> It brings together key legal provisions regarding the institutions and procedures for the exercise of public power.<sup>246</sup>

The Act comprises five parts which deal with the Sovereign, the Executive, the Legislature, the Judiciary and Miscellaneous Provisions. It provides that Parliament has the full power to make laws, and that it controls public finances.<sup>247</sup> Although it brings some of New Zealand's core constitutional arrangements into a single Act, it does not have a higher law status and can be amended by a majority vote of Parliament.

<sup>241</sup> New Zealand Parliament, '25th Anniversary of the Select Committee System' (<http://www.parliament.nz/en-NZ/Features/5/2/9/OONZPHomeNews230720101-25th-anniversary-of-the-select-committee-system.htm>).

<sup>242</sup> Ibid.

<sup>243</sup> New Zealand Parliament, *Parliamentary Debates (Hansard)*, Vol. 495, p 1359.

<sup>244</sup> The Waitangi Tribunal, 'Frequently Asked Questions' (<http://www.waitangi-tribunal.govt.nz/about/frequentlyaskedquestions.asp#22>).

<sup>245</sup> The Rt. Hon. Sir Kenneth Keith, 'On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government', *Cabinet Manual* 2008 (<http://cabinetmanual.cabinetoffice.govt.nz/node/68>).

<sup>246</sup> Matthew Palmer, 'Constitution - What is a Constitution?', *Te Ara - The Encyclopedia of New Zealand* (<http://www.teara.govt.nz/en/constitution/page-1>).

<sup>247</sup> The Rt. Hon. Sir Kenneth Keith (2008)



### State sector reform (1986-1989)

In 1986 a range of reforms to the public service were initiated to promote greater efficiency and accountability. Economic and political conditions had combined to make reform not only possible, but bold and far-reaching as well.<sup>248</sup>

Major reforms to the public service began with the State-Owned Enterprises Act 1986 which transformed five state-owned corporations into nine new state enterprises.<sup>249</sup> State-owned enterprises were required to operate as profitably and efficiently as comparable businesses, to be a good employer, and to exhibit a sense of social responsibility to the community they operated within.<sup>250</sup> Responsibilities were restructured, with managers controlling inputs, boards being responsible for pricing and marketing, and shares held by the Minister of Finance and the Minister for State-Owned Enterprises.<sup>251</sup>

The next major piece of legislative reform was the State Sector Act 1988 which redefined the relationship between Ministers and their departments. The Act made chief executives of departments responsible to their Ministers and fully accountable for managing their organisations. All public servants were now employed by the heads of their departments and employment conditions were governed under the same employment law as other professions.<sup>252</sup> This meant that the State Services Commission became responsible only for the appointment of chief executives instead of the entire public service. The Commission continued to be responsible for maintaining the non-partisan nature of the public service and would serve as an independent adviser on the management of the state sector.<sup>253</sup>

The last of the major public sector reforms of the 1980s was the Public Finance Act 1989. This legislation aimed to transform the framework for the financial management of the public sector as well as improving its reporting to Parliament.<sup>254</sup> Before the Act was passed departmental budgets were based on inputs, such as overheads and salaries, with little attention given to multi-year expenses.<sup>255</sup> The Act, however, changed the focus to outputs and outcomes, meaning departments became funded according to the cost of the goods and services they produced.<sup>256</sup> The Act also requires the Crown, departments and Crown entities to adopt and adhere to Generally Accepted Accounting Practices (GAAPs), where previously it was largely held that it would be too difficult for government to keep pace with modern accounting practices.<sup>257</sup>

<sup>248</sup> State Services Commission, 'The Spirit of Reform: Managing the New Zealand State Sector in a Time of Change', 1996 (<http://www.ssc.govt.nz/spirit-of-reform>).

<sup>249</sup> Geoffrey Palmer & Matthew Palmer, *Bridled Power (4th Edn)* (South Melbourne, Australia: Oxford University Press, 2004) p 110.

<sup>250</sup> State Services Commission, 'New Zealand's State Sector Reform: A Decade of Change', 1998 (<http://www.ssc.govt.nz/decade-of-change>).

<sup>251</sup> Ibid.

<sup>252</sup> Mark Prebble, 'State Services and the State Services Commission - The Merit Principle', *Te Ara - The Encyclopedia of New Zealand* (<http://www.teara.govt.nz/en/state-services-and-the-state-services-commission/page-2>).

<sup>253</sup> Ibid, p 70.

<sup>254</sup> Constitutional Arrangements Committee (2005) p 70.

<sup>255</sup> Richard Shaw, 'Public Service - Revolution, 1980s and 1990s', *Te Ara - The Encyclopedia of New Zealand* (<http://www.teara.govt.nz/en/public-service/page-4>).

<sup>256</sup> Ibid.

<sup>257</sup> Geoffrey Palmer & Matthew Palmer (1997) p 103.

### **New Zealand Māori Council v Attorney-General [1987] 1 NZLR 641**

The landmark decision of the Court of Appeal in this case, commonly known as the Lands Case, was the first to define the principles of the Treaty of Waitangi in some detail.<sup>258</sup> In 1987 a case was brought by the New Zealand Māori Council, led by its Chairman Sir Graham Latimer, to challenge whether the Government was able to transfer land which was subject to Treaty claims to state-owned enterprises.<sup>259</sup>

The Court held that section 9 of the State-owned Enterprises Act 1986 placed certain obligations or duties under the Treaty of Waitangi on the Crown. Consequently, protections and guarantees must be afforded to Māori in the transfer of Crown land to state-owned enterprises.<sup>260</sup>

Some of these protections and guarantees were outlined through what Cooke P referred to as the 'spirit' of the Treaty. The Court's definition of the Treaty principles, articulating that spirit, remains highly influential. They identified the duty to act reasonably and in good faith, active Crown protection of Māori interests, informed Crown decision-making, remedies for past breaches, and the right of the Crown to govern as some of the most important principles of the Treaty.<sup>261</sup>

### **Māori Language Act 1987**

The Act declared the Māori language to be an official language of New Zealand, and conferred the right to speak Māori in certain legal proceedings, and to establish Te Taura Whiri i te Reo Māori and define its functions and powers.

### **Imperial Laws Application Act 1988**

The Act sought to clarify which aspects of British statute and common law were to be part of New Zealand law as well. Amongst other laws, it incorporated the Bill of Rights 1689, the preamble and chapter 29 of Magna Carta 1297, the Act of Settlement 1701, and the Habeas Corpus Acts of 1640, 1679 and 1816.

### **Treaty of Waitangi (State Enterprises) Act 1988**

Arising out of the Court of Appeal decision in the Lands Case, amendments to the powers and functions of the Waitangi Tribunal were made through the Treaty of Waitangi (State Enterprises) Act 1988. This legislation amended the Treaty of Waitangi Act 1975 and the State-owned Enterprises Act 1986. The amendments increased the Tribunal's membership to 17 and gave it binding powers to recommend that land transferred to state-owned enterprises should be transferred back to Māori.<sup>262</sup>

<sup>258</sup> Janine Hayward, 'Principles of the Treaty of Waitangi – Ngā mātapono o te tiriti – Treaty Principles Developed by Courts', *Te Ara – The Encyclopedia of New Zealand* (<http://www.teara.govt.nz/en/principles-of-the-treaty-of-waitangi-nga-matapon-o-te-tiriti/page-2>).

<sup>259</sup> Janine Hayward, 'Appendix: The Principles of the Treaty of Waitangi' in the Waitangi Tribunal *Rangahaua Whanui National Overview Report* (Wellington, NZ: GP Publications, 1997) p 477 (<http://www.teara.govt.nz/en/principles-of-the-treaty-of-waitangi-nga-matapon-o-te-tiriti/page-2>).

<sup>260</sup> John McSorley, 'The New Zealand Constitution', *Parliamentary Library*, 15 February 2000 (updated 3 October 2005) p 5.

<sup>261</sup> Janine Hayward, 'Principles of the Treaty of Waitangi – ngā mātapono o te tiriti – Treaty Principles Developed by Courts'; Janine Hayward (1997) pp 477-479.

<sup>262</sup> Nicola Rowan Wheen, Janine Hayward & Michael Belgrave, *Treaty of Waitangi Settlements* (Wellington, NZ: Bridget Williams Books, 2012) p 257.



### Regulations (Disallowance) Act 1989

Before widespread reforms in the 1980s substantial amounts of policy and law-making were found in regulations rather than statutes. Regulations are authorised by Acts of Parliament, but are made by the Governor-General in Council based on advice from Ministers of the Crown.<sup>263</sup> Although regulations are generally thought desirable only for minor or technical legislative needs, successive governments had used them to achieve more substantive changes.

In response to this problem the Act was passed, allowing complaints about delegated legislation to be made to Parliament's Regulations Review Committee.<sup>264</sup> This committee scrutinises all regulations, investigates complaints about regulations, and examines proposed regulation-making powers in Bills to ensure that the delegated law-making powers are being used appropriately.<sup>265</sup>

### New Zealand Bill of Rights Act 1990

Although the idea of a Bill of Rights Act for New Zealand had been around for some time it was not until 1990 that the legislation was finally passed, although in a different form than previously proposed. Sir Geoffrey Palmer's 1985 *White Paper: A Bill of Rights for New Zealand* had proposed that the Act would require a 75% majority in Parliament or a 50% majority in a referendum to amend its provisions, incorporate the Treaty of Waitangi, and that the Judiciary would be able to invalidate laws that were contrary to the rights contained in the Bill. These changes were considered too far-reaching at the time and the Act that was eventually passed had none of the features listed above.

The Act sets out New Zealanders' fundamental rights and freedoms. It contains important rules about the relationship between the state and the people in this country. It helps us to know what our rights are and to decide whether the state has protected them properly. We can go to court if we think the Government has acted contrary to our rights set out in the Act. Parliament has to think about our rights in the Act when it makes new laws.

### Referendum on the term of Parliament (1990)

As in 1967, legislation was passed in 1990 setting up a referendum on the length of the parliamentary term. Like the 1967 referendum, it was non-binding and offered voters a choice as to whether they preferred the status quo of a three-year term or the longer four-year term. In a turnout of 85.2% of voters, 69.3% voted to retain the three-year term, while 30.7% voted for an extension to four years.<sup>266</sup> As a result, no changes were implemented.

### Resource Management Act 1991

The Resource Management Act 1991 is the main piece of legislation governing the management of the environment and natural resources in New Zealand.<sup>267</sup> The Bill was originally introduced to Parliament in late 1989 and was considered by a select committee for eight months before it was reported back and was referred to a review group in November 1990. The group was asked to make

<sup>263</sup> Geoffrey Palmer, 'Law – Legal Review', *Te Ara – The Encyclopedia of New Zealand* (<http://www.teara.govt.nz/en/law/page-10>).

<sup>264</sup> E.M. Thomas, 'Tinkering in the Constitutional Shed: The Regulatory Standards Bill and Legislative Quality in New Zealand' (<http://www.otago.ac.nz/law/research/journals/otago036335.pdf>) p 5.

<sup>265</sup> New Zealand Parliament, 'The Role of the Regulations Review Committee' (<http://www.parliament.nz/en-NZ/Features/a/8/0/OONZPHomeNews201204161-The-role-of-the-Regulations-Review-Committee.htm>).

<sup>266</sup> Electoral Commission New Zealand, 'Referenda'.

<sup>267</sup> Ministry of Business, Innovation & Employment, 'The Role of the Resource Management Act' (<http://www.med.govt.nz/sectors-industries/energy/energy-environment/the-role-of-the-resource-management-act>).

recommendations to secure clarity on the Act's effect while retaining a commitment to participation and the principle of sustainable management. After consultation, the group reported back with proposed amendments in February 1991.<sup>268</sup>

### **Electoral Act 1993**

The Act sets out the rules for free and democratic elections in New Zealand.<sup>269</sup> It replaced the Electoral Act 1956 after the results of the constitutional referendum in 1993 which endorsed a change in the electoral system. As a result Parliament became larger (increasing from 99 MPs to 120). It also introduced the MMP voting system where parties' shares of seats in Parliament would reflect their share of the nation-wide vote.

### **Citizens Initiated Referenda Act 1993**

Brought in as part of a wide range of reforms in the early 1990s, The Act encourages the use of referenda as a means of promoting direct participatory democracy.<sup>270</sup> The Act obliges the Government to hold a referendum on an issue if a petition proposing the referendum has gained the support of 10% of the electorate. Unlike those in some countries, citizens initiated referenda are indicative rather than binding, meaning that the Government of the day does not necessarily have to act upon the results of any given referendum.

### **Human Rights Act 1993**

The Act consolidated and amended the provisions of the Race Relations Act 1971 and the Human Rights Commission Act 1993.<sup>271</sup> As with those Acts its focus was mainly on the prohibition of discrimination, including the addition of new grounds of prohibited discrimination.

Under the Act, it is unlawful to discriminate on the grounds of gender, religious belief, race, ethnicity or nationality, disability, age, political opinion, employment status, marital status, family status and sexual orientation.<sup>272</sup> Exceptions are available in certain circumstances, such as the exemption from employment discrimination where a position may be available in an organised religion or work involving national security.

Like the Bill of Rights Act 1990, the Human Rights Act 1993 is not supreme law and cannot be used to strike down legislation. The Human Rights Review Tribunal can, however, issue declarations of inconsistency between the Act and other legislation.

<sup>268</sup> Janet McLean, 'New Zealand's Resource Management Act 1991: Process With Purpose?', *Otago Law Review*, Vol. 7, No. 4, p 538.

<sup>269</sup> Ministry of Justice, 'Constitutional Policy and Human Rights' (<http://www.justice.govt.nz/policy/constitutional-law-and-human-rights>).

<sup>270</sup> Joseph (2007) pp 24-25.

<sup>271</sup> State Services Commission, 'Human Rights Act 1993' (<http://www.ssc.govt.nz/node/8518>).

<sup>272</sup> Ibid.



## ✓ Privacy Act 1993

The Act controls how agencies collect, use, disclose, store and give access to personal information.<sup>273</sup> It applies only to the personal information of identifiable individuals, not to companies or organisations.<sup>274</sup> There are 12 privacy principles which form the core of the Privacy Act 1993 which include collection of personal information, storage and security of personal information, requests for access to personal information, accuracy of personal information, retention of personal information, and the use and disclosure of personal information.<sup>275</sup> When it was enacted, the Privacy Act 1993 replaced the parts of the Official Information Act 1982 that dealt with access to personal information with a comprehensive regime for access to such information across the public and private sectors.<sup>276</sup>

## Simpson v Attorney-General [1994] 3 NZLR 667

Also known as Baigent's Case, *Simpson v Attorney-General* was a significant case where the Court of Appeal held that effective and appropriate remedies are available for breaches of the Bill of Rights Act 1990.<sup>277</sup> The plaintiffs sought damages arising out of the obtaining and execution of a search warrant in respect of their residence which was based on incorrect information.<sup>278</sup> Despite no express provision in the Bill of Rights Act 1990 for compensation, the majority of the Court of Appeal held that the Crown was liable for the conduct of the Police and that the breach entitled the plaintiffs to claim for damages.<sup>279</sup>

## First general election under MMP (1996)

The Electoral Act 1993 changed the voting system following referenda in 1992 and 1993 where New Zealanders voted for the introduction of a new electoral system, and specifically for MMP.<sup>280</sup> The first general election under MMP was held on 12 October 1996. Until 1996, parliamentary representation was determined by the FPP system where all MPs were elected from particular electorates. MMP entitles voters enrolled in a general or a Māori electorate to each cast two votes: one for an electorate MP and the other for a political party.

Under MMP, the proportionality of Parliament has increased, meaning that a much more diverse range of MPs exists from across gender and ethnic spectrums. They have also increased the frequency of minority governments, where no one political party has won an outright majority in Parliament. This has meant that every government since 1996 has been comprised of parties in coalition with each other, albeit in different forms, which has changed the nature of decision-making.

<sup>273</sup> Office of the Privacy Commissioner, 'Privacy Act & Codes: Introduction' (<http://privacy.org.nz/the-privacy-act-and-codes/privacy-act-and-codes-introduction/>).

<sup>274</sup> Keeping It Legal, 'Privacy' (<http://keepingitlegal.net.nz/learn-more/privacy/>).

<sup>275</sup> Office of the Privacy Commissioner, 'Privacy Act & Codes: Introduction'.

<sup>276</sup> Nicola White, 'Freedom of Official Information – The Official Information Act in Operation'.

<sup>277</sup> Ministry of Justice, 'The Guidelines on the New Zealand Bill of Rights Act 1990: A Guide to the Rights and Freedoms in the Bill of Rights Act for the Public Sector: Part IV Remedies Under the Bill of Rights Act', November 2004, (<http://www.justice.govt.nz/publications/global-publications/t/the-guidelines-on-the-new-zealand-bill-of-rights-act-1990-a-guide-to-the-rights-and-freedoms-in-the-bill-of-rights-act-for-the-public-sector/part-iv-remedies-under-the-bill-of-rights-act>).

<sup>278</sup> Petra Butler, '15 Years of the Bill of Rights: Time to Celebrate, Time to Reflect, Time to Work Harder?', *Victoria University Human Rights Research*, 2006, p 7 (<http://www.victoria.ac.nz/law/centres/nzcpl/publications/human-rights-research-journal/publications/vol-4/Butler.pdf>).

<sup>279</sup> New Zealand Law Commission, 'Crown Liability and Judicial Immunity: A Response to Baigent's Case and Harvey v Derrick' Report 37, 1997, p 4. ([http://www.lawcom.govt.nz/sites/default/files/publications/1997/05/Publication\\_40\\_104\\_R37.pdf](http://www.lawcom.govt.nz/sites/default/files/publications/1997/05/Publication_40_104_R37.pdf)).

<sup>280</sup> John Wilson, 'Nation and Government – The Electoral System', *Te Ara – The Encyclopedia of New Zealand* (<http://www.teara.govt.nz/en/nation-and-government/page-5>).

Single parties can no longer decide on their own what laws are to be passed. They have to negotiate and build support amongst their coalition partners, or even parties in opposition, meaning that laws require more consensus.

### ✓ Referendum on the size of Parliament (1999) *Chapter 7*

Two referenda were held in conjunction with the 1999 general election. One concerned reform of the justice system to focus more closely on victims and the other asked whether the number of MPs should be reduced from 120 to 99. The turnout was 84.8%, with a result of 81.5% in favour of the reduction and 18.5% against.<sup>281</sup> Because the referendum was indicative the results were not binding and the size of Parliament remained unchanged.

### Local Electoral Act 2001

*school?*  
The purpose of the Act is to modernise the law governing the conduct of local elections and polls, and it was partly designed to give 'fair and effective representation for individuals and communities'.<sup>282</sup> The Act extended the Bay of Plenty model, which guaranteed a minimum number of Māori Councillors to represent Māori views on the Council.<sup>283</sup> The Local Electoral Act 2001 provides opportunities to increase Māori participation in local government decision-making through the creation of Māori wards and an option to adopt single transferable voting.

### Electoral (Integrity) Amendment Act 2001

Following the first MMP election, a number of list and electorate MPs left their parties, but remained as MPs. These actions, known colloquially as waka-jumping or party-hopping, were seen by some people as bringing Parliament into disrepute and undermining the proportionality voted for at the general election. In response the Electoral (Integrity) Amendment Act 2001 was enacted which enabled the Speaker to declare vacant the seat of an MP:

- who has notified the Speaker that he or she has ceased to be a member of the political party that he or she stood for at the last election, or
- if a leader of a parliamentary party gives written notice to the Speaker that they reasonably believed that the member has acted in a manner that distorts the proportionality of representation in Parliament as determined in the preceding general election.

*school?*  
The legislation does not directly affect MPs' ability to cross the floor to vote with another party on particular issues, although political party rules may provide that an MP who does so can be expelled from his or her party.

The Act had a sunset clause in recognition of the German experience which suggested defections would decline substantially as MMP became established. The Electoral (Integrity) Amendment Bill 2005 proposed to reinstate the Act following its expiry in 2005. The Bill was not passed, following the Justice and Electoral Committee's recommendation it not proceed.

<sup>281</sup> Electoral Commission New Zealand, 'Referenda'.

<sup>282</sup> One of the principles the Act is designed to implement: see Local Electoral Act 2001, s. 4.

<sup>283</sup> Bay of Plenty Regional (Māori Constituency Empowering) Act 2001.



### **MMP Review Select Committee (2001)**

The Electoral Act 1993 had made provision for a parliamentary select committee review to report on MMP before 1 June 2002. The cross-party committee decided to operate on a unanimity, or near unanimity, basis.<sup>284</sup> They were able to reach such consensus on a number of issues which would maintain the status quo. There were, however, a range of issues the committee could not reach agreement on. These included the retention of MMP, the number of MPs, whether there should be another referendum to decide if we keep this electoral system, whether the Māori seats should be abolished, retained, or entrenched, reducing the party vote threshold for parliamentary representation, and the one-seat threshold. The Government response noted the difficulty in gaining consensus, and noted that without this it would not progress any changes.<sup>285</sup>

### **Local Government Act 2002**

The Act replaced the Local Electoral Act 1974. The decision to review local government legislation was made in May 2000 following election promises by the Labour party to modernise local government legislation.<sup>286</sup> The review led to the introduction of the Local Government Bill on 18 December 2001.<sup>287</sup> The proposed legislation reflected a growing focus on relationships and networks between local government, central government and the public.<sup>288</sup>

The Act sets out the purpose of local government and the role, powers and principles that local authorities 'must' and 'should' comply with, including providing opportunities for Māori to contribute to its decision-making processes.<sup>289</sup> The Act also requires local government to establish and maintain processes to provide opportunities for Māori to contribute to decision-making, to consider ways it may foster the development of Māori capacity to contribute to decision-making,<sup>290</sup> and to be properly consulted.<sup>291</sup>

### **Supreme Court Act 2003**

This legislation removed the British Privy Council as the final court of appeal for New Zealand and replaced it with a Supreme Court located in Wellington. The idea was to make the final level of appeal more accessible to New Zealanders and to show that New Zealand would have a judicial system fully independent of Britain.<sup>292</sup>

<sup>284</sup> Elizabeth McLeay, 'Building the Constitution: Debates, Assumptions, Developments 2000-2010' in Caroline Morris, Jonathan Boston & Petra Butler (eds.) *Reconstituting the Constitution* (London, UK: Springer, 2011) p 21.

<sup>285</sup> New Zealand Government, 'Government Response to Report of MMP Review Committee on Inquiry into the Review of MMP November 2001' (<http://www.justice.govt.nz/publications/publications-archived/2001/government-response-to-report-of-mmp-review-committee-on-inquiry-into-the-review-of-mmp-november-2001/recommendations-and-government-response>).

<sup>286</sup> Department of Internal Affairs, 'Hon. Chris Carter – Local Government Bill: Third Reading Speech', 20 December 2002 ([http://www.dia.govt.nz/diawebsite.nsf/wpg\\_URL/Legislative-Reviews-Local-Government-Act-Review-Local-Government-Bill-Third-Reading-Speech?OpenDocument](http://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Legislative-Reviews-Local-Government-Act-Review-Local-Government-Bill-Third-Reading-Speech?OpenDocument)).

<sup>287</sup> Department of Internal Affairs, 'Local Government Act 2002' ([http://www.dia.govt.nz/DIAWebsite.nsf/wpg\\_URL/Legislative-Reviews-Local-Government-Act-Review-Index?OpenDocument](http://www.dia.govt.nz/DIAWebsite.nsf/wpg_URL/Legislative-Reviews-Local-Government-Act-Review-Index?OpenDocument)).

<sup>288</sup> Andy Asquith, 'The Role, Scope and Scale of Local Government in New Zealand: Its Prospective Future', *Australian Journal of Public Administration*, Vol. 71, No. 1, p 77.

<sup>289</sup> Local Government Act 2002, s. 14.

<sup>290</sup> *Ibid*, s. 81

<sup>291</sup> *Ibid*, s. 82

<sup>292</sup> Hon. Dame Silvia Cartwright, 'Our Constitutional Journey', *Speech to the Legal Research Foundation, Auckland*, 9 May 2006 (<http://gg.govt.nz/node/574>).

A discussion document issued in 2000 led to two years of public consultation and policy development, culminating in the introduction of the Supreme Court Bill in 2003.<sup>293</sup> The discussion document prompted approximately 70 submissions, which were evenly divided between support and opposition to the proposal to end appeal rights to the Privy Council.<sup>294</sup>

Passing the Supreme Court Act 2003 meant that no appeal could be made to the Judicial Committee of the Privy Council on any civil or criminal decision made after the Act's passage. By creating a locally operated two-tier appellate system, the Act also brought New Zealand into line with comparable Commonwealth nations. The new Supreme Court began its formal operations from the 1 January 2004.

#### **Crown Entities Act 2004**

Crown entities are the most numerous types of central government organisations and are typically created through a specific Act of Parliament. By the late 1990s concerns emerged that fragmentation of the public sector was making co-ordination difficult.<sup>295</sup> Reform of Crown entities was seen as a positive step to improving co-ordination and consistency of objectives across the public sector.<sup>296</sup>

The Crown Entities Act 2004 was enacted to provide a consistent framework for the establishment, governance and operation of Crown entities as well as to clarify the relationships between Crown entities, their board members, responsible Ministers and Parliament.<sup>297</sup> Section 7 outlines the five different types of Crown entity and establishes a different governance framework for each type. Differences in Crown entities usually involve the appointment and removal of board members, and whether the entity is required to *have regard* or *give effect* to government policy. Crown entities must produce statements of intent that set out their goals and funding, which are agreed with the responsible minister at the start of each financial year. Each Crown entity reports on their achievements to Parliament in their annual report.<sup>298</sup>

#### **Constitution Amendment Act 2005**

In 2003 the Standing Orders Committee had made a range of recommendations related to the business of the House of Representatives. Two of these uncontroversial, but fairly significant, recommendations were implemented through the Constitution Amendment Act 2005.<sup>299</sup> It was passed as part of a Statutes Amendment Bill which made textual amendments to 20 Acts of Parliament.

The first of these changes altered the rules about parliamentary business (mainly Bills and petitions) lapsing between sessions of Parliament and for when it dissolves preceding a general election. It clarified that business before the House did not lapse between sessions of a Parliament, but that it did lapse upon its dissolution. However, the legislation provided for the House to reinstate the business by resolution when it next convened.

<sup>293</sup> Advisory Group, 'Replacing the Privy Council: A New Supreme Court: Report' (Wellington, NZ: Office of the Attorney-General, 2002).

<sup>294</sup> Ibid, p 14

<sup>295</sup> Review of the Centre Advisory Group, 'Report of the Advisory Group on the Review of the Centre', November 2001, p 5.

<sup>296</sup> Ibid, pp 5-6.

<sup>297</sup> State Services Commission, 'Crown Entities Act 2004 and Amendment Act 2013' (<http://www.ssc.govt.nz/node/8517>).

<sup>298</sup> Rob Laking, 'Crown Entities - How Are Crown Entities Governed?', *Te Ara - The Encyclopedia of New Zealand* (<http://www.teara.govt.nz/en/crown-entities/page-3>).

<sup>299</sup> Morris, Boston & Butler (2011) p 21.



The second of the changes related to the 'financial veto' of the Crown.<sup>300</sup> Section 21 of the Constitution Act 1986 provided that the 'House of Representatives shall not pass any Bill providing for the appropriation of public money or for the imposition of any charge upon the public revenue ... unless it had been recommended by the Crown.'<sup>301</sup> This effectively meant that the Executive could veto any expenditure that Parliament voted for if it did not support the measure. The Constitution Amendment Act 2005 repealed section 21 and the financial veto is now governed under Standing Orders.<sup>302</sup>

### **Report of the Constitutional Arrangements Committee (2005)**

In 2004 a committee was established to undertake a review of New Zealand's constitutional arrangements. Its main focus was on the constitutional developments since 1840, the key elements in the constitutional arrangements, the process other countries had followed in undertaking constitutional reviews, and what an appropriate process for any constitutional change in New Zealand would look like.<sup>303</sup>

The committee was made up of seven members from different political parties, with United Future Leader Peter Dunne as the chairperson. In 2005 it released a report documenting its findings on its terms of reference. Its main findings included the importance of the social acceptance of constitutional arrangements, the need for understanding of what elements are indeed constitutional, and for increased public understanding of the current arrangements through greater capacity for paying attention to constitutional issues. Another major conclusion was that 'New Zealand's constitution is not in crisis', which meant that although there were isolated issues there was no clamour for major change.

### **Regulatory Responsibility Bill 2007**

In 2007 a private member's Bill in the name of ACT Leader Rodney Hide was drawn from the ballot and was sent to the Commerce Select Committee for consideration. The purpose of the Bill was to improve statutes and regulations in New Zealand by specifying principles of responsible regulatory management and by applying reporting requirements to the Crown with respect to these. It focused in particular on the taking of people's property or impairment of their common law rights without due reason.<sup>304</sup> The committee recommended that an expert taskforce be established to 'consider options for improving regulatory review and decision-making processes, including legislative and Standing Orders options, but not limited to the options that were placed before us.'<sup>305</sup>

### **New Zealand endorses Declaration on the Rights of Indigenous Peoples (2010)**

The United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples in September 2007.<sup>306</sup> It sets out a framework of minimum standards for the survival, dignity, well-being and rights of the world's indigenous peoples.<sup>307</sup> New Zealand had originally voted against

<sup>300</sup> Ibid, p 21.

<sup>301</sup> New Zealand Constitution Act 1986, s. 21 (repealed) ([http://www.nzlii.org/nz/legis/hist\\_act/ca19861986n114215/](http://www.nzlii.org/nz/legis/hist_act/ca19861986n114215/)).

<sup>302</sup> Constitution Amendment Act 2005, s. 5.

<sup>303</sup> Constitutional Arrangements Committee (2005) p 6.

<sup>304</sup> Report of the Commerce Committee, 'Regulatory Responsibility Bill', *New Zealand House of Representatives*, 2008, p 2.

<sup>305</sup> Ibid, p 3.

<sup>306</sup> Human Rights Commission, 'United Nations Declaration on the Rights of Indigenous Peoples' (<http://www.hrc.co.nz/human-rights-and-the-treaty-of-waitangi/united-nations-declaration-on-the-rights-of-indigenous-peoples>).

<sup>307</sup> Ibid.

supporting the Declaration, but in 2010 made a statement of support. The Government expressed that New Zealand had developed a distinct range of approaches to recognising indigenous rights that would inform this country's engagement with the aspirational elements of the Declaration.<sup>308</sup>

### Head of State Referenda Bill 2010

Green MP Keith Locke entered a private member's Bill into the ballot where it sat for seven years until it was drawn in 2010. It provided for a process of two referenda, with the second dependent on the result of the first.<sup>309</sup> In the first ballot, New Zealanders would choose between three options: the present system, with the monarch remaining as our Head of State; a New Zealand Head of State determined by a 75% majority vote in Parliament; or a New Zealand Head of State directly elected by the people via the single transferable vote preferential system, where the successful candidate would be the first to reach 50% of the votes as the preferences are distributed.

Had a majority of voters in referenda voted to retain the status quo, no further referenda would have taken place. If it did not secure a majority, it would have triggered a second referendum between the two most popular options. This was the first time that Parliament had considered legislation which would have fundamentally altered the status of the constitutional monarchy in New Zealand. The Bill did not progress to select committee, with 53 votes in favour and 68 opposed to its progression.<sup>310</sup>

### Review of Standing Orders (2011)

On 5 October 2011 the House of Representatives agreed a motion adopting a series of significant reforms to the Standing Orders of the House of Representatives. These reforms emerged from the regular review conducted by the Standing Orders Committee. During its review, the committee received a number of submissions from MPs, political parties, select committees, organisations and members of the public.

Some of the major themes guiding the reforms were methods to allow an increase in House time without requiring urgency, improving the procedures for scrutinising legislation, making more efficient use of sitting hours, and principles of openness, transparency, accessibility and public participation in the House's work.<sup>311</sup>

The main recommendations of the Standing Orders Committee were the extension of potential sitting hours that did not require urgency, the requirement that a Minister moving urgency state why it was necessary, making instructions to select committees debatable if they shorten the time for a committee to consider a Bill to four months or less, allowing MPs an opportunity to promote and gain support for their member's Bills, and updating several other elements of the parliamentary process.<sup>312</sup>

<sup>308</sup> Hon Dr Pita Sharples, 'Statement by Hon Dr Pita Sharples, Minister of Maori Affairs, 19 April 2010', *Ninth Session of the United Nations Permanent Forum on Indigenous Issues, 19-30 April 2010* (<http://www.mfat.govt.nz/Media-and-publications/Media/MFAT-speeches/2010/O-19-April-2010.php>).

<sup>309</sup> Head of State Referenda Bill, Explanatory Note (<http://www.legislation.govt.nz/bill/member/2009/0092/5.0/DLM2456310.html>).

<sup>310</sup> House of Representatives, 'Head of State Referenda Bill – First Reading', *Parliamentary Debates (Hansard)*, Vol. 662, p 10373 ([http://www.parliament.nz/mi-NZ/PB/Debates/Debates/O/1/7/49HansD\\_20100421\\_00001343-Head-of-State-Referenda-Bill-First-Reading.htm](http://www.parliament.nz/mi-NZ/PB/Debates/Debates/O/1/7/49HansD_20100421_00001343-Head-of-State-Referenda-Bill-First-Reading.htm)).

<sup>311</sup> Standing Orders Committee, 'Review of Standing Orders: Report of the Standing Orders Committee', *Presented to the House of Representatives*, Forty-ninth Parliament, September 2011, p 8.

<sup>312</sup> *Ibid.*



### Wai 262: Ko Aotearoa Tēnei (2011)

Ko Aotearoa Tēnei was the Tribunal's first whole-of-government inquiry.<sup>313</sup> Originally lodged on 9 October 1991, the Tribunal's report was released on 2 July 2011 following an extremely broad and complex inquiry in an ever-changing political and legal environment.<sup>314</sup> The report concluded by saying that it 'is time to move forward. As a nation we should shift our view of the Treaty from that of a breached contract, which can be repaired in the moment, to that of an exchange of solemn promises made about our ongoing relationships.'<sup>315</sup>

Some of the Tribunal's recommendations included: the establishment of new partnership bodies in education, conservation, and culture and heritage; a new commission to protect Māori cultural works; improved support for te reo Māori alongside other aspects of Māori culture and traditional knowledge; and amendments to laws covering Māori language, resource management, wildlife, conservation, cultural artefacts, environmental protection, patents and plant varieties, and more.<sup>316</sup>

### Referendum on the Voting System (2011)

Chapter 7

The Electoral Referendum Act 2010 was passed unanimously by Parliament, legislating that there would be an indicative (non-binding) referendum on New Zealand's voting system to coincide with the 2011 general election. In the referendum, New Zealanders were asked whether they wanted to keep MMP and, second, if the system did change which system they would prefer. In Part A, 56.17% of voters chose to keep MMP, while 41.06% of voters wanted to change the voting system. In Part B, more voters chose FPP than the other voting systems. Because over half of voters opted to keep MMP, there was an independent review of MMP in 2012 to recommend any changes that should be made to the way it works. The Electoral Commission conducted the review, which included public consultation.<sup>317</sup>

<sup>313</sup> The Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wellington, NZ: Legislation Direct, 2011) p 18.

<sup>314</sup> The Waitangi Tribunal, 'Time to Move Beyond Grievance in Treaty Relationship, Tribunal Says', 2 July 2011 (<http://www.waitangi-tribunal.govt.nz/news/media/wai262.asp>).

<sup>315</sup> The Waitangi Tribunal (2011) p 247.

<sup>316</sup> Ibid, pp 56-57.

<sup>317</sup> Electoral Commission New Zealand, 'About the 2011 Referendum on the Voting System' (<http://www.elections.org.nz/events/past-events-O/2011-referendum-voting-system/about-2011-referendum-voting-system>).

## OVERSEAS

The international experience has often differed from New Zealand's. Sweeping constitutional changes have occurred in a way that this country simply has not experienced in its relatively short history.

In the last few decades all countries have modified their constitution in some way, shape, or form. In that same time, countries from every continent have substantially altered or reframed their constitutional arrangements.<sup>318</sup> Some regions have experienced this more than others. Over the last two decades, for example, Latin America has seen almost every country adopt new constitutions or significantly alter existing arrangements.<sup>319</sup>

Research done on the endurance of constitutions has found the median lifespan of constitutions from all countries to be only 19 years.<sup>320</sup> Substantial outliers exist on either side of this margin. The Constitution of the United States of America has the longest life of all current national constitutions, having lasted since 1787. France, meanwhile, has had 14 constitutions since their first one in 1791.<sup>321</sup> Others have had even more regular comprehensive constitutional revisions or upheavals.

It is therefore possible to view New Zealand's 'pragmatic evolution' as more similar to the overall experience of constitutional change than might immediately be thought. But the constitutionally established mechanisms for change are more carefully delineated.

Much of the difference between New Zealand and the rest of the world stems from this country's lack of entrenched or supreme law. By 2011, 83% of countries had empowered their courts to scrutinise the implementation of the constitution and to strike down legislation that was inconsistent with it.<sup>322</sup> Many countries also define the procedures for constitutional amendment and may require specific procedures to alter their constitutional arrangements.

The summaries below outline a selection of constitutions from overseas. They include details on why the constitution was developed, how it was developed, and significant changes or amendments to it. Because of the written nature of most of the constitutions under discussion, less attention has been paid to the development of constitutional principles and conventions in these overseas examples. This is not to deny the role that these forces play. For example, the constitutional arrangements in the United States are not limited to 'the constitution', as statutes are developed and interpreted within their institutional structures.

The examples below seek to draw out the nature of constitutional dialogue in a select range of other countries.

### Australia

On 6 February 1890 representatives from each of Australia's colonial parliaments (New South Wales, Victoria, Tasmania, South Australia, Queensland and Western Australia), as well as delegates from New Zealand, gathered at the Australasian Federation Conference in Melbourne.<sup>323</sup> There they

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<sup>318</sup> Nora Hedling, 'A Practical Guide to Constitution Building: Principles and Cross-cutting Themes', p v.

<sup>319</sup> Schilling-Vacaflor (2011) p 3.

<sup>320</sup> Tom Ginsburg, James Melton & Zachary Elkins, 'The Endurance of National Constitutions', *John M. Olin Law & Economics Working Paper No. 511 (2nd Series)*, 2010, p 2.

<sup>321</sup> *Ibid*, p 1.

<sup>322</sup> *Ibid*, p 2.

<sup>323</sup> Parliamentary Education Office, 'Closer Look: A Short History of Parliament' ([http://www.peo.gov.au/students/cl/shorthistory\\_colonial-parliaments-australia.html](http://www.peo.gov.au/students/cl/shorthistory_colonial-parliaments-australia.html)); [http://www.peo.gov.au/students/cl/federation\\_federation\\_conventions.html](http://www.peo.gov.au/students/cl/federation_federation_conventions.html)).



resolved to hold a national convention to draft a constitution to unite them, as separate states, as the Commonwealth of Australia.<sup>324</sup> Representatives of all those parliaments gathered again in March and April of 1891, spending five weeks discussing and drafting a constitution.<sup>325</sup> They then took the document back to their respective parliaments for consideration, where progress stalled largely due to economic depression.<sup>326</sup>

Over the next few years the federation movement managed to secure renewed momentum for the creation of the Commonwealth of Australia, specifically through instigating a second convention for 1897. Neither New Zealand nor Queensland was represented at the 1897 convention, the latter having failed to pass enabling legislation. Delegates were popularly elected and seen as possessing the sufficient legitimacy to draft a constitution for Australia. Their draft was considered by all of Australia's colonial parliaments, and was amended at further sessions of the convention in September 1897 and January 1898. The last session between 20 January 1898 and 17 March 1898 produced the version that the convention adopted.<sup>327</sup>

After the convention, a series of referenda were held by some of the colonial parliaments. New South Wales' referendum failed to gain a majority of voters and the six colonies met again in Melbourne to make amendments to the proposed legislation in January 1899. Following these changes, referenda were held in five states and secured majorities in all by September. Western Australia did not hold its referendum until 31 July 1900 where its voters would also approve the constitution.<sup>328</sup>

The Commonwealth of Australia Constitution Act 1900 was passed by the British House of Commons and the House of Lords, and received the Royal Assent on 9 July 1900. Amending legislation passed in August 1900 allowed Western Australia to be included as an original state despite its initial delay. Queen Victoria further signed a proclamation that would establish the Commonwealth of Australia as of 1 January 1901.<sup>329</sup>

The Commonwealth of Australia Constitution Act 1900 is the supreme law of the Federation of Australia and can only be amended through a public referendum. The first three chapters of the Act set out that Australia is a constitutional monarchy and details the role and structure of the two Houses of Parliament, the Executive and the courts. Later chapters detail the role of and interaction between the different states, for instance, that trade commerce, and intercourse among the states shall be absolutely free and all citizens have the right to freedom of religion. Chapter Six allows for the admission of new states into the Commonwealth of Australia, although this has never been used. The constitution sets out a very limited number of rights such as a right to compensation in the compulsory acquisition of property, a guarantee of trial by jury on indictment, a right to vote, and a prohibition on the establishment of a national religion. These provisions affect the Commonwealth Parliament, but do not affect state legislatures, meaning that there is no Australia-wide Bill of Rights.

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<sup>324</sup> Parliamentary Education Office, 'Closer Look: Federation' ([http://www.peo.gov.au/students/cl/federation\\_federation\\_conventions.html](http://www.peo.gov.au/students/cl/federation_federation_conventions.html)).

<sup>325</sup> Ibid.

<sup>326</sup> Ibid.

<sup>327</sup> Chief Justice Robert French, 'Liberty and Law in Australia', *School of Law, Washington University, St Louis, USA*, 14 January 2011, p 6.

<sup>328</sup> Ibid, p 7.

<sup>329</sup> Ibid, pp 7-8.

In 1991 a Constitutional Centenary Conference was held to acknowledge the passing of 100 years since the National Australasian Convention of 1891 where the first draft of the Australian constitution was agreed to. One of the major outcomes of the conference was the establishment of the Constitutional Centenary Foundation, a body which was given the task of facilitating a public process of education, review and development of the Australian constitution. Throughout the centenary decade, the Foundation collected and distributed information about the constitution, arranged and participated in meetings across the country, and supported the work of other groups undertaking similar tasks.

Between 2 and 13 February 1998, a constitutional convention was held to discuss whether or not Australia should become a republic with 152 delegates from around the country. After the deliberations the convention voted 89:52 in favour of the proposition 'that this Convention supports in principle Australia becoming a republic.' The Australian public voted against the republican proposal in a referendum in 1999. In 2000 the Constitutional Centenary Foundation released *A Report on a Decade of Experience 1991-2000*.

Over several decades Aboriginal and Torres Strait Islander leaders have called for constitutional recognition. Holding a referendum on this issue has gradually become a common policy platform amongst the major parties. In 2010 the Prime Minister Julia Gillard formed a government with promises to hold a referendum on the matter before the 2013 election. An expert panel was appointed to advise on the process. Throughout 2011 they conducted a wide-ranging national consultation and engagement programme and reported back to the Government in 2012.

Later in 2012 the Labor Government delayed the referendum due to a low level of public awareness and proposed an Act of Recognition to Parliament, with a sunset clause of two years so that there would be a call to action within that time. Meanwhile, a grassroots movement has continued to call for the constitutional recognition of indigenous people through a referendum.

### **Bolivia**

During the 1990s, Bolivia saw an increase in the scale and influence of the indigenous movement for social change to address longstanding issues of exclusion and inequality in the country.<sup>330</sup> In 2005, President Evo Morales and the Movement Toward Socialism won the national elections having promised constitutional change to address many of the social challenges.

In 2006 members of the public elected a Constituent Assembly, which was responsible for producing a draft constitution. The Assembly encouraged participation, set up special committees to collect public input, and created a website where those with internet access could go to read about the history and purpose of the review. The constitution that emerged from this process showed a particular focus on indigenous rights, the responsibilities of the state, sovereignty over resources, workers' rights, environmental rights and gender rights. It was affirmed in a national referendum on 25 January 2009, with 61.43% of registered voters in favour.

Bolivia's 2009 constitution, enacted after a prolonged push for constitutional change, is the highest law of the land. Amendments can only be made through a referendum on a particular issue, or through a referendum which establishes a Constituent Assembly where the proposed changes affect the fundamental principles of the constitution. The preamble emphasises the centrality of Bolivia's indigenous culture.

Two changes of substantial note have taken place since Bolivia's new constitution was enacted.

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<sup>330</sup> ConstitutionNet, 'Constitutional History of Bolivia' (<http://www.constitutionnet.org/country/constitutional-history-bolivia>).



The first came about in 2010 when the Bolivian National Congress passed legislation creating an independent justice system for indigenous communities.<sup>331</sup> The second significant amendment was a successful 2013 law change enabling current President Evo Morales to run for re-election in the elections scheduled for December 2014.<sup>332</sup> In 2013 Bolivia's Constitutional Tribunal ruled the two-term limit for presidents was not retroactive, meaning that Morales' term before the passage of the new constitution did not count for the purposes of the term limit.

## Canada

The British North America Act 1867 (UK) united the British colonies of North America into one Dominion with responsible self-government. This legislation followed decades of political tension, including rebellions in 1837 and 1838, and increased calls from the 1850s onwards for a federal union of British colonies in North America.<sup>333</sup> In 1864 the Charlottetown Conference and Quebec Conference both produced resolutions that would set out the basis for the 1867 Act.

In 1967, one of Canada's constitutional scholars argued that there was a need to patriate the Canadian constitution to give the country full control over its own law-making abilities.<sup>334</sup> The Constitution Act 1982 was the tool used to bring about this patriation. The Act sets out that the Constitution of Canada is made up of the Canada Act 1982 (including the Constitution Act 1982), legislation referred to in the Constitution Act (including the Constitution Act 1867), and any amendments made to those. In the same section it is explicitly stated that the constitution is the supreme law of the land.

The first 35 sections of the Constitution Act 1982 are known collectively as the Canadian Charter of Rights and Freedoms. The Charter begins with the enumeration of 'Fundamental Rights' which include freedom of conscience, freedom of religion, freedom of expression and freedom of association. It also enumerates the right to vote, to life, liberty and security of person, freedom from cruel and unusual punishment, and the right to be presumed innocent until proven guilty. Later sections detail Canada's federal arrangements and oblige the branches of state, at national and provincial levels alike, to promote equal opportunities for all Canadians, furthering economic development to reduce disparities and providing essential public services.

There are several different procedures for amending the constitution depending on what type of change is proposed. For example, provinces almost always must agree through their legislatures to constitutional change that affects them.

The Canadian constitution has been amended substantively on 10 occasions since 1982. The first amendment came in 1983, adding a provision to the Constitution Act 1982 which committed, but did not require, federal and provincial governments to consult with aboriginal communities on constitutional amendments related to their communities.<sup>335</sup> Further amendments included the

<sup>331</sup> Jurist, 'Bolivia Parliament Advances Indigenous Justice System Bill', 9 June 2010 (<http://jurist.org/paperchase/2010/06/bolivia-congress-advances-indigenous-rights-bill.php>).

<sup>332</sup> Jurist, 'Bolivia Lawmakers Approve President's Third Term', 17 May 2013 (<http://jurist.org/paperchase/2013/05/bolivia-lawmakers-approve-presidents-third-term.php>).

<sup>333</sup> Canada in the Making Project, '1837-1839: Rebellion' ([http://www.canadiana.ca/citm/themes/constitution/constitution10\\_e.html](http://www.canadiana.ca/citm/themes/constitution/constitution10_e.html)); Canada in the Making Project, '1850-1867: On the Road to Confederation' ([http://www.canadiana.ca/citm/themes/constitution/constitution12\\_e.html](http://www.canadiana.ca/citm/themes/constitution/constitution12_e.html)).

<sup>334</sup> Neil Boyd, 'The Constitution of Canada: The British North America Act, the Constitution Act, and the Future of Federalism' in Neil Boyd (ed), *Canadian Law: An Introduction* (Toronto, Canada: Harcourt Brace & Company Canada Ltd, 1995) p 89.

<sup>335</sup> Royal Commission on Aboriginal Peoples, '5 - Constitutional Amendment: The Ultimate Challenge' *Volume 5 - Renewal: A Twenty-Year Commitment*, 1996, p 113 (<http://caid.ca/RRCAP5.5.pdf>).

addition of a new section entrenching bilingualism in New Brunswick in 1993, the 1991 amendment to the Constitution Act 1867 ensuring the Territory of Nunavut's representation in the Senate and the House of Commons, and the 2001 amendment which changed the name of the 'Province of Newfoundland' to the 'Province of Newfoundland and Labrador'.<sup>336</sup>

Two major attempts to amend the constitution were unsuccessful. The first of these is commonly referred to as the Meech Lake Accord, named for the location at which the negotiations took place. The meeting sought to comprehensively address the question of how to include Quebec fully into the renewed constitutional arrangements of 1982.<sup>337</sup> At a second meeting on 2 and 3 June 1986 the First Ministers of the provinces reached agreement on the Accord. The main provisions of the communiqué announcing the accord included the recognition of Quebec as a 'distinct society' within Canada, greater co-operation between federal government and the provinces over immigration, entrenching the Supreme Court along with greater input from the provinces into its composition, and effectively granting each province a veto over major constitutional change.<sup>338</sup>

The Meech Lake Accord, however, failed when it did not secure the support of the provinces of Manitoba and Newfoundland even though it had been approved twice by the House of Commons and by eight other provincial legislatures.<sup>339</sup> Another attempt in 1992, known as the Charlottetown Accord, was rejected in a Canada-wide referendum<sup>340</sup> but contained a broad set of significant proposals. Some of these included redefining the responsibilities of the federal and provincial governments with regard to a range of industries, a right to compensation for provinces who opted out of constitutional amendments transferring provincial powers to federal government, and creating a social charter to promote a range of social, economic and cultural rights.<sup>341</sup>

### Ecuador

Ecuador had for some time experienced a widespread drive for social change, led in particular by movements in favour of indigenous rights and social justice leading up to their constitutional reforms. President Rafael Correa had campaigned on addressing political, social and economic challenges through constitutional reform, and a 2007 referendum showed that 81.72% of registered voters were in favour of electing a Constituent Assembly to rewrite the constitution.<sup>342</sup>

<sup>336</sup> Parliament of Canada, 'The Constitution Since Patriation: Chronology' (<http://www.parl.gc.ca/parlinfo/compilations/constitution/ConstitutionSincePatriation.aspx>).

<sup>337</sup> Richard Simeon, 'Meech Lake and Shifting Conceptions of Canadian Federalism', *Canadian Public Policy/Analyse de Politiques*, Vol. 14 (Supplement), 1988, p 9.

<sup>338</sup> First Ministers' Meeting on the Constitution, 'Meech Lake Communiqué', 30 April 1987 (<http://www.originaldocuments.ca/api/pdf/1stMinistersConfMeechCom1987Apr30.pdf>); Jenny Higgins, 'Meech Lake' *Newfoundland and Labrador Heritage Web Site* ([http://www.heritage.nf.ca/law/wells\\_gov\\_meech.html](http://www.heritage.nf.ca/law/wells_gov_meech.html)).

<sup>339</sup> Peter W. Hogg, 'Formal Amendment of the Constitution of Canada', *Law and Contemporary Problems*, Vol. 55, No. 1, 1992, p 260 (<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4131&context=lcp>).

<sup>340</sup> Royal Commission on Aboriginal Peoples (1996) p 109.

<sup>341</sup> Gerald L. Gall, 'The Charlottetown Accord', *The Canadian Encyclopedia* (<http://www.thecanadianencyclopedia.com/articles/the-charlottetown-accord>).

<sup>342</sup> The Carter Center, 'Report on the National Constituent Assembly of the Republic of Ecuador' No. 1, January 2008 ([http://www.cartercenter.org/resources/pdfs/news/peace\\_publications/americas/English\\_The\\_Carter\\_Center\\_Report2\\_Ecuador\\_Constituent\\_Assembly\\_January08.pdf](http://www.cartercenter.org/resources/pdfs/news/peace_publications/americas/English_The_Carter_Center_Report2_Ecuador_Constituent_Assembly_January08.pdf)) p 1; The Carter Center, 'Final Report on Ecuador's September 30, 2007, Constituent Assembly Elections', 20 June 2008 ([http://www.cartercenter.org/resources/pdfs/peace/americas/Ecuador\\_Carter\\_Center\\_Electoral\\_Report\\_FINAL\\_website.pdf](http://www.cartercenter.org/resources/pdfs/peace/americas/Ecuador_Carter_Center_Electoral_Report_FINAL_website.pdf)) p 3.



The Constituent Assembly and its various Working Groups made themselves open to dialogue with various social sectors and also showed willingness to modify its proposals based on ongoing public consultations and demonstrations. Part-way through January 2008 the Assembly had already heard from around 6,000 individuals as well as over 500 organisations, groups and government authorities.<sup>343</sup>

One of the constitution's most publicised features was that it was the first constitution to create legally enforceable rights of nature.<sup>344</sup> There are also provisions relating to the right to food and restrictions on international investment. It also created two new branches of state, an Electoral Branch and a Transparency and Citizen Monitoring Branch, in addition to the pre-existing Executive, Legislative and Judicial branches. In a 2008 referendum 64% of voters endorsed the proposed constitution and it was subsequently enacted.

Ecuador's constitution was approved in 2008 by 64% of voters in a referendum. The constitution is supreme law, with the Constitutional Court having the power to strike down laws or state action that are inconsistent with the principles of the constitution. There are three different amendment procedures, all of which include a public referendum.

## France

The Constitution of the Fifth Republic of France was enacted following a public referendum on the text drafted by Michel Debré, who would become the first Prime Minister of the Fifth Republic, and designed by the President Charles de Gaulle.

Prior to 1971 the Constitution was not considered supreme law. However, in a significant decision in 1971 the Constitutional Council, using the references and wording within the Preamble as justification, effectively turned the constitution into higher law that legislation could be reviewed against. Amending the constitution requires special processes which differ depending on the scale of change. Super-majorities in one or both Houses of Parliament and the use of referenda are part of these rules. France's republican form of government cannot be amended under the constitution.

In the rest of the constitution the structure of Parliament, the Executive and the Courts are laid out, rights to universal, secret and free voting are established, and government is declared to be of the people, by the people and for the people. There are also provisions which set out France's relationship with the European Union and rules around the incorporation and supremacy of international treaties.

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<sup>343</sup> The Carter Center, 'Report on the National Constituent Assembly of the Republic of Ecuador' No. 2, January 2008 ([http://www.cartercenter.org/resources/pdfs/news/peace\\_publications/americas/English\\_The\\_Carter\\_Center\\_Report2\\_Ecuador\\_Constituent\\_Assembly\\_January08.pdf](http://www.cartercenter.org/resources/pdfs/news/peace_publications/americas/English_The_Carter_Center_Report2_Ecuador_Constituent_Assembly_January08.pdf)) p 4.

<sup>344</sup> Ibid, p 9.

## Iceland

Iceland had lived under Danish rule since the late 14<sup>th</sup> century and Norwegian rule for almost a century before that.<sup>345</sup> Independence movements had some success as early as 1809, with a brief period of independence achieved, but would not develop strong support until the 1830s.<sup>346</sup> Denmark's transition to a constitutional monarchy in 1849 sparked a significant and ongoing political dispute between Iceland and Denmark, which led to King Christian IX of Denmark presenting a constitution to Iceland in 1874.<sup>347</sup>

Although this constitution provided the Althingi (Parliament) of Iceland with legislative powers in domestic affairs, the country's struggle for greater self-determination continued.<sup>348</sup> In 1918 Iceland was granted sovereignty and equal status in union with Denmark under the same king, ratified under the Union Act 1918 which was approved by national referendum.<sup>349</sup> The Act also promised negotiations between the countries in 1940 concerning the future of the union. Iceland adopted its own constitution in 1920, which transferred supreme judicial powers and the technical control over foreign affairs to Iceland, moving it further towards independence.

German occupation of Denmark in 1940 severed much contact between the countries and Iceland took over all powers that had previously been exercised on its behalf.<sup>350</sup> It became apparent that the Union Act 1918 was not likely to be renewed and a cautious program of constitutional reform was laid out, mainly focused on amending the 1920 constitution to provide for a president in place of a monarch.<sup>351</sup> These amendments were ratified in a national referendum by approximately 95% of the population with a turnout of over 98% of voters.<sup>352</sup> The new constitution took effect on 17 June 1944.

Iceland suffered a significant collapse of its banking industry at the onset of the global financial crisis, which led in turn to large-scale protests about the country's constitutional arrangements. One of the most common demands was to draft a new constitution. In November 2010 an election was held for a Constitutional Assembly whose appointment was confirmed by the Althingi (Parliament) but a Constitutional Council was introduced instead, following some technical difficulties around the election. Specifically tasked with seeking public input, the Council subscribed itself to popular social media websites Youtube, Flickr, Facebook and Twitter. They used these platforms to post updates, minutes, interviews with Council members and videos of their deliberations.

The draft constitution created by the Council contained several important changes, most of which increased the potential for direct democracy through the use of referenda. It was given general approval by registered voters in a referendum in October 2012, but progress stalled before the April 2013 elections.

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<sup>345</sup> Björg Thorarensen, 'Constitutional Reform Process in Iceland: Involving the People in the Process', *Oslo-Rome International Workshop on Democracy*, 2011, p 2.

<sup>346</sup> Gunnar Karlsson, 'The Emergence of Nationalism in Iceland' in Sven Tägil (ed.), *Ethnicity and Nation Building in the Nordic World* (Illinois, USA: Southern Illinois University Press, 1995), p 39.

<sup>347</sup> Thorarensen (2011) p 2.

<sup>348</sup> Ibid.

<sup>349</sup> Ibid.

<sup>350</sup> Ágúst Þór Arnason, 'Colonial Past and Constitutional Momentum: The Case of Iceland', *Nordicum-Mediterraneum: Icelandic E-Journal of Nordic and Mediterranean Studies*, Vol. 8, No. 2, 2013 (<http://nome.unak.is/nm-marzo-2012/vol-8-no-2-2013/58-conference-paper/425-colonial-past-and-constitutional-momentum-the-case-of-iceland>).

<sup>351</sup> Ibid.

<sup>352</sup> Thorarensen (2011) p 3.



## Israel

Israel does not have a constitution contained within a single document, despite a provision in its Proclamation of Independence that this should have been done by 1948. Instead of developing a comprehensive constitution, Israel's first Prime Minister, David Ben-Gurion proposed that the country enact Basic Laws as consensus was found on specific constitutional areas.<sup>353</sup> This proposal was accepted by the Knesset (Parliament) and the process for Israel's constitutional development to date was established.<sup>354</sup> Some of these Basic Laws are:

- Basic Law: The Knesset (1958) which sets out the role and composition of the Knesset
- Basic Law: The State Economy (1975) which contains rules around taxes and the budget process
- Basic Law: Human Dignity and Liberty (1992) which serves the function of a Bill of Rights containing rights securing life, body and dignity, personal liberty, and the right to privacy.

Although there is no specific legislative provision of the supremacy of these laws, the judicial interpretation has effectively made the Basic Laws supreme, binding the legislative functions of the Knesset.<sup>355</sup> Most laws are simply subject to majority amendment in the Knesset. However, some of Israel's Basic Laws contain entrenched provisions regarding a special majority in the Knesset to amend.<sup>356</sup> For instance, sections 44 and 45 of the Basic Law: The Knesset (1958) require 80 members (two-thirds) of the Knesset to amend. Clauses Five and Six of Basic Law: Jerusalem, Capital of Israel (1980) are also entrenched, but require the passage of a Basic Law passed by a majority of the Knesset.

## Kenya

Kenya had a long build-up to the enactment of its new constitution in 2010. Following decades of one-party rule, the political process gradually became more accessible during the 1990s.<sup>357</sup> Dissatisfaction with the country's constitutional arrangements remained, however, and from the late 1990s there were a series of initiatives aimed at bringing about constitutional reform.

In 1997 an Inter-Party Parliamentary Group considered reforms but no major change emerged. Between 2001 and 2002 the Constitution of Kenya Review Commission carried out an information gathering, public education and basic drafting process.<sup>358</sup> Shortly after, a constitutional conference took place at the Bomas of Kenya in Nairobi. The conference was plagued by political disputes and many delegates abandoned the process, although a draft constitution was eventually produced. That draft was revised by the Government and taken to a referendum where it was rejected by the Kenyan people.

Violence in the wake of the 2007 elections prompted calls for a new constitutional review process. A new Committee of Experts for Constitutional Review was established in 2008 to hold a civic education campaign, consult with the public and, alongside a parliamentary select committee, draft

<sup>353</sup> Daniel J. Elazar, 'The Constitution of the State of Israel', *Jerusalem Center for Public Affairs*, Daniel Elazar Papers Index (<http://www.jcpa.org/dje/articles/const-intro-93.htm>).

<sup>354</sup> *Ibid.*

<sup>355</sup> Justice Aharon Barak, 'A Constitutional Revolution: Israel's Basic Laws', *Constitutional Forum*, Vol. 4, No. 3, 1993, p 83.

<sup>356</sup> Michael Tamir, 'A Guide to Legal Research in Israel', August 2006 (<http://www.nyulawglobal.org/globalex/israel.htm>).

<sup>357</sup> Bobby Mkangj & Nyambura Githaiga, 'Kenya's New Constitution and Conflict Transformation', *Institute for Security Studies Paper*, No. 232, February 2012, p 7.

<sup>358</sup> Alicia L. Bannon, 'Designing a Constitution Drafting Process: Lessons from Kenya', *The Yale Law Journal*, Vol. 116, 2007, p 1824.

a new constitution.<sup>359</sup> The draft that the Committee of Experts submitted to the National Assembly in 2010 went to a referendum where it was endorsed by 67% of registered voters and enacted shortly after.

The 2010 constitution is Kenya's supreme law, meaning that laws which are inconsistent with the constitution can be struck down by the courts. One of the major changes was to curtail the powers of the presidency while strengthening the powers of Parliament. Kenya now formally acknowledges socio-economic rights within its constitution in a range of 'second generation' stated rights, including healthcare, food, education and housing.<sup>360</sup> Freedom from discrimination on an ethnic basis is also enshrined in the new constitution and political parties must adopt a national character, meaning that they cannot be formed on a demographic basis. Kenya's constitution also created an independent ethics and anti-corruption commission.

Constitutional amendments can be proposed in either House of Parliament and must be passed by both before going to the president for assent. Alternatively amendments can be initiated by the will of at least one million registered voters. Majority approval in a referendum is required for final confirmation of any substantial amendment.

### South Africa

South Africa's 1996 constitution brought in several major reforms following the social and political changes that had swept the country. One of these major shifts was moving from the doctrine of parliamentary sovereignty to a constitution which has higher legal status than other laws. All amendments to the constitution require a super-majority in the National Assembly of either two-thirds or three-quarters and may also require the consent of six out of the nine provincial legislatures as well.

The Constitution of the Republic of South Africa has 14 chapters and a total of 243 provisions. There are also several schedules appended to the main chapters. It includes founding provisions asserting that South Africa is a sovereign, democratic state founded on values of human dignity, equality, non-racialism and non-sexism, supremacy of the constitution and rule of law, and universal suffrage. Following those provisions is a Bill of Rights which protects rights of human dignity, security of the person, equality, freedom of expression, education, health and food, privacy, and access to official information.

Later chapters set out the structure of the state, principles for the civil service, public finances and international laws. Chapter 12 recognises the status of traditional leaders and customary law, and the courts are enabled to recognise customary law in so far as it does not conflict with the constitution.

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<sup>359</sup> Democracy Reporting International, 'Lessons Learned from Constitution-Making: Process with Broad Based Public Participation', Briefing Paper No. 20, 2011 ([http://www.democracy-reporting.org/files/dri\\_briefingpaper\\_20.pdf](http://www.democracy-reporting.org/files/dri_briefingpaper_20.pdf)) p 7; Committee of Experts on Constitutional Review, 'Final Report of the Committee of Experts on Constitutional Review', 11 October 2010 ([http://www.mlgi.org.za/resources/local-government-database/by-country/kenya/commission-reports/CoE\\_final\\_report.pdf](http://www.mlgi.org.za/resources/local-government-database/by-country/kenya/commission-reports/CoE_final_report.pdf)) p 32.

<sup>360</sup> Eric Kramon & Daniel N. Posner, 'Kenya's New Constitution', *Journal of Democracy*, Vol. 22, No. 2, 2011, pp 89-103.



## United Kingdom

The United Kingdom is one of three countries, along with Israel and New Zealand, that does not have a constitution found in a single document. There are no laws with higher legal status than other laws and Parliament is able to amend laws by a majority vote of its members. Constitutional principles include established conventions of the constitutional monarchy, the fusion of the legislative and executive branches of government where the government must be drawn from MPs, and representative and responsible government. Formal sources of the constitution can also be found in a range of Acts of Parliament, key decisions of the courts, and authoritative written material concerning the United Kingdom's constitutional arrangements.

The Commission on a Bill of Rights was established by the government in 2011 to investigate the possibility and desirability of creating a United Kingdom Bill of Rights. The Commission was explicitly tasked with public consultation on its terms of reference. They conducted two rounds of consultation, including visits all over the United Kingdom, public seminars, meetings with the Judiciary and posting information on their website.

In December 2012, the Commission released a comprehensive report on the topic of adopting a Bill of Rights.<sup>361</sup> On the core issue of whether the time was right to create a United Kingdom Bill of Rights, there was no unanimous agreement amongst the members of the Commission. There was greater agreement on other issues, for instance, that if there were to be a Bill of Rights or something similar it should include the concept of responsibilities and could take on a broader scope than the Human Rights Act 1998.

## United States of America

Perhaps the most well-known constitution in the world and the oldest modern constitution, the Constitution of the United States of America, was signed on 17 September 1787 in Philadelphia, Pennsylvania after a prolonged period of political and military conflict.

Growing resentment against British colonial policy had led to protests such as the Boston Tea Party in 1773, and the British response punishing those actions had only heightened the tension. The First Continental Congress was held in 1774 which initiated a trade boycott with Britain and made provision for a Second Continental Congress.

This Second Continental Congress began meeting on 10 May 1775, soon after the outbreak of the American Revolutionary War against the British Empire. The Second Continental Congress moved to support independence from Britain, particularly through its adoption of the Declaration of Independence on 4 July 1776. Doing so committed those leading the revolution to expel the British military power and, just as importantly, to establish the institutional arrangements of self-government.<sup>362</sup> The Second Continental Congress also passed the Articles of Confederation in 1781 which provided the basis for American government until the passage of the Constitution in 1787.

<sup>361</sup> Ministry of Justice (UK), 'Commission on a Bill of Rights' (<http://www.justice.gov.uk/about/cbr>).

<sup>362</sup> Ben Baack, 'Forging a Nation State: The Continental Congress and the Financing of the War of American Independence', *Economic History Review*, Vol. 54, No. 4, 2001, p 639.

The Treaty of Paris in 1783 ended the American Revolutionary War, with the United States achieving international recognition of their independence. Between 25 May and 17 September 1787 the 55 delegates from all 13 states, except for Rhode Island, met at the Constitutional Convention in Philadelphia.<sup>363</sup> There they debated, drafted and ultimately ratified the Constitution of the United States of America.

This constitution is the country's supreme law and its provisions are difficult to amend. Amendments may be proposed in two ways, but the only method that has been used is through ratification by two-thirds of both houses of the United States Congress. The first three articles set out the different roles, powers and responsibilities of the Legislative, Executive and Judicial branches of government, while Article Four articulates the role and relationship of the different states.

Since the constitution was enacted there have been 17 amendments passed; the first 10 amendments were ratified simultaneously in 1791 and are known as the Bill of Rights. These rights include freedom of religion and assembly, that government must follow due process of law, and freedom from cruel and unusual punishment. Other constitutional amendments include the 1865 Thirteenth Amendment which abolished slavery, the Eighteenth Amendment of 1919 which brought in prohibition of alcohol and which was later repealed in 1933 by the Twenty-First Amendment, and the 1951 Twenty-Second Amendment limiting the President to two terms in office.

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<sup>363</sup> John R. Vile (ed.), *The Constitutional Convention of 1787: A Comprehensive History of America's Founding, Volume 1* (Santa Barbara, California: ABC-CLIO Ltd, 2005) p 215.



