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# On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government

The Rt Hon Sir Kenneth Keith, 1990, updated 2008, 2017 and 2023

## A constitution: What is it?

A constitution is about public power, the power of the state. It describes and establishes the major institutions of government, states their principal powers, and regulates the exercise of those powers in a broad way. While all constitutions have these general characteristics, each constitution is affected by the national character of the state it services.

## The New Zealand constitution: Its main features

The New Zealand constitution is to be found in formal legal documents, in decisions of the courts, and in practices (some of which are described as conventions). It reflects and establishes that New Zealand is a constitutional monarchy, that it has a parliamentary system of government, and that it is a democracy. It increasingly reflects the fact that the **Treaty of Waitangi** (<https://nzhistory.govt.nz/politics/treaty/read-the-treaty/english-text>) is regarded as a founding document of government in New Zealand (see **appendix A (/node/3509)**). The constitution must also be seen in its international context, because New Zealand governmental institutions must increasingly have regard to international obligations and standards.

## The Constitution Act 1986

The **Constitution Act 1986** (<http://www.legislation.govt.nz/act/public/1986/0114/latest/DLM94204.html>) is the principal formal statement of New Zealand's constitutional arrangements. The Act first recognises that the King - the Sovereign in right of New Zealand - is the Head of State of New Zealand, and that the Governor-General appointed by him is his representative in New Zealand. Each can, in general, exercise all the powers of the other.

The Act then deals with the executive, the legislature, and the judiciary.

The provisions about the executive emphasise its parliamentary character. Only members of Parliament may be Ministers of the Crown, members of the Executive Council, and Parliamentary Under-Secretaries. One Minister may also act for another.

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Parliament - the legislature - consists of the Sovereign and the House of Representatives. The members of the House are elected in accordance with the **Electoral Act 1993**

(<http://www.legislation.govt.nz/act/public/1993/0087/latest/DLM307519.html>). Each Parliament has a term of three years, unless it is earlier dissolved. The Governor-General has the power to summon, prorogue and dissolve Parliament. After each general election, Parliament is to meet within six weeks of the date fixed for the return of the writs.

The **Constitution Act** (<http://www.legislation.govt.nz/act/public/1986/0114/latest/DLM94204.html>) recognises that Parliament continues to have full power to make laws; a Bill passed by the House becomes law when the Sovereign or Governor-General assents to it.

The **Constitution Act** (<http://www.legislation.govt.nz/act/public/1986/0114/latest/DLM94204.html>) reaffirms the constitutional principles about parliamentary control of public finance: the Crown may not levy taxes, raise loans, or spend public money, except by or under an Act of Parliament.

The provisions about the judiciary also relate back to long-established constitutional principle. To enhance their independence, the Judges of the Supreme Court, the Court of Appeal and the High Court are protected against removal from office and reduction of salary.

## Other major sources of the constitution

The other major sources of the constitution include:

- **The prerogative powers of the Sovereign** under which, for instance, the Queen issued the Letters Patent Constituting the Office of the Governor-General of New Zealand in 1983 and conferred her powers in respect of New Zealand on the Governor-General. The King appoints the Governor-General who, in general, exercises his prerogative powers. The King or Governor-General appoints and dismisses members of the Executive Council and Ministers of the Crown. Those powers are part of the common law. They exist independently of statutes, although statutes can, of course, limit or even supersede them.
- Other relevant **New Zealand statutes**, such as the **Public Service Act 2020** (<https://www.legislation.govt.nz/act/public/2020/0040/latest/LMS106159.html>), the **Electoral Act 1993** (<http://www.legislation.govt.nz/act/public/1993/0087/latest/DLM307519.html>), the **Senior Courts Act 2016** (<http://www.legislation.govt.nz/act/public/2016/0048/latest/DLM5759262.html>), and the **District Court Act 2016** (<http://www.legislation.govt.nz/act/public/2016/0049/latest/DLM6942201.html>), relating in turn to the three branches of government, as well as the **Ombudsmen Act 1975** (<http://www.legislation.govt.nz/act/public/1975/0009/latest/DLM430984.html>), the **Official Information Act 1982** (<http://www.legislation.govt.nz/act/public/1982/0156/latest/DLM64785.html>), the **Public Finance Act 1989** (<http://www.legislation.govt.nz/act/public/1989/0044/latest/DLM160809.html>) and the **New Zealand Bill of Rights Act 1990** (<http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html>).
- Relevant **English and United Kingdom statutes**, such as **Magna Carta 1297** (<http://www.legislation.govt.nz/act/imperial/1297/0029/latest/DLM10926.html>), the **Bill of Rights 1688** (<http://www.legislation.govt.nz/act/imperial/1688/0002/latest/DLM10993.html>), and the **Act of Settlement 1700** (<http://www.legislation.govt.nz/act/imperial/1700/0002/latest/DLM11131.html>) (regulating succession to the throne among other matters), all confirmed as part of the law of New Zealand by the **Imperial Laws Application Act 1988** (<http://www.legislation.govt.nz/act/public/1988/0112/latest/DLM135074.html>). These statutes also regulate the relations between the state and the individual.
- Relevant **decisions of the courts**, for instance decisions upholding rights of the individual against the powers of the state, and determining the extent of those powers.
- **The Treaty of Waitangi**, which may indicate limits in our polity on majority decision-making. The law sometimes accords a special recognition to Māori rights and interests, particularly those covered by Article 2 of the **Treaty**.

(/node/3509). And in many other cases the law and its processes should be determined by the general recognition in Article 3 of the Treaty that Māori belong, as citizens, to the whole community. In some situations, autonomous Māori institutions have a role within the wider constitutional and political system. In other circumstances, the model provided by the Treaty of Waitangi, of two parties negotiating and agreeing with one another, is appropriate. Policy and procedure in this area continues to evolve.

- **The conventions of the constitution**, which in practice regulate, control and in some cases transform the use of the legal powers arising from the prerogative or conferred by statute. The most important conventions arise from the democratic character of our constitution. Constitutional conventions are of critical importance to the working of the constitution, even though they are not enforceable by the courts. In 1982, the Supreme Court of Canada summarised the constitutional position in that country in an equation: constitutional conventions plus constitutional law equal the total constitution of the country.

## The underlying principle: Democracy

### Q The King reigns . . .

This basic equation and the democratic character of the main conventions appear clearly in relation to the powers of the King and Governor-General under the law. Thus they may appoint Ministers and other holders of important offices (such as the Judges, the Defence Chiefs, the Ombudsmen, and the Controller and Auditor-General), they may dismiss them (following certain procedures), they may summon and dissolve Parliaments, they may assent - or not - to Bills passed through the House, and they may agree - or not - to proposed regulations and other decisions submitted to them by the Executive Council and Ministers.

### . . . but the government rules . . .

The King and the Governor-General are free to take those steps as a matter of law. But, as a matter of convention, they do so only on the advice of the Prime Minister or Ministers who have the support of the House of Representatives - that is, on the advice of those who are elected by the New Zealand voters, and who belong to a party that has a majority in the House; or who are part of a coalition that has a majority; or who, as a minority, are accepted by the House as able to sit on the Treasury benches. There must always be a ministry (the government of the day) to advise the King or Governor-General.

### . . . so long as it has the support of the House of Representatives

This convention of course incorporates its own limit - one that conforms with democratic principle. If the government loses the support of the House, or if the Prime Minister loses their support as the leader of that government, then the ministry or the Prime Minister is likely to change: another party or combination of parties may now have the support of the House, or a new leader may be identified as Prime Minister. Or the Governor-General may face a more difficult situation because the position in the House or the governing party is unclear.

Situations where the position is unclear were rare in New Zealand under the first past the post electoral system, but have been less rare since the introduction of the proportional representation electoral system. The essential principle in such situations continues to be that the King, as a constitutional monarch, or the Governor-General, as his representative, acts in accordance with the advice of the Prime Minister or Ministers who have the necessary support of the House of Representatives for confidence and supply (the money to fund the state's functions). Where that support is unclear, the Governor-General relies on the elected representatives in the House, and especially the party leaders, to clarify by way of

public statement whether a party or grouping of parties has the support of the House to govern, or whether fresh elections will be required. In the meantime, the incumbent government continues in office, where necessary acting in accordance with the convention on caretaker government.

This is not to deny the important role of the Governor-General in the business of government. Practice and the Letters Patent indicate that the role includes being informed and consulted, and advising and warning Ministers. The office has central symbolic, unifying, and representative roles, as well as the important legal powers mentioned.

In a broad sense, it is the ministry or government of the day that governs. The members of the ministry as a whole have the support of the House and must take collective and individual responsibility for their decisions, the decisions that are taken in their name, and the measures they propose. That is the position in law and in convention. That responsibility and power to take decisions results from the electoral process and the political contest.

## Real power and legal form

The decisions often take a legal form that departs from the practical and conventional reality. The decision taken in fact by Cabinet has then to be taken, as a matter of law, by the Governor-General in Council, the Governor-General or a Minister, as the law requires; or the Bill passed by the House through all its readings has to be assented to by the Governor-General to become law. The Cabinet, essentially a body established by convention, has no legal power; and the House acting alone has very limited powers to take decisions with full legal effect.

## The role of political parties

Political parties provide a vital link between the people, Parliament, and the government. The competition for the power of the state, exercised by and through the House of Representatives, is a competition organised by and through political parties. It is party strength in the House after elections that decides who is to govern. It is the parliamentary party (or parties) with the support of the House (and the ability to maintain confidence and ensure supply) that provides the government.

The importance of political parties in our constitutional system is recognised in the **Electoral Act 1993** (<https://www.legislation.govt.nz/act/public/1993/0087/latest/DLM307519.html>) and in the **Standing Orders of the House of Representatives** (<https://www.parliament.nz/en/pb/parliamentary-rules/standing-orders/>). It follows that parties' internal procedures, for instance in respect of the means of selecting their leaders and members of Cabinet, have an important practical effect on our governmental arrangements. The relationships between parties, including any agreements they may reach, have become more important under coalition and minority governments.

## The role of the Prime Minister and Ministers

The Prime Minister is the head of government, chairs Cabinet and has a general coordinating responsibility across all areas of government. By constitutional convention, the Prime Minister alone can advise the Governor-General to dissolve Parliament and call an election, and to appoint, dismiss, or accept the resignation of Ministers.

Ministers constitute the ministry, or executive arm of government. Their powers rise from legislation and the common law (including the prerogative). Ministers are supported in their portfolios by the public service.

# The role of the public service

The role of the public service is stated in some detail in legislation, particularly in the provisions of the **Public Service Act 2020** (<https://www.legislation.govt.nz/act/public/2020/0040/latest/LMS106159.html>), the **Public Finance Act 1989** (<https://www.legislation.govt.nz/act/public/1989/0044/latest/DLM160809.html>), and the **Official Information Act 1982** (<https://www.legislation.govt.nz/act/public/1982/0156/latest/DLM64785.html>), as well as a great number of particular statutes. Constitutional principles and that legislation support five broad propositions (among others). Members of the public service:

- are to act in accordance with the law;
- are to be imbued with the spirit of service to the community;
- are to give free and frank advice to Ministers and others in authority, and, when decisions have been taken, to give effect to those decisions in accordance with their responsibility to the Ministers or others;
- are to support constitutional and democratic government;
- when legislation so provides, are to act independently in accordance with the terms of that legislation.

Public servants meet these obligations in accordance with important principles and values such as political neutrality, fairness, and integrity.

## Independent powers of decision: statutory bodies

Members of the public service sometimes have independent statutory powers of decision, over which Ministers do not have control and for the exercise of which they are not responsible. Other parts of the broad state sector are not subject to ministerial control and responsibility in the same way that departments and their members usually are.

The bodies set up separately from government include regulatory agencies, providers of a wide range of services, state trading bodies, and supervisory, control, and advice agencies.

In establishing such bodies, over a very long period, Parliament has recognised and reaffirmed that much public power should not be concentrated. It should be allocated to distinct bodies with varying degrees of independence from the executive. This separation and independence may help ensure, for instance, a judicial independence of decision, equitable distribution of funds, the pursuit of commercial profit and business efficiency, or effective and credible processes of independent scrutiny, supervision and advice.

## Towards more open government

Over recent decades the processes of government have become more open. Notably, in 1982 the **Official Information Act** (<http://www.legislation.govt.nz/act/public/1982/0156/latest/DLM64785.html>) reversed the basic principle of the Official Secrets Act 1951: the principle now is that official information is to be made available to those seeking it unless there is good reason for withholding it. Such reasons relate to public interests such as the national security and law enforcement, and to private interests such as confidences and privacy. Underlying the principle are a number of purposes, including enabling the more effective participation of the people of New Zealand in the making and administration of laws and policies, and promoting the accountability of Ministers of the Crown and officials, with the consequence of enhancing respect for the law and promoting the good government of New Zealand.

The emphasis on greater transparency in decision making and policy development is also to be seen in the legislation governing the government's spending and fiscal policies (especially the **Public Finance Act 1989** (<https://www.legislation.govt.nz/act/public/1989/0044/latest/DLM160809.html>)) in the practice of proactive release, and in the operation of the parliamentary select committee processes.

# Individuals, autonomy and majority rule

In a range of ways, individuals and communities participate directly in political and governmental processes important to them. There is for instance much emphasis in law and in practice on those exercising public power giving fair hearings to and consulting those affected by the exercise of that power. Also relevant is the enactment of the **Citizens Initiated Referenda Act 1993** (<https://www.legislation.govt.nz/act/public/1993/0101/latest/DLM317193.html>).

A balance has to be struck between majority power and minority right, between the sovereignty of the people exercised through Parliament and the rule of the law, and between the right of elected governments to have their policies enacted into law and the protection of fundamental social and constitutional values. The answer cannot always lie with simple majority decision-making. Indeed, those with the authority to make majority decisions often themselves recognise that their authority is limited by understandings of what is basic in our society, by convention, by the **Treaty of Waitangi** ([/node/3509](#)), by international obligations and by ideas of fairness and justice.

## The international context

Major changes in science, technology, communications, trade patterns, financial systems, population movement, the environment and many other matters of international concern mean that more and more law is made through international processes. The powers of national governmental institutions are correspondingly reduced. This has important consequences for national and international constitutional processes. Parliament has an opportunity to scrutinise and comment on the more significant international treaties before they are ratified by the executive.

## Changing the constitution

In theory, many parts of the constitution can be amended by legislation passed by a simple majority of the Members of Parliament. That power is, however, restrained by law, convention, practice, and public acceptance.

Some limits on constitutional change arise from the international obligations just mentioned.

Certain key elements of the electoral system can be amended only if the people approve it in a referendum, or if three-quarters of the Members of Parliament agree. The provisions thus protected concern the three-year term of Parliament, the membership of the Representation Commission, the division of New Zealand into general electoral districts, the voting age, and the method of voting. Accordingly, the amendments made in the past 50 years to these provisions have been made only following agreement between the major political parties in the House or, in the notable instance of the change to proportional representation, following a binding referendum (which had itself been preceded by an indicative referendum).

It is also accepted, at the level of convention, that those voting requirements apply to any proposal to amend the protective provision. Similarly, **Standing Orders** (<https://www.parliament.nz/en/pb/parliamentary-rules/standing-orders/>) provide that an entrenched provision is to be adopted by the House only by the vote that would be required for the amendment or repeal of the provision being entrenched. The 1986 **Constitution Act** (<https://www.legislation.govt.nz/act/public/1986/0114/latest/DLM94204.html>) itself was enacted with general bipartisan support in the House. And recommendations to the House for new *Standing Orders*, in accordance with convention, are adopted by consensus in the Standing Orders Committee.

Other constitutional changes arise from legislation enacted in the regular way, such as the **New Zealand Bill of Rights Act 1990** (<https://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html>), from decisions of the courts, from new prerogative instruments, and from changing practices (which may contribute to new conventions). Some matters are

better left to evolving practice rather than being made the subject of formal statement. But such development, like other changes to the constitution, should always be based on relevant principle.

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