Wiliame Iupeli Gucake

The Cook Islands within the Realm: A Storm Cloud with No Rain?

LLM RESEARCH PAPER

LAWS 582: MASTERS LEGAL WRITING

FACULTY OF LAW

2020

Contents

Abstract

The Cook Islands is a self-governing state in free association with New Zealand. It forms part of the Realm of New Zealand, a collective of states and territories shared colonial histories. However, the relationship between states like the Cook Islands have continued to become more complex. This paper will review the constitutional relationship between the Queen and the Cook Islands in the context of the Realm of New Zealand. It argues that the current constitutional settings between the Cook Islands and the Queen engenders a subordinance by the Cook Islands to New Zealand. This disadvantages the Cook Islands and undermines its right to self-governance and independence.

Word length

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 12,000 words.

Subjects and Topics

The Realm of New Zealand, the Cook Islands, New Zealand, Self-Government, Free Association, Associated Statehood

I Introduction

E tumurangi matangi ra i ua - A storm cloud but no rain[1]

The title of this paper is a play on the above Kuki Airani adage,[2] which describes someone who promises you something but forgets to provide it.[3] This Cook Island pearl of wisdom can be applied to the underlying thesis of this paper: that the influence of New Zealand on the Cook Island's constitutional relationships with the Crown, undermine the Cook Islands self-governing status. The promise of self-government to the Cook Islands, is therefore unfulfilled and undermined by the current constitutional mechanisms. While the Cook Islands status of self-government in free association were implemented with the hope of self-determination and independent statehood, the current constitutional settings do not live up to those guarantees and instead provide for a relationship more akin to a colonial overlord and its territory rather than two independent states.

The Cook Islands is a self-governing island state in the South Pacific that is in a relationship of free association with New Zealand, under which both states are independent in the conduct of their own affairs.[4] The Cook Islands form part of the Realm of New Zealand. The "Realm" is a politico-legal construct consisting of New Zealand and the states and territories that are constitutionally linked to it, namely the Cook Islands, Niue, Tokelau and the Ross Dependency. The Realm of New Zealand unites the states and territories that were formerly British colonies and inherited by New Zealand but remain part of Commonwealth, retaining the Queen as their Head of State.

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1 Sir Apenera Pera Short KBE "Native proverbs and figurative expressions of the Cook Islands" (1951) 60(4) JPS 255 at 258. Notably, Sir Apenera Pera Short was the Queen's Representative for the Cook Islands from 1990 to 2000.

2 'Kuki Airani' is indigenous transliteration term for the "Cook Islands" in Cook Islands Māori.

3 Apenera Short, above n 1, at 258.

4 Cook Islands Constitution Act 1964, s 3 and Joint Centenary Declaration of the Principles of the Relationship Between New Zealand and the Cook Islands, 11 June 2001, cl 1.

This paper provides an examination of the relationship between the Cook Islands and the Queen. The current constitutional instruments and mechanisms are applied as a looking glass to review on the nature of the relationship between Cook Islands and the Crown, and the influence of New Zealand in that relationship. This paper argues that New Zealand's influence places the Cook Islands in a position of disadvantage in regard to its statehood and reflects a colonial attitude in New Zealand's approach to the Cook Islands.

The first section of this paper provides a brief political and constitutional background of the Cook Islands and how it came to be under the British Crown and subsequently New Zealand. The next section reviews the Realm of New Zealand and the Letters Patent constituting the Office of the Governor-General 1983. The third section considers the Constitution of the Cook Islands 1965 (specifically, the articles relating to the Head of State and the Queen's Representative), the Six-Point protocol, the Kirk-Henry Letters 1973 and the Joint Centenary Declaration 2001 in order to assess the relationship between the Cook Islands and the Crown. The paper then goes on to analyse whether the relationship created from these constitutional instruments engender a subordinance of the Cook Islands to New Zealand.

II Background and History of Cook Islands Constitutional System

A Becoming part of New Zealand

In the 1880s, the Cook Islands was governed by the Ariki (chiefs) who held control over 15 islands sprawled across an exclusive economic zone of around two million square kilometres of ocean.[5] The period was influenced by the rise in power of missionaries, the influx of European traders and settlers, and the onslaught of raids by blackbirders seeking

[5] Government of the Cook Islands *National Report to the World Summit on Sustainable Development* (October 2015) at [1.1].

slave labour.[6] These events transpired in an era of a political power struggle for control in the Pacific between the French and British, as well as the colonial aspirations of New Zealand leaders.[7]

These factors, coupled with the desires of the Ariki to gain the protection and potential trade benefits of being part of the British Empire, culminated in the declaration of parts of the Cook Islands as a British Protectorate in 1888. [8] A British Resident was appointed in 1890.[9] This later developed into formal annexation of the Cook Islands; on 7 October 1990, with a deed of cession was signed by five Ariki and seven lesser chiefs, incorporating the Cook Islands within New Zealand.[10] On 13 May 1901, an Order in Council was gazetted under the Colonial Boundaries Act 1895 (Imp) which redefined New Zealand's territorial boundaries to include the Cook Islands.[11] This was also confirmed within the Letters Patent Constituting the office of the Governor General of New Zealand 1917 (Letters Patent 1917) which applied to the Cook Islands as part of New Zealand.

The relationship between New Zealand and the Cook Islands was set out in the Cook and other Islands Government Act 1901, which provided for a Resident Commissioner to be appointed to administer the domestic government within the Cook Islands.[12] A New Zealand Minister with responsibility over the Cook Islands was appointed in 1902.[13]

The New Zealand Parliament passed the Cook Islands Act 1915, which at enactment, vested the executive government of the Cook Islands as 'Resident Commissioner of

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6 W P Morrell *Britain in the Pacific Islands* (London, Oxford University Press, 1960), at 280 - 297 and R Gilson *The Cook Islands 1820 - 1950* (Victoria University of Wellington and Institute of Pacific Studies of the University of the South Pacific, Wellington and Suva, 1980), at 20 – 109.

7 Alison Quentin-Baxter *Laws of New Zealand* Pacific States and Territories: Cook Islands (online ed) at [1]. Also see Phillipa Webb "Cook Islands" in Stephen Levine (ed) *Pacific Ways: Government and Politics in the Pacific Islands* (2ed, Victoria Univesity Press, Wellington, 2009).

8 W P Morrell and R Gilson, above n 6.

9 W P Morrell and R Gilson, above n 6.

10 Phillipa Webb, above n 7.

11 As established by the New Zealand Boundaries Act 1863 (Imp).

12 Cook and other Islands Government Act 1901, s 5(1).

13 R Gilson, above n 6, at 114.

Rarotonga'.[14] The Commissioner acted under the direction of a New Zealand Minister responsible for the administration of the islands.[15] The Cook Islands Act 1915 and its subsequent amendments, remained the leading constitutional document that guided the relationship between the Cook Islands and New Zealand until the Cook Islands gained independence in 1964.[16] The Cook Islands Act 1915 was developed by then Solicitor-General John Salmond who was commissioned to consolidate the Cook Islands laws.[17] This led to legislative reform like the Cook Islands Amendment Act 1946 created the first territory-wide legislative body with a mixture of official and indirectly elected unofficial members with limited legislative powers.[18]

In 1946, New Zealand declared the Cook Islands to be a non-self-governing territory for the purposes of art 73 of the Charter of the United Nations.[19] Accordingly, the Cook Islands were regarded as a "dependent territory" or a "territory for whose international relations the Government of New Zealand was responsible", the terms then used in territorial application clauses.[20]

B Self-governing and Free Association

In 1965, the Cook Islands became self-governing in free association with New Zealand. The impetus for the move to self-governing status stemmed from the focus, towards

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14 Cook Islands Act 1915, s 9.

15 Alison Quentin-Baxter, above n 7 and Cook Islands Act 1915, ss 5 – 9.

16 Alison Quentin-Baxter, above n 7, at [4].

17 Alex Frame *Salmond: Southern Jurist* (Victoria University Press, Wellington, 1995), at 180-189. Notably, the Act contained protections against the alienability native land rights and interests, a marked contrast to the New Zealand Policy of facilitating land sales. This was a major and enduring contribution to the preservation of the culture and economic base of the indigenous people of the Cook Islands. See also Frame, above n 17, at 186 – 188.

18 Cook Islands Amendment Act 1946, ss 2 – 18.

19 Charter of the United Nations (San Francisco, 26 June 1945; 1 UNTS, XVI; AppHR 1945 A2; EAPub No 11; UKTS 67 (1946).

20 Alison Quentin-Baxter, above n 7, at [5].

decolonisation and empowering former territories to become independent states, following World War II.[21]

The seeds for this new status were planted in 1962, when New Zealand put a proposal to the Cook Islands Legislative Assembly, for the Cook Islands to become self-governing.[22] The Cook Islands would still retain New Zealand citizenship, but the domestic Cook Islands Government would be responsible for the management of its own territory. Other proposed options included 'complete independence' akin to the status of Western Samoa, or integration into New Zealand with representation in Parliament.[23] The Cook Islands Legislative Assembly unanimously supported a declaration announcing the transition to internal self-government, while remaining citizens of New Zealand, the continued loyalty to the Queen and also the ongoing relationship of aid and assistance from New Zealand.[24]

These developments led to the Cook Islands Constitution Act 1964, which outlined the new status of the Cook Islands and provided for a Constitution for the self-governing Cook Islands.[25] The Act and Constitution were to come into effect on a date requested by the Legislative Assembly following the 1965 general election.[26] Before the Legislative Assembly, a number of amendments like lowering the residential qualification for candidates were made to the Cook Islands version of the legislation and Constitution,[27] which were correspondingly enacted in the New Zealand Parliament.[28] Following the election on 27 July 1965, the Legislative Assembly ratified the Constitution, coming into

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21 Caroline McDonald "Decolonisation and Free Association: The Relationships of the Cook Islands and Niue with New Zealand" (PhD Thesis, Victoria University of Wellington, 2008), at 2-4.

22 Caroline McDonald, above n 21, at 4.

23 D J Stone "Political Resurgence in the Cook Islands: The Path to Self-Government 1944 – 1965" (MA thesis, University of Auckland, 1966), at 449.

24 At 451.

25 Cook Islands Constitution Act 1964, ss 3, 4 and Schedule.

26 Cook Islands Constitution Act 1964, s 1(2). The original enacted legislation required that the Constitution not come into force until the first Ariki members of the proposed Council of State had been appointed.

27 Under the Cook Islands Amendment Act 1957, s 32A, as repealed and substituted by the Cook Islands Amendment Act 1965, s 2(1).

28 See Cook Islands Constitution Amendment Act 1965 and Cook Islands Amendment Act 1965.

force on 4 August 1965, establishing the Cook Islands as being self-governing in free association with New Zealand.[29]

C What does this mean? Self-governing? Free Association?

The next logical question is what do the terms 'self-governing' and free association' mean? Alison Quentin-Baxter,[30] provides useful definitions. Firstly, characterising a state that is 'self-governing' to mean "the system of government established by the constitution and other laws of the Associated State" with a common feature being the ability of a self-governing state "to make and execute its own laws".[31] Secondly, Quentin-Baxter defines 'free association' as being a descriptor of the relationship between a State and New Zealand.[32] Quentin-Baxter outlines a number of key factors that will characterise a relationship of free association under the New Zealand model:[33]

- The constitution of the self-governing State recognises that the Head of State continues to be Her Majesty the Queen in right of New Zealand; [34]
- The people of the State remain New Zealand citizens as of right;[35]
- The New Zealand Government has given a commitment to go on giving the government of the associated State financial and other support as it did before self-government;[36] and

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29 D J Stone, above n 23, at 584, S D Wilson "Cook Islands Development" in Ross A (ed) *New Zealand's Record in the Pacific Islands in the Twentieth Century* (New Zealand Institute of International Affairs, Auckland, 1969) at 113.

30 Hereon referred to as Quentin-Baxter. References made to Prof Robert Quentin Quentin-Baxter will be stated in full.

31 Alison Quentin-Baxter "The New Zealand Model of Free Association: What Does it Mean for New Zealand?" (2008) 39(4) VUWLR 607 at 611.

32 At 611.

33 At 613.

34 Cook Islands Constitution Act 1964, s 3 and Joint Centenary Declaration 2001, cl 2.

35 Cook Islands Constitution Act 1964, s 6. For further discussion of citizenship in the Realm, see Elizabeth Perham "Citizenship Laws in the Realm of New Zealand" (2011) 9 NZYIL 219.

36 Exchange of Letters between the Prime Minister of New Zealand and the Premier of the Cook Islands concerning the Nature of the Special Relationship between the Cook Islands and New Zealand [1973] I AJHR A 10. (hereon referred to as the Kirk-Henry Letters)

- There is an expectation that the laws and policies of both governments will reflect the shared values stemming from the common citizenship.[37]

A key aspect for our purposes is the recognition at art 2 of the Cook Islands Constitution that Her Majesty the Queen in right of New Zealand is the Head of State. Quentin-Baxter explains that the reference to 'in right of New Zealand', does not connote superior legal authority of New Zealand, but is in reference to the wider constitutional entity - the Realm of New Zealand.[38] Quentin-Baxter clarifies that in New Zealand and other Realm states, where executive authority continues to be vested in the Queen, the Queen or her Representative is separately advised, or delegated the whole of the executive power to an organ of the government of the self-governing state.[39] Under the Letters Patent Constituting the Office of Governor-General of New Zealand 1983 (Letters Patent 1983).[40]

Free association does not necessarily require the Queen to remain as Head of State but as Quentin-Baxter reasons, this stems from the Letters Patent 1983.[41] Under this prerogative instrument, the Queen acting on approval of the New Zealand Government, appoints a Governor-General as her representative in the Realm of New Zealand.[42] The Letters Patent 1983 are therefore a unifying tool that form part of the law of every part of the realm and brings New Zealand and the associated states together as a single wider constitutional entity.[43]

The Cook Island's legal-political history reflect a constitutional journey from New Zealand colony to self-governance in free association with New Zealand. The following section will go on to consider the Realm of New Zealand and the Letters Patent1983.

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37 Kirk-Henry Letters, above n 36.

38 Alison Quentin-Baxter, above n 31, at 614.

39 At 614.

40 Letters Patent Constituting the Office of the Governor-General of New Zealand 1983 (SR 1983/225), cl 7 (hereon referred to as the Letters Patent 1983).

41 Letters Patent 1983, preamble and Alison Quentin-Baxter, above n 31, 614.

42 Letters Patent 1983, cls 1 & 2.

43 Alison Quentin-Baxter, above n 31, at 614.

III The Realm of New Zealand and the Letters Patent

A The Realm Generally

The terminology of a "Realm" was devised by Quentin-Baxter, then legal consultant to the New Zealand Prime Minister's Department which led the review of the Letters Patent 1917 and the fashioning of the Letters Patent 1983.[44] Quentin-Baxter took inspiration from the words of the Sovereign's royal style and titles as described within s 2 of the Royal Titles Act 1974; "Queen Elizabeth the Second … Queen of New Zealand and her other realms and territories".[45] As Quentin-Baxter explains this reflects the "clear implication (that) New Zealand itself is a "Realm", comprising all the countries and territories within the territorial sovereignty of the Queen in the right of New Zealand".[46] The Realm while constitutionally important, has no separate international legal personality, being, "a 'symbolic term' that reflects the shared history, values, and Head of State of its constituent parts".[47]

The constituents of this "Realm" are outlined in the Letters Patent Constituting the Office of the Governor-General, which states at cl 1:

> We do hereby constitute, order, and declare that there shall be, in and over Our Realm of New Zealand, which comprises—
> (a) New Zealand; and
> (b) The self-governing state of the Cook Islands; and
> (c) The self-governing state of Niue; and
> (d) Tokelau; and

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44 Alison Quentin-Baxter *Review of the Letters Patent 1917 Constituting the Office of Governor-General of New Zealand* (Report to the Prime Minister's Department, Cabinet Office, Wellington, 1980) at 134.

45 Alison Quentin-Baxter and Janet McLean *This Realm of New Zealand: The Sovereign, the Governor-General, the Crown* (Auckland University Press, Auckland, 2017) at 104. (hereon referred to as AQB and Mclean)

46 At 104.

47 Andrew Townend "The Strange Death of the Realm of New Zealand: The Implications of a New Zealand Republic for the Cook Islands and Niue" (2003) 34 VUWLR 571 at 588, citing interview with HE Hon Dame Silvia Cartwright PCNZM DBE, Governor-General of New Zealand (Townend, Wellington, 31 July 2002).

> (e) The Ross Dependency,—
> a Governor-General and Commander-in-Chief who shall be Our representative in Our Realm of New Zealand ...

The Letters Patent 1983 reflected and clarified the power of the Governor-General, but more pointedly for our purposes, was an expression of prerogative power as to how the Crown's relationship with its Realm countries would be constituted. The development of this grouping can be traced through to the Letters Patent 1917, which applied to the geographical areas declared to have been brought within the boundaries of New Zealand, which at the time constituted the Cook Islands and Niue who were annexed to the Crown in 1901.[48]

Later in 1923, the Ross Dependency was brought into the fold as it was claimed by the United Kingdom to be part of Her Majesty's possessions.[49] In 1925, Tokelau was separated from the United Kingdom colony of the Gilbert and Ellis Islands and brought under the authority of the Governor-General of New Zealand, who would act as Governor of Tokelau.[50] As outlined above in Part I, the nature of the different countries has changed with time, with the Cook Islands and Niue now each self-governing in free association, as opposed to the early colonial period, where the Letters Patent gave legitimacy to the ability for the New Zealand to administer and make laws for the territories.

The autonomy of the Cook Islands and Niue formed part of the impetus for the restructuring of the Letters Patent. This led to the approach that the Letters Patent 1983 include all five states and territories as parts of a single 'Realm of New Zealand' and take into account the different sets of laws of the different states and territories of the realm.[51]

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48 AQB and Mclean, above n 45, at 105.

49 Order in Council for Government of the Ross Dependency (16 August 1923) *New Zealand Gazette* at 2211, cl II.

50 Tokelau Act 1948, preamble.

51 AQB and Mclean, above n 45, at 108.

The Realm is a way of referring to the collection of states or territories outlined within clause one, being the "sum of its part" rather than a separate body politic.[52] The Realm reflects the historical political and constitutional relationships between the Queen, New Zealand, and the other states and territories.

These linkages also provide legitimacy to the shared rights of citizenship across all parts of the Realm. The shared rights of citizenship, however, do not and should not undermine the self-governing status of the Cook Islands and Niue, and do not connote New Zealand as a federal state. The Prime Minister of New Zealand is not Prime Minister of the Realm.

B Letters Patent 1983 and the Divisibility of the Crown

Letters Patent are an exercise of the royal prerogative. The Letters Patent 1983 therefore reflect the Sovereign's expression of what the nature of the Realm is. This prerogative instrument is promulgated as law for all the states and territories within the Realm, however equally it outlines that the Governor-General will serve the reigning monarch and the people of the Realm, in accordance with the laws and customs of the Realm countries.[53] This illustrates that the Governor-General's role will be distinct and different in each part of the Realm.[54]

As shown by cl 1 in the extract in Part III(A), the Letters Patent 1983 provide that the Governor-General is the representative of the Sovereign of the Realm of New Zealand. Therefore, this illustrates the pre-eminence given to role of the Governor-General of New Zealand as the Queen's Representative in the Realm of New Zealand. The clause also includes a savings provision that the Governor-General exercises their authority and powers conferred by the Letters Patent 1983, "without prejudice to the office, powers and authority of any other person who has been or may be appointed" to represent the Crown

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52 AQB and Mclean, above n 45, at 109.

53 Letters Patent 1983, cl 6.

54 AQB and Mclean, above n 45, at 109.

in any other part of the Realm and exercise powers on their behalf.[55] This explicitly takes into account the Queen's Representative role in the Cook Islands and the autonomy of that relationship between the Cook Islands and the Queen.

Notably for current purposes this reflects the 'divisibility of the Crown'.[56] This is the concept that the Sovereign reigns as Queen of the Cook Islands, independently of being Queen of New Zealand, with the monarch being advised by the responsible Ministers of self-governing states with respect to matters concerning those states.[57] This is foreshadowed in the Preamble to the Letters Patent 1983, which proclaim "Elizabeth the Second, by the Grace of God Queen of New Zealand and Her Other Realms and Territories."[58] Simply, this illustrates that Queen Elizabeth II, is the queen of all sixteen Realms, but the Crown, referring to the Sovereign rather than the Executive, is a different legal entity in each Realm.[59]

The distinction between the Queen in the right of New Zealand and the Queen in the right of the Realm of New Zealand is indicative that the Queen in the right of New Zealand is distinct from the Queen in the right of the Realm, which is illustrative of the divisibility of the Crown. The Queen therefore has distinct individual relationships with the Cook Islands and Niue within the Realm.[60] Accordingly, the Queen must be able to be advised by a single advisor for each state.[61] A 'six-point procedure' was developed for the tendering of advice to the Monarch by the Cook Islands government, which is discussed further later in this paper.

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55 Letters Patent 1983, cl 1.

56 For further discussion see Peter Boyce *The Queen's Other Realms: The Crown and Its Legacy in Australia, Canada and New Zealand* (Federation Press, Sydney, 2008) and Anne Twomey *The Chameleon Crown: The Queen and Her Australian Governors* (Federation Press, Alexandria, 2017).

57 Anne Twomey "Responsible Government and the Divisibility of the Crown" (2008) Sydney Law School Research Paper 09/137 at 1.

58 Letters Patent 1983, preamble.

59 Townend above n 47, at 581.

60 Tokelau and the Ross Dependency as territories fall within the ambit of the Queen in the right of New Zealand and would not necessarily have distinct relationships.

61 AQB and Mclean, above n 45, at 110.

This is demonstrated in the Australian and Canadian position where the Queen is represented not only by the Governor-General but with provincial or federal representatives (a Lieutenant-Governor in Canada and a State Governor in Australia).[62] This reflects the historical relationship where each state previously were separate colonies that had their own relationship with the Queen.[63] However the practice now is that the Sovereign acts only on the advice of the Prime Minister of Canada or of Australia.[64] There is an interesting point of analogy to the relationship between the Realm countries and the Queen. The practice that limits the relationship between the Sovereign's representatives on the federal level in Australia and New Zealand, is rationalised on the basis that those states/provinces are not sovereign independent countries.[65]

However similar practices are employed in the provision of advice in regards to the Realm, whereby there is a single representative of the Realm – the Governor-General of New Zealand.[66] The practice is founded on the traditional British view that the Queen should not be placed in "the position of receiving advice from more than one source in any one country", or for our purposes one Realm.[67] On that basis there is a need for a representative to speak for the Realm as a whole and advise on the status of its individual parts, which by convention is generally the Prime Minister of New Zealand who advises the Governor-General.[68]

The contrast to the Australia/Canadian federal situation, is that the Cook Islands is a self-governing state that has the right to advise the Queen directly on matters relating solely to the Cook Islands. The convention therefore has developed that in matters affecting the Realm, like a change in the law of succession to the throne or amendment to the Letters Patent constituting the Office of the Governor-General, the New Zealand Prime Minister

62 Twomey, above n 57, at 8, citing Twomey, above n 56, at ch 21. See also Michael Stokes, "Comment: Are There Separate State Crowns?" (1998) 20(1) Syd LR 127.

63 AQB and Mclean, above n 45, at 110.

64 At 111.

65 At 111.

66 At 111 and Letters Patent 1983, cl 1.

67 At 111.

68 At 111.

will advise the sovereign on behalf of the Realm, after consulting with the Cook Islands, Niue and Tokelau.[69] This commitment to consultation is enshrined in cl 3(2) of the Joint Centenary Declaration 2001 (Declaration),[70] which promises that in all matters for the Cook Islands affecting the Realm, there will be close consultation between New Zealand and the Cook Islands.

A further question is why the Prime Minister of New Zealand should solely carry the responsibility to tender advice to the Governor-General as representative for the Realm. Why can it not be the Prime Minister of the Cook Islands or the Premier of Niue? It is clear in the Australian/Canadian federal example why it would be unworkable to have both national (Governor-General) and provincial (Lt-General or State Governor) to provide advice to the Queen, as the different states ultimately fall under one body as "Australia", but why should the same be applied to the Realm? As discussed above, the Realm is constituted by its countries but is not a fully separate entity. As Angelo states, the Realm is an entity with no formal international status and probably no existence beyond the Letters Patent 1983.[71] So why does there need to be a hierarchical system that favours New Zealand in relation to how advice is tendered to the Queen. It should however be recognised that in terms of resources and administrative burden, it may just be that New Zealand is best placed to carry out this role.

Interestingly, it raises an interesting question of: what is the purpose of the Letters Patent 1983 in regard to the Realm? Are they a Treaty between the illusionary different Crowns that co-exist within the Realm, which have created the Realm and its representative? The Realm is a constitutional spectre, weaving together the shared constitutional histories between the Realm countries. If the Letters Patent 1983 birthed the Realm, then perhaps the constituent parts and their respective Heads of States theoretically agree to form part of this entity, as the Realm country arguably does cede some part of independence in being part of the Realm. Alternatively, perhaps the Realm is simply the

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69 AQB and Mclean, above n 45, at 112.

70 Joint Centenary Declaration 2011, above n 4.

71 Tony Angelo "Pacific Constitution Overviews – Niue" (2009) 15(20) CLJP/JDCP 157 at 160.

modern political mechanism employed by the British to streamline advice received from its faraway colonies. Are the Letters Patent 1983 more akin to a feudal decree to Realm countries then from their colonial overlords? This paper does not make conclusive points here, but simply raises them as interesting points to consider.

There is still the question then of why does there need to be a sole representative to speak for the Realm as a whole? Why do such matters need to be streamlined into a single representative, when it may be just as effective for the Cook Islands and Niue to provide their perspective to their Head of State instead of being filtered through New Zealand? This paper argues that these constitutional conventions of the Realm stem from the initial colonial relationship maintained between New Zealand as administrator of Realms countries like the Cook Islands, Niue and Tokelau. The continued subordination of the Cook Islands in these settings to New Zealand, reflect a colonial attitude taken by New Zealand towards other Realm countries, despite their statehood and inherent rights to provide advice to the Monarch.

A further question is that while consultation is enshrined in the practice undertaken on matters of the Realm,[72] to what extent does this necessarily correlate to a duty to accommodate the views of Realm countries by New Zealand. Is there sufficient transparency in the provision of such advice to understand whether the Cook Islands or Niue perspective is included, and substantive consultation has occurred? As explained above, the practice of consultation is employed when there are matters which affect the Realm as a whole, like changes to the Letters Patent 1983. There have been subsequent amendments to the Letters Patent 1983, in 1987 and 2006 all which contain the clause:[73]

> **Recites approval by Government of Cook Islands and Government of Niue of draft of amending Letters Patent**
>
> (7) And whereas approval of the draft of the amending Letters Patent has been signified on behalf of the Government of the Cook Islands and the Government of Niue:

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72 See also the Joint Centenary Declaration 2011, above n 4.

73 Letters Patent (2006) Amending Letters Patent Constituting the Office of Governor-General of New Zealand (SR 2006/219), cl 7.

How would it be received if the Cook Islands requested in their consultation to also make an amendment to the Letters Patent? There are no examples to cite authoritatively but the amendments, indicate they have been largely New Zealand led changes.[74]

The Realm ultimately is a key constitutional link between New Zealand and the Cook Islands. It forms the basis of the relationship of free association and shared constitutional elements between the two states like Head of State, though separate entities in their own right, and citizenship. The Realm springs from the Letters Patent 1983 which defines the Realm and the constitutional practices surrounding its operation.

IV Cook Island Constitution and the Queen's Representative

The Cook Islands Constitution Act (NZ) 1964 (Act) was the bridge for shift of the Cook Islands becoming self-governing in free association with New Zealand. The schedule to the Act contained a draft Cook Islands Constitution.[75] This was debated before the Legislative Assembly who made amendments to the final version that now applies in the Cook Islands.[76]

The Act embeds the status of the Cook Islands as self-governing within the constitutional frameworks of both the Cook Islands and New Zealand.[77] This is a formal recognition that the Cook Islands is independent with its own Constitution and laws that are exclusively within the prerogative of the people of the Cook Islands to determine. This is evidenced by s 4 of the Act which provides that the Constitution is the supreme law of the Cook Islands, and therefore to the extent there is an inconsistency between any section of the Act and the Constitution, the Constitution takes precedence and the relevant section of the Act is void.[78]

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74 Letters Patent (1987) Amending Letters Patent Constituting the Office of Governor-General of New Zealand (SR 1987/8) and Letters Patent (2006) Amending Letters Patent Constituting the Office of Governor-General of New Zealand (SR 2006/224).

75 Cook Islands Constitution Act 1964, Schedule.

76 See D J Stone, above n 23, at 584 and the Cook Islands Constitution Act (Ck) 1964.

77 Cook Islands Constitution Act 1964, s 3. See also Alison Quentin-Baxter, above n 7, at [8].

78 Cook Islands Constitution Act 1964, s 6.

The Cook Islands Constitution sets out the terms of the relationship of free association and the relationship between the Cook Islands and the Queen. The relationship is not explicitly stated in either document but the nature and terms are to be deduced from the provisions of the Act, the Constitution, contextual factors and other dealings between the two states.[79] This section will review in turn the provisions relating to the Head of State of the Cook Islands and the Queen's Representative.

A Head of State

Article 2 of the Constitution confirms simply that "Her Majesty the Queen in right of New Zealand shall be the Head of State of the Cook Islands." It is important to understand that the reference to "the Queen in the right of New Zealand" does not connote that the "Crown is indivisible" between New Zealand and the Cook Islands.[80] This simply reflects the assumption by the Queen, in 1953, of a separate royal style and title for her Realm of "New Zealand",[81] with New Zealand being an allusion to the Realm of New Zealand, not New Zealand itself.[82]

A further explanation for the use of New Zealand is for "reasons of convenience" the Constitution took inspiration from New Zealand's constitutional setup and made use of certain offices and institutions.[83] This is in accordance with the relationship of free association, though the Cook Islands has the "exclusive power" to terminate these constitutional arrangements if desired. Quentin-Baxter contends however that art 2 that 'the Queen in the right of New Zealand', would be an exception that could not be

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79 Alison Quentin-Baxter, above n 7, at [8].

80 At [10].

81 Professor R Q Quentin-Baxter's Letter of 24 January 1969 to the Secretary, Department of Maori and Island Affairs on "Aspects of the Constitutional Relationship between New Zealand and the Cook Islands", at [2].

82 Alison Quentin-Baxter, above n 7, at [10].

83 At [9].

terminated under the Cook Islands "exclusive power".[84] She reasons that in regard to the Head of State, the convention has developed to confirm that "although the Queen in right of New Zealand is the symbol of the free association between the two countries, she is separately advised by her ministers in each country."[85]

The above points are made to affirm that the Cook Islands remains a self-governing state, that has the right to an independent relationship with its Sovereign and to advise the Queen separately from New Zealand. Quentin-Baxter explains that this right is exercised within the relationship of free association:[86]

> when the Queen in right of New Zealand is advised by her Cook Islands ministers, in matters involving her exercise in person of powers in respect of the Cook Islands, the terms of the free association may require the cooperative involvement of the Governor-General and New Zealand minister.

B Queen's Representative and the Six-Point procedure

The Queen's Representative is the constitutional officer who is the Representative of "Her Majesty the Queen in the Cook Islands".[87] The Office was created in 1982 to replace the position of High Commissioner of the Cook Islands, who formerly represented the Cook Islands to both New Zealand and the Queen.[88]

The Queen's Representative is appointed by Her Majesty for a term of three years and can be reappointed.[89] Under the Constitution, the Queen's Representative is empowered to exercise the executive authority of the Cook Islands vested in the Queen in right of New Zealand, either directly or through subordinate officers.[90] The Queen's Representative role

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84 Alison Quentin-Baxter, above n 7, at [9].

85 At [9].

86 At [10].

87 Constitution of the Cook Islands 1965, art 3.

88 As noted at art 3 as it appeared in the Schedule to the Cook Islands Constitution Act (NZ) 1964.

89 Constitution of the Cook Islands 1965, art 3(2).

90 At art 12.

corresponds in nature to the Governor-General of New Zealand, in that it is non-political and the Office is required to act on the advice of the Cabinet, the Prime Minister, or the appropriate Minister.[91]

Importantly for our present purposes is the right of the Queen's Representative to advise Her Majesty in matters regarding the Cook Islands. There is no express provision within the Constitution as to how Her Majesty is to be advised and the process of how advise to Her Majesty would work also in light of the relationship of free association and shared monarchs discussed above. In comparison, the Letters Patent 1983 provide for the Governor-General to be Representative of the Queen in and over the Realm of New Zealand, and constitutes an Executive Council, which will tender advice to the Queen and their Representative – the Governor-General.[92]

The potential doubling up of advice regarding the Realm between New Zealand and the Cook Islands, was recognised early on by the Royal Household who foresaw the implications in the early development of the Cook Island's Constitution, with the New Zealand representative to the Cook Islands making the following statement to the Cook Islands Government:[93]

> It follows that as [there is] a sovereign Parliament with plenary powers and no legal fetters on the exercise of those powers the Cook Islands Government must be entitled to tender advice to the Queen on matters wholly within its competence without any substantive involvement on the part of New Zealand Ministers.

This led to the formulation of a 'six-point procedure' between the two states, for the tendering of advice from the Cook Islands to the Queen. This was first derived from the

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91 Constitution of the Cook Islands 1965, at art 5(1).

92 Letters Patent, cls 1 and 7.

93 Extract from a letter of the New Zealand Representative in the Cook Islands to the Attorney-General of the Cook Islands dated 28 October 1980, quoted in a letter dated 8 December 1980 from the Premier of the Cook Islands, the Hon Sir Thomas Davis, to the Prime Minister of New Zealand, the Rt Hon R D Muldoon, copy on CAB 3/1/6.

"Exchange of Letters between the Prime Minister of New Zealand and the Premier of the Cook Islands concerning the Nature of the Special Relationship between the Cook Islands and New Zealand".[94]. The statement contains both principles and the procedure for the formal tendering of advice to the Queen, which overtime has increased to more than 'six-steps'.[95] The six-steps developed were:[96]

1. Advice to Her Majesty on matters within the exclusive competence of the Cook Islands Government should be tendered by the Cook Islands Government;
2. The Prime Minister of the Cook Islands would discuss informally the nature of such advice with the Prime Minister of New Zealand before the advice is tendered;
3. After this discussion the Prime Minister of the Cook Islands would forward the advice to the Queen's Representative in the Cook Island;
4. The Prime Minister of the Cook Islands would then provide the Prime Minister of New Zealand with a copy of the advice;
5. The Prime Minister of New Zealand would advise the Governor-General that advice from the Cook Islands Government to her Majesty the Queen will be forwarded to the Governor-General by the Queen's Representative in the Cook Islands for onward transmission to the Palace; and
6. The Queen's Representative would send the advice to the Governor-General who would forward it to the Queen.

The first point explains that all correspondence to the Queen, whether informal or formal should be signed by only the Prime Minister of the Cook Islands. Quentin-Baxter explains that there is a further principle implicit within the first. She explains that as Cook Islands remains part of the Realm of New Zealand, the Queen needs the assurance of the Prime

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94 Alison Quentin-Baxter, above n 7, at [11].

95 AQB and Mclean, above n 45, at 111-112 and Alison Quentin-Baxter, above n 7, at [27].

96 As outlined in Justin Fepulea'i "Neither Fish nor Fowl: the Cook Islands, New Zealand and the Politics of Free Association" (Phd diss, University of Auckland, 2002) at 203, citing the Letter dated 21 May 1981 from the Prime Minister of New Zealand , the Rt Hon R D Muldoon, to the Hon Sir Thomas Davis, Premier of the Cook Islands; Reply dated 10 June 1981 from Sir Thomas Davis to the Rt Hon R D Muldoon.

Minister of New Zealand that the matter on which she receives advice on from the Prime Minister of the Cook Islands is "within the exclusive competence of the Cook Islands".[97]

This is reasoning for the bureaucratic procedure for the tendering of informal or formal advice to the Queen, which starts from the Queen's Representative (on advice of the Cook Islands Prime Minister), to the Governor-General (on advice of the New Zealand Prime Minister), to the Queen's Private Secretary and ultimately the Queen herself. In reality, the practice is usually that the Prime Minister of New Zealand, requests the Governor-General to forward to the Palace the letter or advice signed by the Prime Minister of the Cook Islands.[98]

A further consideration in review of all the six points is the level of oversight the New Zealand Prime Minister has in regard to the substance of advice tendered to the Monarch. The Prime Minister of New Zealand has no oversight over the substance of the advice tendered to the Queen. However, the Prime Minister of New Zealand, may in practice have more influence than simply being a tick box that the Prime Minister is indeed exclusive adviser of the Queen on the matter at issue. The six-point procedure requires the informal discussion by the Prime Minister of the Cook Islands with the New Zealand Prime Minister of the nature of such advice, before it is tendered. Such a discussion has the potential to encroach on the borders of influencing the substance of the advice tendered. For example, in the recommendation for appointment of the Queen's Representative, there may be a discussion between both Prime Ministers to avoid the possibility of an appointment that could cause embarrassment to the Monarch.

Quentin-Baxter explains that the involvement of the Governor-General and New Zealand Ministers within the six-point procedure steps has "constitutional significance" insofar as it provides Her Majesty assurance that those matters are within the constitutional authority of the Cook Islands and are not matters of the Realm of New Zealand.[99] Fepulea'i reasons

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97 Alison Quentin-Baxter, above n 7, at [11]. The notion stems from the wording of the Constitution of the Cook Islands 1965, particularly arts 3 and 5.

98 AQB and McLean, above n 45, at 112.

99 Alison Quentin-Baxter, above n 7, at [27].

that the necessity of the six-point procedure is derived from art 2 of the Constitution, which declares that the Queen in the "right of New Zealand" is the head of state of the Cook Islands.[100] Article 2 simply affirms that the Cook Islands are part of the Realm of New Zealand and therefore consultation is necessary with the Representative of the Queen to the Realm of New Zealand, the Governor-General of New Zealand,[101] who is acts only on the advice of the Prime Minister of New Zealand.

These constitutional web of lines of authority provide the underlying rationales of the six-point procedure. The six-point procedure has been criticised however as being "intrusive and cumbersome" due to New Zealand's heavy oversight of this constitutional right of the Cook Islands to tender advise to its Head of State.[102]

This section has provided the historical and constitutional background to the relationship between the Cook Islands and the Head of State of the Cook Islands, and the influence of New Zealand on such relationship. The next section considers the influence of the Exchange of Letters between the Government of New Zealand and the Government of the Cook Islands on the Constitutional Relationship between the two Countries 1973 (Kirk-Henry Letters) and the Joint Centenary Declaration 2001 (the Declaration) and the Cook Islands on the relationship between the Cook Islands and the Queen in the right of the Cook Islands.

V Kirk-Henry Letters and Joint Centenary Declaration 2001

Two other instruments which provides insight into the Cook Islands relationship with the Queen are the Kirk-Henry Letters, and the Declaration. Both are political statements of the Cook Islands relationship of free association and are discussed in turn:

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100 Justin Fepulea'i, above n 96, at 202.

101 As outlined within the Letters Patent 1983.

102 Caroline McDonald, above n 21, at 114, citing Justin Fepulea'i, above n 96, at 202-203.

A Kirk-Henry Exchange of Letters 1973

The Kirk-Henry Letters were an expression of the political commitment towards a relationship of "free association between the Cook Islands and New Zealand". This international legal-political statement was drafted as an exchange of formal letters between Prime Minister Norman Kirk and Premier Albert Henry and addressed the desire of the Cook Islands Government to formally clarify its ability to pursue independent foreign policy.[103] The need for clarification can be linked to pressure faced by New Zealand from other members of the Pacific Islands Forum. The Exchange of Letters confirms that the relationship of free association does not restrict the Cook Islands self-government, nor does it limit the law-making powers of the Cook Islands. The relationship is characterised in Prime Minister Kirk's letter as "one of partnership, freely entered into and freely maintained", with a reaffirmation of New Zealand's role to support and protect the Cook Islands.[104]

The key narrative outlined however within Kirk's letter is to make clear the expectations of the Cook Islands as "citizens of New Zealand" in accordance with the "shared interests and shared sympathies" as citizens.[105] The notion of shared interests and sympathies is considered integral to the relationship, being reciprocal of New Zealand respecting the independence of the Cook Islands, while also an understanding by the Cook Islands of New Zealand's will to safeguard the values upon which its citizenship is based.

Kirk's letter firstly states that the continued rights citizenship of New Zealand carry a corresponding allegiance to the Queen in the right of New Zealand and acknowledges the Queen in her capacity as their Head of State, "like all other New Zealand citizens".[106] Shared citizenship is a complex set of political dynamics that arguably place the Cook Islands in a position of subordination to New Zealand. Technically, it is a country with not

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103 Caroline McDonald, above n 21, at 119.

104 Kirk-Henry Letters, above n 36, at 3.

105 Kirk-Henry Letters, above n 36, at 3.

106 At 3.

citizens, and both constitution allegiance owed by and responsibility for Cook Islanders resting with New Zealand.

Kirk's statement reflects the hierarchy that prioritises the Crown in the right of New Zealand over other Crowns within the Realm. The Kirk-Henry Letters are before the development of the 'Realm', and so perhaps the discussion of New Zealand can now be taken in wider reference to the Realm. This provides an interesting insight to the perspective of New Zealand prior into the formalisation of the Realm.

This reasoning draws on the legal basis advanced by Professor Robert Quentin-Baxter for the New Zealand Government in the development of the Kirk-Henry letters, who argued:[107]

> when New Zealand citizens are in a foreign country, they remain under New Zealand protection; and the New Zealand Government will, if necessary, make representations on their behalf. The New Zealand Government's interest is obviously much larger in relation to an area for which New Zealand itself is internationally responsible.

Secondly, Kirk's letter goes on to explain that the continued shared citizenship entails a continued degree of "New Zealand involvement in Cook Islands affairs" reflected not only New Zealand's support of the Cook Island's material needs but also in an "expectation that the Cook Islands will uphold, in their laws and policies a standard of values generally accepted by New Zealanders." These statements create expectations on the relationship between New Zealand and the Cook Islands which implicitly have elements of control.

It is recognised that the direct remedy here the issue outlined above is the removal of shared citizenship and providing for Cook Islanders to be citizens of the Cook Islands in their own right. This is however is unlikely to be a politically palatable option to both to the Cook Islands Government and people.

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107 Prof R Q Quentin-Baxter to the Secretary of Maori and Island Affairs, "The Cook Islands and the Colonial Boundaries Act," 18 January 1973, reference ABHS 6978 W4637/5, record M85/1/37, part 5, Archive.

The rationale behind these sentiments has been linked to concerns by New Zealand of Premier Henry's leadership, due to issues arising out of the 1972 Cook Islands elections and proposed legislation by the Cook Islands government in 1973 that would cut across human rights of New Zealand citizens in the Cook Islands.[108] Though altruistic, these intentions evidence the desire to apply controls over the Cook Islands and undermine their autonomy as a self-governance state. The linkages outlined within Kirk's letter between material needs, "aid" and "citizenship" show the colonialist approach taken by New Zealand towards the Cook Islands.

Interestingly, Niue which undertook parallel journey to the Cook Islands towards self-governance, has its relationship of economic cooperation with New Zealand legislated for in statute under s 6 of the Niue Constitution Act 1974. The provision establishes that New Zealand shall have a continuing responsibility to "provide necessary economic and administrative assistance to Niue". Angelo explains that this is crucial to the relationship of free association, with the statutory undertaking, at the time of and the Niue expectation since self-determination is the guarantee by New Zealand of basic budgetary and administrative support to maintain the daily operation of government in Niue.[109]

This relationship is not perfect, with the budgetary allocation for Niue by New Zealand being significantly reduced at the cost of detriment of provision of services in Niue and ultimately the retention of the Niue population.[110] Angelo notes that s 6 is justiciable in New Zealand but that a claim that may be brought by Niue against New Zealand is unlikely under the relationship of free association.[111] There is difficulty in defining what exactly "necessary economic or administrative assistance" involves on the part of New Zealand.[112]

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108 Caroline McDonald, above n 21, at 120 citing Ron and Marjorie Crocombe, "The Saga of Tension," in *Cook Islands Politics: The Inside Story*, Ron Crocombe (ed) (Auckland: Polynesian Press, 1979), 249 and Alison Quentin-Baxter, above n 31, at 616-617.

109 Tony Angelo, above n 71, at 164.

110 At 165.

111 At 165, citing *Controller and Auditor General v Davison* [1996] 2 NZLR 278, as authority that the provision is justiciable before New Zealand courts.

112 At 165.

While there are difficulties, Niue's position is much stronger than the Cook Islands under the Kirk-Henry letters which formalise the relationship of economic and administrative support as a "continuing responsibility of New Zealand".[113] This inhibits New Zealand from using its economic and administrative support as a political tool, which is how it is arguably employed to the Cook Islands under the Kirk-Henry Letters. This section goes on to consider the development of the Cook Islands relationship under the Declaration.

B Joint Centenary Declaration 2001

The Declaration serves a similar purpose to the Kirk-Henry LAetters, being an ongoing commitment to preserve the relationship of free association. The Declaration represents the current formal position on the free association relationship between New Zealand and the Cook Islands. The Declaration was instigated by the Cook Islands for a statement that would support its engagement internationally.[114]

In comparison to the Kirk-Henry Letters, there is a shift in the political dynamics. While the Kirk-Henry Letters outline the free association relationship largely on New Zealand's terms, the Declaration reflects a stronger representation of Cook Island's position. This is indicated from the strong affirmations of the Cook Islands in cl 4, where it is made clear that "in the conduct of its foreign affairs, the Cook Islands interacts with international community as a sovereign and independent state".[115]

These affirmative positions clarify the independence of the Cook Islands and can be seen in other clauses like cl 5, which confirm the Cook Islands capacity to enter into treaties and international agreements, and cl 6, which confirm the Cook Islands full legal and executive competence in respect of its own defence and security.[116] Clause 6 goes on to state that s 5 of the Cook Islands Constitution Act (NZ) 1964 reflects a responsibility to assist the Cook

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113 Niue Constitution Act 1974, s 7.

114 Joint Centenary Declaration 2001, above n 4 and Caroline McDonald, above n 21, at 121.

115 Joint Centenary Declaration 2001, cl 4.

116 At cls 5 & 6.

Islands, but clarifies that it is not a qualification on the Cook Islands statehood.[117] All these points reflect a strong statement of the independence and self-governance of the Cook Islands within the relationship of free association with New Zealand.

Notably for present purposes is cl 3 which concerns the relationship of the Cook Islands to the Head of State:

Clause 3

Head of State

1. Her Majesty the Queen as Head of State of the Cook Islands is advised exclusively by Her Cook Islands Ministers in matters relating to the Cook Islands.

2. In all matters affecting the Realm of New Zealand, of which the Cook Islands and New Zealand are part, there will be close consultation between the signatories.

Looking first to subclause 1, this is an unequivocal position of the exclusive right of the Cook Islands to advise the Queen in Her capacity as Queen of the Cook Islands in matters relating to the Cook Islands. This is different from the wording of the Kirk-Henry letters which mainly reference the Queen in her capacity as Head of State of New Zealand. Subclause 1 confirms the right that the Cook Islands may tender advice to the Queen in regard to matters relating to the Cook Islands, and this is not a matter for New Zealand to interfere with nor a right that is qualified by the overarching supervision of New Zealand.

Subclause 3(2) also makes clear that there is a duty of consultation in the tendering of advice to the Queen on matters of the Realm, and that this is not solely determined by New Zealand. On one hand this subclause simply formalises the position under the Letters Patent 1983 which considers the Governor-General's powers to be "without prejudice" to any other person who represent the Queen in any part of the Realm.[118] This arguably created an implicit duty of consultation by the Governor-General in its representations in the Realm and vice-versa in the Governor-Generals representation of the Realm to the Queen, there is an obligation to consult so as to not prejudice as representatives of the Realm. This notion

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117 At cl 6.

118 Letters Patent 1983, cl 1.

is consistent with the Letters Patent 1983, which prescribes the Governor-General powers and authorities to be exercised without prejudice to other Representatives of the Realm.

The obligation of consultation under subclause 2 is not so radical, when considered against the practice established under s 8 of the Niue Act 1974. This is expanded on later in this paper, but the section provides for the co-operation between Niue and New Zealand and the consultation between Heads of Government. The obligation of consultation in the Declaration therefore merely brings the Cook Islands relationship with New Zealand in line with the well-established practice of its Realm counterpart Niue and New Zealand.

On the other hand, the Declaration can be interpreted as going further than the terms of free association sketched out in the Kirk-Henry Letters. The Declaration strengthens the obligation within the Letters Patent 1983, creating an active duty of consultation in matters of the Realm. This subclause is also considered alongside the underlying six-point protocol policy, as discussed above. As a formal political expression of the relationship between New Zealand and the Cook Islands, the Declaration would weigh heavier as the lead guiding principles of the relationship, instead of the informal six-point protocol which are akin to a convention.

The Declaration likely went further than New Zealand would have liked, as indicated by Prime Minister Helen Clark's public statements following the Declaration that there are limits to the Cook Islands pursuing its international ambitions stating to the media that there are "New Zealand citizenship implications for Cook Islanders if the Cooks sought sovereignty, enabling them to be a member (of the United Nations) in their own right."[119]

These statements reflect similar elements of control asserted by New Zealand in Prime Minister Kirk's letters revealing a colonial attitude that possibly underpins New Zealand's

[119] John Andrews, "PM warns Cook Islands Over Sovereignty," New Zealand Herald, (15 June 2001); John Andrews, "Cook Islands put NZ Citizenship First," New Zealand Herald, (14 June 2001); John Andrews, "NZ Won't Stand in Way of Cook Islands' Independence," New Zealand Herald, (13 June 2001).

approach to the free association relationship. However, the Declaration still stands as the formal political commitment of an evolved relationship of free association that aligns more with the Cook Island's position in the relationship than one dictated by New Zealand.

VI Analysis

The nature of the relationship between the Cook Islands and the Queen is guided by several constitutional mechanisms. In summary, the development and nature of the Realm of New Zealand and the Cook Island's role in that relationship, and the position in which the 'Realm' construct places, states, and territories. The preceding sections reviewed the Letters Patent 1983 (and subsequent amendments) considering how it constitutes the Realm and reflects the divisibility of the Crown. The paper has also considered the relationship between the Cook Islands and the Queen as outlined by the Constitution, the influence of the Queen's Representative, and process for the tendering of advice to the Queen through the 'six-point protocol'. The paper has also assessed the text of the Kirk-Henry Letters and the Declaration and how the influence of the relationship of free association guides the relationship between the Cook Islands and the Queen.

This section now develops on the points raised and evaluates how New Zealand's influence on the Cook Island's relationship with the Queen as its Head of State, reveals a colonial attitude disadvantages the Cook Islands and undermines its independence and self-governance.

A Does New Zealand's Influence Disadvantage the Cook Islands?

1 The Realm – a hierarchy of states/territories?

The 'Realm' construct in its current form arguably creates a hierarchy between the states, given that the relationship between these states is predicated on the former colonial relationship. As explained above, Quentin-Baxter rationalises that references to New Zealand within the name itself - "the Realm of New Zealand" and "Her Majesty in the right of New Zealand" scattered throughout the constitutional instruments above are symbolic

of the Realm relationship and do not give New Zealand, the state any "superior legal powers".[120] But in terms of how the Realm operates in practice, there is an obvious New Zealand bias creating what Townend characterises as 'a lopsided Realm'.[121]

Firstly, to consider the general terminology used, to the average person it would seem that New Zealand has an overarching role over the Cook Islands, as concept of the Realm does not easily translate. The references in art 2 to "Her Majesty in the right of New Zealand" are rationalised as being symbolic of the Realm, but the Realm is not what the average Cook Islander reading their Constitution would automatically perceive. The use of the Realm of New Zealand as discussed above is derivative of the previous colonial relationships that were administered by New Zealand, and therefore the collective of these states logically is a Realm of New Zealand.

But as the colonies develop to become associated states that are self-governing with their own right to self-determination, is it still apt to apply terminology that reflects that previous colonial relationship, or should the name reflect a relationship of partnership and free association? This is somewhat analogous to the terminology used for United Kingdom, which is an overarching sovereign state but constituted by the self-governing states of England, Scotland, Wales and Northern Ireland under the Westminster system. The political context is different but the phrasing of the collective of these states as a United Kingdom, rather than the United States of England for example, given where the main power for the collective is located, changes the tone of how the relationships between those states are perceived.

Secondly, the current constitutional settings within the Realm construct provide a lot of opportunities for New Zealand to have an influence over the other states. This can be seen in the relationship of the Governor-General of New Zealand and in the process for the tendering of advice, which will be discussed further in the next section, but also in the common members of the judiciary. Article 49 of the Cook Island's Constitution states that

120 Allison Quentin-Baxter, above n 31, at 614.

121 Townend, above n 47, at 588.

the Cook Islands High Court may comprise New Zealand High Court and Court of Appeal judges, and art 56 requires the Court of Appeal to contain at least one New Zealand High Court or Court of Appeal judge.

There is an increasing trend for Māori Land Court judges to sit as Judges of the Cook Islands and Niue.[122] Notably, art 63 also exempts New Zealand judges from having to recite the Cook Islands oath of allegiance and judicial oath.[123] While these are provisions of the Cook Islands law, it is important to be cognisant of the genealogy of the Constitution and its development in New Zealand, in consultation with the Cook Islands. These inherited provisions show a subordination of the Cook Islands to New Zealand within the Realm relationship.

Practically, given the size of the Cook Island's legal profession, the use of foreign judges is probably a necessity. But does it engender a complacency with the status quo of deferring to foreign judges and no development of local judges, particularly at appellate levels for long periods of time as seen in other Pacific countries.[124] This paper employs Baird's contention that the final domestic appellate court is symbolic of sovereignty and use of foreign judges "diminishes the sovereignty of the state itself".[125] In regard to the Cook Islands, the heavy influence of New Zealand judges within the Cook Islands legal system. can undermine the Cook Island's self-governing status. Though the Cook Islands final appellate Court is the Privy Council, the costs of bringing a claim to the Privy Council may mean that most Cook Islands will really only access justice at that domestic appellate level

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122 Prof Richard Boast "Māori Land and Land Tenure in New Zealand: 150 Years of the Māori Land Court" (2016) 22 NZACL 77 at 102. Also see Ministry of Justice "Our judges | Māori Land Court" (7 October 2020) <maorilandcourt.govt.nz>.

123 Constitution of the Cook Islands 1965, art 63.

124 For example, Tonga only appointed its first Tongan Justice of the Supreme Court in 2018, Justice Laki Niu, over 100 years since the establishment of the Supreme Court in 1910. For further discussion of the influence of foreign judges in the Pacific, see Anna Dziedzic "Foreign Judges on Pacific Courts: Implications for a Reflective Judiciary" (1 August 2017) 5/2018 Federalismi 1.

125 Natalie Baird "Judges as Cultural Outsiders: Exploring the Expatriate Model of Judging in the Pacific" (2013) 19 Canta LR 80 at 84 -85 citing Peter MacFarlane "Some Challenges facing Legal Strengthening Projects" (2006) 4(1) JCLLE 103 at 105.

would be.[126] Therefore the use of foreign judges in the Cook Islands domestic courts, particularly final domestic appellate courts may as contended by Baird, "undermine a sense of national identity and independence, particularly a sense of 'ownership' of the judicial system, and may delay the development of jurisprudence unique to Pacific states".[127]

2 Governor-General of the Realm of New Zealand

As explained above in Part III(B), the Letters Patent 1983 established a Realm of New Zealand, with the Governor-General of New Zealand being the representative of the Queen to the Realm.[128] The duality of the Governor-General's role, as the Queen's representative to New Zealand and the Realm, arguably creates conflict of allegiances in certain situations. By convention the Governor-General only acts on the advice of the Prime Minister of New Zealand.[129] Therefore, in the Governor-General's exercise of the Queen's "executive authority" over the Realm of New Zealand,[130] the Prime Minister of New Zealand by convention advises the Sovereign on matters relating to any part of the Realm of New Zealand.[131]

This raises the question of whether the Prime Minister of New Zealand, in reality the Prime Minister of the Realm, can determine the exercise of the Sovereign's power in the Realm? The Prime Minister's advice regarding the Realm as explained above is commonly done in consultation with other Realm countries,[132] and as canvased earlier this raises questions of the degree to which consultation must be taken into account. The blending of the roles that represent the Realm and represent New Zealand reflect the bias towards New Zealand

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126 Alex Frame "The Cook Islands and the Privy Council" [1984] 14 VUWLR 311.

127 New Zealand Law Commission *Converging Currents: Custom and Human Rights in the Pacific* Study Paper No 17 (NZLC, Wellington, 2006) at [13.75].

128 Letters Patent 1983, cl 1.

129 The Governor-General "The Role of the Governor-General" (3 April 2006) <www.gg.govt.nz>.

130 Letters Patent 1983, cl 3.

131 AQB and Mclean, above n 45, at 111-112.

132 For example, as required under for the Cook Islands in the Joint Declaration 2001, cl 3.

discussed earlier and how the current settings rank New Zealand's influence over the Realm.

A further question then is whether there should be more of a distinction between the two roles. If there were a conflict between the priorities of the Realm and New Zealand, could the Governor-General act on his or her own volition, or for the avoidance of such a situation should there be a clearer separation between roles? It may be that the roles now are too closely entwined. The role of Governor-General has since 1967 only been performed by metropolitan New Zealanders, with there never have been a Cook Islander appointed as the Queen's Representative, nor a Niuean or Tokelauan.[133] The Governor-General is appointed by the Queen on the advice of the New Zealand Government, with the Cook Islands and Niue being advised of it but not a part of the appointment decision-making process, even though the Governor-General's ambit as representative of the Realm is much a part of their constitutional system as it is New Zealand's.[134]

It is not unreasonable that a Cook Islander, Niuean or Tokelauan could become Governor-General. It is arguably an entirely different story if for example, the Queen's Representative of the Cook Islands or Premier of Niue were to be recommended as Governor-General. It is unclear how palatable that would be to the New Zealand government, but it is not a likely route for the New Zealand government to take. It may also be that changes to such roles are unnecessary given the perception by the Cook Islands that the Queen's Representative is the sole representative of the Queen in the Cook Islands and the Governor-General is New Zealand's representative.[135]

This is an inaccurate perception, with the Letters Patent 1983 being part of the law of the Cook Islands and the Office of the Governor-General reflecting the common colonial history and shared citizenship. Therefore, in recognition of the significance of the office,

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133 Townend, above n 47, at 588, citing Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2ed, Brookers, Wellington, 2001), at 147.

134 Townend, above n 47, at 588.

135 At 588.

the Governor-General, when formally visiting the self-governing State, is accorded equal precedence with the Queen's Representative in the Cook Islands.[136] The Governor-General is accorded this status in recognition that as representative of the Realm to the Queen, the Office has a similar status to that of the Queen's Representative.[137] This further reflects the bias towards New Zealand within the relationship.

Under the Letters Patent 1983, the Governor-General of the Realm is advised by an Executive Council, the body by which formal advice of the New Zealand Government is tendered to the Monarch and executive decisions given legal effect.[138] he make-up of the Executive Council comprises entirely of New Zealand Ministers, most of who are members of Cabinet.[139] The Executive Council however provides advice as to the 'government of the Realm', and keeps the Governor-General informed as to the general government of the Realm.[140] The reason for this function is rationalised on the basis that as New Zealand is the hub of the Realm, the main factors of the Realm will relate to New Zealand, however it results in all matters relating to the Realm being channelled to the Governor-General through New Zealand Ministers.[141]

The question is thus why should it only be New Zealand Ministers who comprise the Executive Council? Why not also include the Prime Ministers of the Cook Island and Premier of Niue, or their representatives, for general matters of the Realm? The makeup of the Executive Council therefore undermines the principle that, "the Crown in the right of New Zealand is a divisible one whereby Niue and the Cook Islands are self-governing".[142] The current settings undermine the Cook Island's right to self-government and create a

136 AQB and Mclean, above n 45, at 107.

137 At 107.

138 Letters Patent 1983, cl 7.

139 Tony Angelo "Pacific Constitution Overviews – Niue" (2009) 15(20) CLJP/JDCP 157 at 161, citing Letters Patent, VII and VIII. The giving of advice to the sovereign in respect of a state of the Realm is in accordance with the law of that state.

140 Townend, above n 47, at 589.

141 At 589.

142 At 589.

paternalistic relationship with New Zealand predetermining the relationship between the Cook Islands and the Monarch.

3 Tendering of advice to the Sovereign.

As discussed in Part III (B), the divisibility of the Crown establishes a direct relationship between the Cook Islands and the Queen in right of the Cook Islands. From this relationship flows the right of the Cook Islands government to tender advice to the Queen in right of the Cook Islands. However, this is not simply a letter or email to Buckingham Palace from the Queen's Representative on the advice of the Cook Islands Prime Minister.

It requires the involvement of consultation of the New Zealand Prime Minister both informally and formally from the initial advice to the final tendering of advice to Buckingham palace, in a manner that is akin to an approval process. This bureaucratic and unnecessarily arduous 'six-point procedure' is ostensibly carried out on the premise that advice to Her Majesty is provided on a unified front regarding the Realm and ensures that she is not provided different advice from different parts of the Realm.[143]

There is a marked contrast between the Cook Islands cumbersome process and that of Niue.[144] Niue, following in the footsteps of the Cook Islands towards 'self-governance in free association' had the benefit of the lessons from the Cook Islands experience. Section 8 of the Niue Constitution Act 1974, outlines that there will be "positive co-operation" between New Zealand and Niue. The provision establishes a right of consultation at the head of government level between the Prime Minister of New Zealand and the Premier of Niue, in accordance with the policies of their respective governments. Angelo explains the crystallising of the relationship of co-operation and consultation between the two countries in statute reveals the relationship as one of partnership and equal respect. [145] The Niue

143 Townend, above n 47, at 590.

144 Tony Angelo, above n 139, at 165.

145 At 165.

position is in stark contrast to New Zealand's relationship with the Cook Islands in this context, which could be characterised as more akin to colonial subordination of the Cook Islands.

This paper contends that the process is unnecessarily complicated and reveals an "underlying paternalistic" attitude of New Zealand towards the Cook Islands.[146] There is arguably merit towards having consultation in the tendering of advice but the overview of the New Zealand government in the process undermines the statehood of the Cook Islands. It is the Cook Islands right and obligation to tender advice to its Queen and keep her updated with any matters of concern regarding the Cook Islands.[147]

The inference of New Zealand with this right undermines the Cook Island's status as a self-governing state. New Zealand has similar procedures in place for Niue,[148] which indicates this to be a general approach taken by New Zealand in having oversight of these constitutional rights of Realm countries, which this paper argues is founded on the colonial administration mindset that the Realm relationship was founded on.

4 Free Association

The relationship of free association as it is currently framed, reflects the 'lopsided Realm' arrangements between New Zealand and Realm countries.[149] The Kirk-Henry Letters and the Declaration, expose a tension between New Zealand and the Cook Islands to set the terms of the relationship. The relationship is and should be one of partnership but is made complicated by key tenets of the free association relationship, like a shared head of state and citizenship.[150] That both New Zealand and the Cook Islands share a Head of State,

146 Townend, above n 47, at 590.

147 Constitution of the Cook Islands 1965, art 5 and Joint Centenary Declaration 2001, cl 3.

148 Townend, above n 47, at 590.

149 At 588.

150 Alison Quentin-Baxter, above n 31, at 613.

though with separate hats, creates a tension over access to Her Majesty and the method by which access is gained to the Queen.

Shared citizenship, arguably creates a power imbalance between both states as it places New Zealand in a superior position.[151] It seems implicit from the Kirk-Henry Letters that the relationship required the Cook Island's continued adherence to certain values predetermined by New Zealand, and failure to do so would have implication for their continued economic support and possibly the continued status of shared citizenship with the Cook Islands.

This is made more apparent following the Declaration, where a stronger position of Cook Island's independence and ambition to participate in international fora came to the forefront, but was rebutted by the remarks of Prime Minister Clark, who warned that there would implications for the continued shared citizenship between New Zealand and the Cook Islands, if the Cook Islands wished to pursue membership of the United Nations.[152]

The question is why is citizenship being employed here to enforce control and political pressure? That there are legal liability and political issues to be resolved is clear in that situation, but why does citizenship need to be framed as a mechanism for control rather than a discussion and consultation process that is more aligned to the values of partnership within the relationship of free association?

Prime Minister Clark's statement is likely founded in the position outlined by Townend, that citizenship of New Zealand is extended under statute,[153] to the Cook Islands and Niue, rather than Realm countries being considered citizens of the Realm.[154] Townend explains

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151 See the discussion earlier in this paper at Part II, citing Alison Quentin-Baxter, above n 31. For further discussion of citizenship across the realm see Elizabeth Perham "Citizenship Laws in the Realm of New Zealand" (2011) 9 NZYIL 219.

152 John Andrews, above n 119.

153 The Citizenship Act 1977 under s 2(1), defines New Zealand expansively to include the Realm countries and territories.

154 Townend, above n 47, at 595 and Charter of the United Nations, above n 19.

that the rights of citizenship are governed by the Citizenship Act 1977,[155] a statutory creature of the Parliament of New Zealand, and is extended to include the Cook Islands and Niue.[156]

Therefore, it is on New Zealand's terms to use citizenship as it wills. This paper argues that the relationship is more nuanced, and that shared citizenship is rooted in shared colonial history. It is derived from the original administration of New Zealand over the Cook Islands and other Realm countries. However, it is not simply the narrative of a colonial overlord maintaining paternalistic links over its former territories developed nation being altruistic and supportive.

While New Zealand ultimately holds responsibility for its citizens, it should be recognised that shared citizenship is a tenet of the historical relationship between the two countries and that it is a reciprocal. The Cook Islands contribution is reflected in the migration of many Cook Islanders to New Zealand in the post-war era.[157] The migration was facilitated and encouraged by New Zealand in an effort fill the demand in New Zealand's growing manufacturing and agricultural sectors.[158] Cook Islanders were therefore were critical to New Zealand's industrial growth in these areas to become the developed economy it is today.[159]

The Cook Islands contribution to the reciprocal relationship was also illustrated in the deployment of the Rarotongan Company, which consisted of two contingents of 165 Cook Island soldiers that served under New Zealand in the First World War.[160] A further 500 Cook Island soldiers enlisted in the First World War as part of the Māori contingent,

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155 Citizenship Act 1977, s 29.

156 Townend, above n 47, at 595.

157 Rosemary Anderson "The Origins of Cook Island Migration to New Zealand, 1920 – 1950" (MA thesis, University of Otago, 2014) at 15.

158 Anderson, above n 157, at 16.

159 It should be recognised that many Pacific Island countries, like Niue Samoa, also contributed its people to support the demand in these areas.

160 New Zealand History "Pacific Islanders in the NZEF - Page 3 – The Rarotongan Company" (26 March 2019) <https://nzhistory.govt.nz>

serving as labourers and ammunition bearers in France, Egypt and Palestine.[161] For a small country, this was not a small number of people. The point made here is that the relationship of free association and shared citizenship is not a simple courtesy by New Zealand for its smaller Realm cousins, which is the usual rhetoric employed to describe the relationship. It is a relationship founded on the blood, sweat and service of the Cook Islands people and this fact should not be forgotten in the minds of New Zealand officials as they possibly attempt to manipulate the relationship for political gain.

However, Prime Minister Clark's statements reveal that citizenship itself can be a political tool used by New Zealand to apply political pressure to the Cook Islands.[162] Overall, the tension between New Zealand and the Cook Islands over the issue of membership of the United Nations reflect the underlying paternalism identified above towards its relationship with the Cook Islands.

5 To what extent does this really disadvantage the Cook Isl, ands?

Several factors have been identified above which reflect a colonial attitude of New Zealand, particularly in regard to its influence on the relationship between the Cook Islands and the Monarch. But does this place the Cook Islands in a position of disadvantage? While theoretically this paper would answer yes, in that the Cook Islands are placed in a position of disadvantage, the further inquiry is what are the practical implications the Cook Islands face by being placed in this subdued position in the relationship? Clearly there is a greater administrative burden on the Cook Islands to consult New Zealand in the tendering of advice to the Monarch, that is almost akin to gaining permission from the New Zealand government. It should however also be recognised that the requirement of consultation

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161 Daniella Moate-Cox "Cook Island WW1 soldiers remembered in NZ" (17 November 2016) <https://www.rnz.co.nz>.

162 John Andrews, above n 119.

places a corresponding burden on New Zealand. However, as a more developed country with a larger bureaucracy, there is a greater resource burden on the Cook Islands.

The Cook Islands is placed in a position of subordination under the Realm relationship, which while there are evident benefits, it also comes at the cost of limiting its statehood. Are these disadvantages and incursions on the Cook Island's statehood a necessary loss for the benefits it gains from its economic dependency on New Zealand and having a New Zealand passport? Are the economic benefits worth the undermining of their Statehood? Why must the strengthening of the Cook Islands sovereignty come at such a cost? These are all questions that need to be answered by the people of the Cook Islands in exercise of their autonomy. If a strengthened Cook Islands position comes at the cost of New Zealand citizenship, this will not be an attractive option.

6 Recommendations moving forward

The Cook Islands is in a position of subordination to New Zealand within the Realm. The question then is, what can remedy this inequity? What would be required is a resetting of the Realm relationship so that it is one of equality and respect. This section explores the possible option of how the amendment of the Letters Patent 1983 could achieve a reconfigured relationship.

Amending the Letters Patent 1983 would provide formal constitutional recognition of a strengthened relationship of partnership between not just New Zealand and the Cook Islands but all Realm countries. The suggested amendments would help rectify the issues identified with the Letters Patent.

First, the appointment of the Governor-General under cl 2, could be amended not to be only done by Her Majesty on the advice of the New Zealand government, but the appointment would also occur in consultation with the governments of the Realm states.[163]

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163 Letters Patent 1983, cl 2.

Having a consultative appointment process may also allow for more diverse candidates with potential Governor-Generals coming from the Cook Islands, Niue or Tokelau.

Second, the membership of the Executive Council under cl 8, could be amended to include the Heads of Government of the Realm countries or their representatives.[164] Amending cl 8 in this way would provide for representation of the views of Realm countries at the decision-making table, particularly when it comes to matters affecting the Realm as a whole. A suggested amended provision would be:

> **VIII. Membership of Executive Council.**
>
> The Executive Council shall consist of those persons who, having been appointed to the Executive Council from among persons eligible for appointment under the Constitution Act 1986 *and the Heads of Government of the Realm states, or their representative for matters pertaining to the Realm*, are for the time being Our responsible advisers

Third, a new clause that follows the same approach taken in the Niue Act 1974 which would strengthen the relationship between New Zealand and Realm countries. Taking inspiration from s 7 of the Act, a similar clause employed in the Letters Patent that creates an obligation of continuing co-operation and consultation between the heads of governments of Realm countries, in regard to matters of the Realm. The Governor-General as representative of the Realm would also ensure there has been effective consultation between the Heads of Government of Realm countries.

These amendments would go a long way to strengthening the position of the Cook Islands. They recast the relationship as one of partnership and mutual respect instead of deference and disadvantage. Such amendments are likely to attract criticism within New Zealand, with possible fears of how the amendments may impinge on New Zealand autonomy given the Governor-General's office having the duality of being representative of New Zealand and the Realm. It may also not be politically palatable for New Zealand to undertake obligations of co-operation and consultation. However, the reframing of the relationship

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164 Letters Patent 1983, cl 8.

may align with the current Governments own 'Pacific Reset' policy, whereby the New Zealand government has committed to building better partnerships and engagement within the Pacific, under the principles of Understanding, Friendship, Mutual Benefit, Collective Ambition, and Sustainability.[165]

VII Conclusion

Self-government and in free association with New Zealand were what was promised and is legislated for the Cook Islands. However, in practice the relationship is akin to a "Lopsided Realm" relationship in which the Cook Islands is placed in a subordinate position to New Zealand. This subordination undermines the Cook Island's self-governing status and independence. The Cook Island's subordination within the relationship is reflected in the constitutional mechanisms that construe the relationship in this way: the Letters Patent 1983, the Cook Islands Constitution Act 1964, the Cook Islands Constitution the Six-Point Procedure, the Kirk-Henry Letters and the Declaration.

The paper identifies the underlying paternalism of New Zealand, particularly in relation to the unnecessary influence of New Zealand on the relationship between the Cook Islands and the Queen. This underlying paternalism is founded in the colonial relationship between the Cook Islands and New Zealand. The current settings reflect this a colonialist mindset which continues to inform the relationship today. This paper recommends that amendments to the Letters Patent 1983, which may provide some remedy to the inequity identified. The amendments would reset the relationship to be of one of partnership and respect. A relationship whereby the storm cloud finally brings the bountiful rain that was promised.

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165 Cabinet External Relations and Security Committee Minute Decision "The Pacific Reset – The First Year" (4 December 2018) ERS-18-MIN-0028.

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