

QUENTIN DUFF

INCORPORATION OF THE  
TREATY OF WAITANGI  
INTO AN  
ENTRENCHED  
CONSTITUTION

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Incorporation of the Treaty of Waitangi...



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*Te Whare Wananga  
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*Part Five*

INTRODUCTION

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The Minister of Justice, Hon. Geoffrey Palmer presented a White Paper on a Bill of Rights for New Zealand (hereafter the "White Paper"). Included as part of the White Paper were Articles 4, 25 and 28. Article 4—*The Treaty of Waitangi* was intended to recognise and affirm "the rights of the Maori people under the Treaty of Waitangi". Article 25—*Enforcement of Guaranteed Rights and Freedoms* allowed persons whose rights and freedoms had been violated to seek a remedy through a competent court. Article 28—*Entrenchment* intended to elevate the status of the proposed Bill of Rights to supreme law.

Judging by submissions made to the Justice and Law Reform Select Committee (hereafter the "Committee"), the New Zealand public was overwhelmingly opposed to the introduction of the Bill. Despite such opposition the *New Zealand Bill of Rights Act 1990* (hereafter the "NZBORA") was enacted into New Zealand law with the above Articles notable omissions. During a seminar conducted at Victoria University in 1996, Professor Margaret Beckett<sup>1</sup> submitted the view that the issue of Palmer's White Paper needs to be revisited. This paper intends to undertake a part of Beckett's submission.

The major focus of this paper concerns the incorporation of the Treaty of Waitangi (hereafter the "Treaty") into an entrenched Constitution. The Committee submitted that Maori objected to incorporation<sup>2</sup> of the Treaty with the result being exclusion of Article 4 from the NZBORA. This paper challenges that submission, however in order to provide a relevant backdrop it will consider briefly the issues surrounding entrenchment and the Canadian movement to a Constitutional framework. This paper will then examine the

<sup>1</sup> For the purposes of this paper, reference to the White Paper refers to the draft Bill of Rights as presented by Palmer rather than the White Paper itself. Meaning that it denotes what would have been the NZBORA had Palmer's draft had been accepted.

<sup>2</sup> Dean of Law, Waikato University.

<sup>3</sup> Justice Report of the Justice and Law Reform Committee Inquiry into the White Paper: A Bill of Rights for New Zealand (1987) A.R. 130.



## I. INTRODUCTION

In 1985 the Minister of Justice, Hon. Geoffrey Palmer presented a White Paper on a Bill of Rights for New Zealand (hereafter the "White Paper"<sup>1</sup>). Included as part of the White Paper were Articles 4, 25 and 28. Article 4—*The Treaty of Waitangi* was intended to recognise and affirm "the rights of the Maori people under the Treaty of Waitangi". Article 25—*Enforcement of Guaranteed Rights and Freedoms* allowed persons whose rights and freedoms had been violated to seek a remedy through a competent court. Article 28—*Entrenchment* intended to elevate the status of the proposed Bill of Rights to supreme law.

Judging by submissions made to the Justice and Law Reform Select Committee (hereafter the "Committee"), the New Zealand public was overwhelmingly opposed to the introduction of this Bill. Despite such opposition the *New Zealand Bill of Rights Act 1990* (hereafter the "NZBORA") was enacted into New Zealand law with the above Articles notable omissions. During a seminar conducted at Victoria University in 1996, Professor Margaret Bedggood<sup>2</sup> submitted the view that the issue of Palmer's White Paper needs to be revisited. This paper intends to undertake a part of Bedggood's submission.

The major focus of this paper concerns the incorporation of the Treaty of Waitangi (hereafter the "Treaty") into an entrenched Constitution. The Committee submitted that Maori objected to incorporation<sup>3</sup> of the Treaty with the result being exclusion of Article 4 from the NZBORA. This paper challenges that submission, however in order to provide a relevant backdrop it will consider briefly the issues surrounding entrenchment and the Canadian movement to a Constitutional framework. This paper will then examine the

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<sup>3</sup> Interim Report of the Justice and Law Reform Committee *Inquiry into the White Paper: A Bill of Rights for New Zealand* (1987) AJHR I 8A.



submissions made to the Committee and responses to a questionnaire sent to various Maori on the issue of incorporation of the Treaty. The intention of the questionnaires and ultimately this paper, is to gauge whether Maori views on this issue have changed ostensibly in the ten or so years since this issue was mooted sufficient to state that incorporation of the Treaty is now an appropriate action.

#### A. Introduction

The White Paper as Palmer saw it, was to provide a "mechanism by which governments are made more accountable by being held to a set of standards".<sup>4</sup> Those standards included the importance of fundamental rights, protecting an abuse of power by the Executive or Legislative arms of government, and providing a remedy in the event of a breach. The watchdogs of these standards were to be the courts. It would become their role to ensure that an enactment of the Legislature or an action of the Executive was consistent with those fundamental rights and freedoms contained in the NZBORA.

By its very nature a Bill of Rights (hereafter a "BOR"), though affirming the existence of such rights and freedoms, is in a sense a last resort tool. Palmer, whilst adhering to the notion that "[n]o Government and no Parliament we are likely to have in New Zealand in the foreseeable future are going to attempt to sweep away basic rights"<sup>5</sup> was yet moved to stating that "[t]hat is not the real point... What is in point is the continual danger – the constant temptation for a restless Executive – of making small erosions of these rights."<sup>6</sup>

The corollary is that the accountability mechanism of a Bill of Rights creates a burden or fetter upon the exercise of State sovereignty. In the event of a government who found the conditions of a BOR too stabilising, there needed to be a provision that would provide protection and enforcement for the Act.

<sup>4</sup> M. Chen and Sir G. Palmer *Public Law in New Zealand: Cases, Materials, Commentary and Questions* (Auckland, Oxford University Press, 1993) 443.

<sup>5</sup> Reference to a Bill of Rights in this context is intended to apply to such Acts in a generic sense.

<sup>6</sup> *A Bill of Rights for New Zealand: A White Paper* 1981 AIDR 46, para. 4.3. See also above n 4, 447.

<sup>7</sup> See above n 6, para. 4.9–4.10.



## II. ENTRENCHMENT

### A. Introduction

The White Paper as Palmer saw it, was to provide a “mechanism by which governments are made more accountable by being held to a set of standards”.<sup>4</sup> Those standards included the importance of fundamental rights; protecting an abuse of power by the Executive or Legislative arms of government; and providing a remedy in the event of a breach. The watchdogs of these standards were to be the courts. It would become their role to ensure that an enactment of the Legislature or an action of the Executive was consistent with those fundamental rights and freedoms contained in the NZBORA.

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<sup>5</sup> Reference to a Bill of Rights in this context is intended to apply to such Acts in a generic sense.

<sup>6</sup> *A Bill of Rights for New Zealand: A White Paper* 1985 AHJR A6, para. 4.8. See also above n 4, 447.

<sup>7</sup> See above n 6, para 4.9 – 4.10.



## *B. Form Of Enforcement And Protection*

### *1. Full entrenchment*

This mechanism can take three different forms: full entrenchment, semi-entrenchment and ordinary legislation.<sup>8</sup> Full entrenchment is (possibly) the extreme end of the spectrum and is seen in countries such as the United States, Ireland and Germany. Under this option the court has power to strike down primary legislation. It acts effectively as the final trump over legislative making powers.

Article VI of The United States Constitution provides:<sup>9</sup>

"The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made or shall be made, under the Authority of the United States, shall be the Supreme Law of the Land."

It also provides that all federal, state, and local officials are required to take an oath to support the Constitution. This means that state governments and officials cannot take actions or pass laws that interfere with the Constitution, laws passed by Congress, or treaties.

The US Constitution was:<sup>10</sup>

"interpreted, in 1819, as giving the Supreme Court the power to invalidate any state actions that interfere with the Constitution and the laws and treaties passed pursuant to it. That power is not itself explicitly set out in the Constitution but was declared to exist by the Supreme Court in the decision of *Marbury v. Madison*."

As we will see below, what was envisaged for New Zealand under the White Paper was something analogous but still of a lesser force than the United States framework.

### *2. Semi-entrenchment*

Semi-entrenchment provides that violation of a BOR is actionable in the courts. Though the courts to a certain degree have the same ability to strike down State actions as in full

<sup>8</sup> F. Klug and J. Wadham "Democratic' entrenchment of a Bill of RightsLiberty's proposals" [1993] Public Law 579, 579.

<sup>9</sup> See The Supremacy Clause: U.S. Constitution, art. VI, § 2.

<sup>10</sup> Legal Information Institute *Constitutional Law Materials* <http://www.law.cornell.edu/topics/constitutional.html>.



entrenchment jurisdictions, there is a critical limitation of their power through the inclusion of a 'notwithstanding' clause.

Section 33 of the Canadian Charter of Rights and Freedoms (hereafter the "Charter") provides a classic example of this type of provision. In particular s.33(1) states:

(1) *Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.* [Emphasis added]

Therefore though the Canadian Courts are able to strike down Acts, the State Parliament is yet able to pass legislation provided that it expressly intends to breach the Charter.

### 3. *Ordinary legislation*

The NZBORA is an example of a BOR with mere 'ordinary legislation' status. The NZBORA was passed without an entrenching provision and without a provision in relation to its status as supreme law.<sup>11</sup> Instead "the Attorney General is the guardian of the Bill of Rights, with responsibility for bringing to the House of representatives' attention any 'legislative' breaches."<sup>12</sup>

Under this regime a BOR has a limited role as an interpretative aid for Acts of Parliament. Furthermore in Acts such as the NZBORA, the courts are prohibited from refusing to apply any provision of an Act merely because it is inconsistent with the Bill.<sup>13</sup> This is the same approach as that seen in Danish and Belgium constitutional frameworks.

### C. *Supreme Law And Article 1*

The White Paper was intended by Palmer to be both supreme law through Article 1 and protected from interference through Article 28. Article 1 stated:

This Bill of Rights is the supreme law of New Zealand, and accordingly any law (including existing law) inconsistent with the Bill shall, to the extent of the inconsistency, be of no effect.

<sup>11</sup> Article 1 of the proposed Bill would have elevated this to supreme law.

<sup>12</sup> See above n 8, 580.

<sup>13</sup> See section 4(1) *New Zealand Bill of Rights Act 1990*.



Many submissions supported the elevation of the White Paper to supreme law. For example it was Shaw and Elkind's view that a "truly effective Bill of Rights requires it to have the status of supreme law."<sup>14</sup>

What is interesting in relation to the so-called supremacy of this law was that Article 1 would hypothetically allow a proposed Act to stand because the provision would only be applied to the *parts* of the proposed Act inconsistent with the White Paper. Shaw et al commented that:<sup>15</sup>

"[t]he words 'to the extent of the inconsistency' mean that, where part of a law is inconsistent with the Bill of Rights and part of the law is not, the inconsistent law may be severed from the rest of the statute which will remain in force; provided, of course, the absence of the inconsistent part does not impair the operation or substantially alter the meaning of the whole."

Therefore, for such inconsistent legislation all is not lost because Article 23 required that legislation to be read consistent with the White Paper and Article 3 allowed for 'justifiable limitations'.

I submit that this poses an interesting question about the nature of supreme law as envisaged by Article 1. Is supremacy measured by the White Paper's ability to strike down an inconsistent law, or is a BOR supreme because all other Acts must be first measured against it? If it is the former then one might suggest that Article 1 was not sufficiently supreme given the need to read it in conjunction with an Article 23 and 3. If the latter, then supremacy can arguably include any number of Acts.

Notwithstanding this question, essentially the White Paper - with the inclusion of Article 1 - would have amounted to a constitutional document of a lesser force than the American Constitution, which as previously noted, inheres in the Court power to strike down an Act in its entirety. At the same time the White Paper would have been something more than a semi-entrenchment regime because it contained no provision

<sup>14</sup> J.B. Elkind and A. Shaw "A Standard For Justice: A Critical Commentary on the Proposed Bill of Rights for New Zealand" at 52 in *Submissions on A Bill of Rights for New Zealand: A White Paper Volume 3* (Victoria University, Wellington, 1985) Submission 186.

<sup>15</sup> See above n 14, 270.



analogous to a 'notwithstanding clause'.

#### *D. Parliamentary Sovereignty And Article 28*

The specific use of the words 'no provision of this Bill of Rights' in Article 28<sup>16</sup> of the White Paper would have had the effect of double entrenchment, in that both the NZBORA and the entrenching provision were protected from being easily changed. This would have rendered the NZBORA unique in terms of New Zealand statutes, because there is no other example of double entrenchment, and along with Article 1 such entrenchment would have enhanced the NZBORA status as supreme law.

The submissions in opposition to entrenchment predictably concerned the issue of parliamentary sovereignty, which itself can be broken into two parts. The first was in relation to the purported binding of future Parliaments and the other concerned the appropriateness and indeed ability of the courts to ensure that Parliament adheres to the standards posited in a BOR.

#### *1. 'Parliament or 'p'arliament*

The notion of parliamentary sovereignty expounded by Dicey was "a sovereign power cannot, whilst retaining it sovereign character, restrict its own powers by any particular enactment."<sup>17</sup> Entrenchment is a procedural, or manner and form limitation on future Parliaments. That is, one Parliament purporting to bind another by implementing the manner in which an action can be taken and also the form that, for example, subsequent

<sup>16</sup> Article 28 provided the following.

No provision of this Bill of rights shall be repealed or amended or in any way affected unless the proposal

- (a) Is passed by a majority of 75 percent of all the members of the House of Representatives and contains an express declaration that it repeals, amends, or affects this Bill of Rights; or
- (b) Has been carried by a majority of the valid votes cast at a poll of the electors for the House of Representatives;

And, in either case, the Act making the change recites that the required majority has been obtained.

<sup>17</sup> A Chander "Sovereignty, Referenda, and the Entrenchment of a United Kingdom Bill of Rights" [1991-92] 101 Yale L.J. 457, 463.



legislation must take. An attempt to allay this concern was made in paragraph 7 of the White Paper.<sup>18</sup>

“In requiring a special procedure for enacting or repealing a statute, Parliament is not binding its successors but only redefining “Parliament” or laying down a new procedure for a certain purpose.”

Commentators have accepted “that Parliament could not fetter its powers, yet reflected that the sovereignty problem existed only so long as parliament continued to exist in its present form.”<sup>19</sup> So whilst Palmer’s redefinition of Parliament may arguably have still begged the sovereignty question, it is a question that can only be asked under the status quo. In the event of the White Paper being passed through the House, the status quo would have ended and Parliament effectively redefined. Palmer’s comment is echoed by H.L.A. Hart who stated that “Parliament has not ‘bound’ or ‘fettered’ Parliament or diminished its continuing omnipotence, but has ‘redefined’ Parliament and what must be done to legislate.”<sup>20</sup>

Chander along similar lines notes that the English courts are recognising the pre-eminence of European Community law over domestic law.<sup>21</sup> Through the UK Parliament’s ascension to the *European Communities Accession Act 1972* (hereafter the “ECAA”) Community law takes a priority over domestic. This Act provides effectively manner and form restrictions over Acts made before and after the ECAA. It instructs the Courts to adopt an interpretation according to principles laid down by the European Court of Justice.<sup>22</sup> Does this redefine Parliament? I submit that it does not. What the UK Parliament has demonstrated is a willingness to see its own sovereignty and the sovereignty of future UK Parliaments fettered by European Community law. In other words in order to legislate in the future, the UK Parliament must be mindful of European

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<sup>18</sup> See above n 6, para. 7.12

<sup>19</sup> P.A. Joseph *Constitutional and Administrative Law in New Zealand* (The Law Book Company Ltd, New South Wales, 1993) 103.

<sup>20</sup> See above n 17, 464.

<sup>21</sup> See above n 17, 467.

<sup>22</sup> See above n 22, 467. In *Macarthys Ltd v Smith* [1981] 1 QB 180,

The Court of Appeals found that the Community law standard for determining sex discrimination in wages took priority over the domestic law standard.



Community law. *Power to the judiciary*

It should be noted that Shaw et al considered this redefinition or 'self-embracing' doctrine as "controversial...[and]...not universally accepted".<sup>23</sup> This is supported by other commentators who note that "[t]he suggestion of the 'new view' finds only tenuous support in the Commonwealth cases heard by the Privy Council."<sup>24</sup> However I believe the doctrine has some merits particularly if we consider the increasing importance of the United Nations and international law upon the domestic sphere. This importance is evidenced by the long title of the NZBORA which states:

- (a) To affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and
- (b) *To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.* [Emphasis added]

Clearly what this demonstrates is that though not a statement of such unequivocal accession as seen in the ECAA, the long title of the NZBORA indicates an acknowledgement by the New Zealand Parliament that restrictions on sovereignty are a possible if not practical consideration. New Zealand still has a supreme Parliament, but eventually some consensus as to the effect of an entrenched Constitution will need to be reached as the impetus for such an Act gains momentum.

<sup>23</sup> Reiteration of this concept is made notwithstanding comments made by D. Knight "Judges as 'Law-Makers'" (Public Law, *Masters Seminar* (unpublished), 1997) to which I agree that the judiciary does indeed make law. However the context in which they "make" law is not well necessarily seen as an affront to parliamentary sovereignty.

<sup>24</sup> M. Mandel *The Charter of Rights and the Legitimation of Politics in Canada* (Walt & Thompson, Inc., Ottawa, 1989) 4.

<sup>23</sup> See above n 14, 277: See also Interim Report of the Justice and Law Reform Select Committee, *Inquiry into the White Paper: A Bill of Rights for New Zealand* (1987) AJHR I 8A 240.

<sup>24</sup> See above n 17, 469.



## 2. *Power to the judiciary*

In relation to the second ground, the traditional model of parliamentary sovereignty saw that the legislature made law and the judiciary applied law.<sup>25</sup> This concept was seen as the "essence of British democracy"<sup>26</sup> because the people voted for Parliament therefore Parliament was seen as carrying out the will of the people. The accompanying objection was that it was not for a non-elected judiciary to restrain Parliament.

The Interim Report of the Justice and Law Reform Select Committee (hereafter the "Interim Report") notes that the power given to the judiciary "was clearly the principal reason for opposition to the proposal [of the Bill]".<sup>27</sup> A full one-third of the submissions cited this concern as reason not to pass the draft bill.

The question to be asked is whether such concerns are well founded. If the ability to strike down law is the same as making law then cutting rain-forests is an exercise in conservation. The increased powers of the judiciary mean only that there is an enforcement mechanism to their interpretation of a law.

There was also the fact that not only is the judiciary not elected, but also they are not representative of a typical sample of New Zealanders. The New Zealand Law Society notes that consideration of the Bill would mean rule by an elite few.<sup>28</sup> They state that "judges then are selected from an extremely small pool of talent, from a very small minority of a very small minority."<sup>29</sup> Clearly there is no easy answer to this concern except perhaps to point to decisions that are made every day in the New Zealand courts. Has the fact that judges represent a selective sample of the citizenry impaired their ability

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<sup>25</sup> Restatement of this concept is made notwithstanding comments made by D Knight "Judges as 'Law-Makers'?" [Public Law, Masters Seminar (unpublished), 1997] to which I agree that the judiciary does indeed *make* law. However the context in which they 'make' law is not itself necessarily seen as an affront to parliamentary sovereignty.

<sup>26</sup> M Mandel *The Charter of Rights and the Legalization of Politics in Canada* (Wall & Thompson, Inc., Ontario, 1989) 4.

<sup>27</sup> See above n 3, 8.

<sup>28</sup> *Submissions on A Bill of Rights for New Zealand: A White Paper Volume 3* (Victoria University, Wellington, 1985), Submission 140.

<sup>29</sup> See above n 28, p.3, para. 4.2.1.



to adjudicate fairly and in the interests of the New Zealand public to date? I leave that for the reader to draw conclusions on their own.

It was also the Law Society's view that judges were better trained to deal with the black letter law and did not have the training to deal with essentially policy issues.<sup>30</sup> Having the benefit of retrospect, I submit that the judiciary has through the subsequent litigious activity following the passing of the BOR, proved itself more than apt at dealing with policy considerations.

For example in the *Baigent*<sup>31</sup> decision the Court held that an effective remedy was appropriate even though the Bill has no specific remedy provision. The Court stated that:<sup>32</sup>

"the Bill of Rights was passed to affirm, protect, and promote human rights and fundamental freedoms in New Zealand and to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights. From these purposes, it was implicit that effective remedies should be available to any person whose Bill of Rights guarantees were alleged to have been violated."

In the case of *Noort*<sup>33</sup> the court was persuaded by counsel to adopt the meaning of 'arbitrary' from international jurisprudence particularly in relation to the International Covenant on Civil and Political Rights as opposed to the black letter meaning from the dictionary or from an English decision - arguably another example of *policy v black letter*.

### 3. *Planned obsolescence*

As a final note on the objections to the NZBORA, Sir Dove-Myer Robinson states that his greatest objection was the future being bound to "today's conceptions of human rights".<sup>34</sup> It was Borland's submission that the English common law:<sup>35</sup>

<sup>30</sup> See above n 28, p.3, para. 4.2.2.

<sup>31</sup> *Simpson v AG [Baigent's Case]* (1994) 1 HRNZ 42.

<sup>32</sup> See above n 31, 46.

<sup>33</sup> *Noort v Police: Curran v Police* [1990 - 92] 1 NZBORR 97.

<sup>34</sup> See above *Submissions on A Bill of Rights for New Zealand: A White Paper Volume 4* (Victoria University, Wellington, 1985) Submission 216W.

<sup>35</sup> See above n 34, Submission 319W.



“by its very nature, is a living organism constantly changing and adapting to changing conditions[.] It is not a fixed immutable code ‘written on tablets of stone’, that will become obsolete and irrelevant within fifty years[.]”

It might be curious to wonder whether the notion of fundamental rights as presented within the White Paper would change ostensibly with the passage of time? However even in the event that fundamental rights contained in the White Paper were not sufficiently encompassing, the wording of Article 22 would have applied to broaden the scope of the Act.

Article 22 provided that:

An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not guaranteed or is guaranteed to a lesser extent by this Bill of Rights.

Wording such as an ‘existing right’ specifically presupposes that there might be additional rights not contained in the White Paper. That being the case it shall not then be sufficient to consider non-inclusion in the White Paper or its enacted replacement as reason to derogate from the right.

Though semantic, the above interpretation is consistent with the approach taken by the international community in relation to Article 1(1)<sup>36</sup> of the International Covenant on Civil and Political Rights (hereafter the “Covenant”). Nowak notes that use of the word ‘have’ instead of ‘shall have’ “was consciously selected by the Working Party in the 3d Committee of the [General Assembly].”<sup>37</sup> It is from this wording that one can imply Article 1 of the Covenant as pertaining to a continuing right rather than a right created by political recognition.

So too with the rights and freedoms contained in the White Paper (and codified in the NZBORA). Parliament was not attempting to quantify these rights as being only those

<sup>36</sup> Article 1(1) provides:

All peoples *have* the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

<sup>37</sup> Dr. iur. et habil. M. Nowak *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (N.P. Engel, Arlington, 1993) 15.



contained in the draft (or final Act). Instead, the White Paper as supreme law would attach to itself the overarching intention to protect rights and freedoms. It is this protection which is set in stone as opposed to the actual rights themselves.

*E. Summary*

Entrenchment is a mechanism through which an Act is elevated from ordinary law to something of a higher status. Through provisions such as Article 1 of the White Paper, this status can be raised to the level of supreme law. New Zealanders voiced overwhelming opposition to the White Paper, yet by virtue of its enactment one must assume that this was interpreted as being opposition to enactment of a supreme Act rather than a BOR per se. What we currently have in this country is the NZBORA, ordinary legislation which purports to provide an interpretative mechanism for the New Zealand government, but which has no compelling element save the goodwill of the State.

Given the predominantly negative public response, the reader must be left to wonder why anyone might suggest it appropriate to revisit the White Paper. Notwithstanding the submission of Bedggood, where is the mandate for such a proposition? Clearly the desired ideal of the White Paper was to introduce an Act that would set in stone protection for the fundamental rights and freedoms of people in this country. It was against the possibility of a Government whose intention is to erode the rights and freedoms of New Zealand citizens that the White Paper was drafted. Yet what we have is far short of that ideal.

It is the submission of this paper that New Zealand will move to an entrenched Constitutional framework, though as we will see in Part Four, what form the framework will take is still to be debated. The Canadian model is something that many commentators are attributed to preferring over our own<sup>38</sup> though some Maori commentators would reject even this in relation to indigenous status.

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<sup>38</sup> See above n 8, 341.



Part Two of this paper examines how Canada became a Constitutional monarchy. In submitting that New Zealand is likely to follow the Canadian model it is important first to consider how the Charter of Rights and Freedoms (hereafter the "Charter") came to be enacted. explains the pre-Constitution political environment; the incremental approach from a Federal Bill of Rights to entrenched Constitution; and then the entrenchment of the *Canada Act 1982*.

#### A. *The Pre-Constitution Political Environment*

With both French and English colonial history dating to the 1600's, Canada since 1867 has existed as a self-governing "Dominion" of the British Empire. Its initial Constitution was a British Statute, the *British North America Act 1867* (also called the *Constitution Act 1867*). This statute divided law-making powers between the federal and provincial governments<sup>19</sup> and placed Constitutional amendment powers over Canada with the UK Parliament.

Mandel notes that prior to the enactment of *The Canada Act and the Charter of Rights and Freedoms 1982*, Canadian democracy did not command great respect.<sup>20</sup> The people of Canada only saw politicians once every four years during an election, otherwise the

<sup>19</sup> The Worldwide Legal Information Association *Canadian Constitutional Law* <http://www.wflla.org/canada.htm>

Federal Government: peace, order and good government laws in all areas not specifically given to Provinces in the *Constitution Act, 1867*; regulation of trade and commerce; unemployment insurance; taxation; postal service; census and statistics; military and defense matters; navigation and shipping; western and inland fisheries; money making and banking; weights and measures; bills of exchange (e.g. cheques); bankruptcy; patents, copyright, Indians; marriage and divorce; criminal law including post-secondary.

Provincial Government: taxation for provincial purposes; hospitals; municipalities; wine and alcohol liquor; incorporation of marriage, property and civil rights; administration of justice; education; all matters of a private or local nature; non-renewable natural resources (e.g. forestry and hydro-electricity).

Court decisions and national regulations have added or clarified these powers. For example, the federal responsibility for unemployment insurance was the result of national negotiations. The exact delimitation between the federal government's responsibility for "marriage" and the provincial responsibility for the "[determination] of marriage" continues to be a matter of Court decisions even today.

<sup>20</sup> M. Mandel *The Charter of Rights and the Legalization of Politics in Canada* (Wall and Thompson, Toronto, 1982) see generally Chapter 1.



### III. THE CANADIAN EXPERIENCE: FROM BILL OF RIGHTS TO ENTRENCHED CONSTITUTION

#### A. *The Pre-Constitution Political Environment*

With both French and English colonial history dating to the 1600's, Canada since 1867 has existed as a self-governing "Dominion" of the British Empire. Its initial Constitution was a British Statute, the *British North America Act 1867* (also called the *Constitution Act 1867*). This statute divided law-making powers between the federal and provincial governments<sup>39</sup> and placed Constitutional amendment powers over Canada with the UK Parliament.

Mandel notes that prior to the enactment of *The Canada Act and the Charter of Rights and Freedoms 1982*, Canadian democracy did not command great respect.<sup>40</sup> The people of Canada only saw politicians once every four years during an election, otherwise the

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<sup>39</sup> The Worldwide Legal Information Association *Canadian Constitutional Law* <http://www.wwlia.org/ca-const.htm>

**Federal Government:** peace, order and good government laws in all areas not specifically given to Provinces in the Constitution Act, 1867; regulation of trade and commerce; unemployment insurance; taxation; postal service; census and statistics; military and defense matters; navigation and shipping; seacoast and inland fisheries; money making and banking; weights and measures; bills of exchange (e.g. cheques); bankruptcy; patents; copyright; Indians; marriage and divorce; criminal law including penitentiaries.

**Provincial Government:** taxation for provincial purposes; hospitals; municipalities; store and alcohol licenses; solemnization of marriage; property and civil rights; administration of justice; education; all matters of a private or local nature; nonrenewable natural resources (e.g., forestry and hydro-electricity).

Court decisions and national negotiations have added or clarified these powers. For example, the federal responsibility for unemployment insurance was the result of national negotiations. The exact delimitation between the federal government's responsibility for "marriage" and the provincial responsibility for the "[solemnisation] of marriage" continues to be a matter of Court decisions even today.

<sup>40</sup> M. Mandel *The Charter of Rights and the Legalization of Politics in Canada* (Wall and Thompson, Toronto, 1989) see generally Chapter 1.



dominant principle was “one-dollar-one-vote” as opposed to the popular adage “one-person-one-vote.”<sup>41</sup> Highly paid lobbyists, ownership of the media, busy signals on the telephone, low level bureaucrats with “standard forms and unchangeable procedures”<sup>42</sup> contributed to an environment conducive to the cry “power to the people” through the “right to appeal to the courts”.<sup>43</sup>

In the 1970s additional regional strains arose:<sup>44</sup>

“as residents of the rapidly developing western provinces (especially oil-rich Alberta) chafed under a federal system that, in their view, deprived them of the full benefits of their resources. Such controversies pointed to the need for reform of the federal-provincial power arrangement and led to agitation for the patriation of the constitution.”

### B. *Judicial Proactivity*

Though based upon the Westminster precept of parliamentary sovereignty, the Canadian courts could hardly be accused of reticence in terms of its Constitution-like decisions prior to 1982. Under the *Constitution Act 1867* the court had the power to “defeat legislative initiatives they disagreed with”.<sup>45</sup> The criterion for court intervention required that there had to be some jurisdictional violation. For example:<sup>46</sup>

“In [*Union Colliery*, 1899, 585], the Privy Council struck down racist provincial law providing that ‘no Chinamen shall be employed in any mine.’ That they did so on purely jurisdictional grounds, however, is underlined by the fact that the racist provisions of the federal *Chinese Immigration Act 1886* were used in the case to demonstrate the exclusive federal jurisdiction over ‘Naturalization and Aliens.’”

During the 1930’s and using only the jurisdictional criteria, the courts “held their own reactionary fight against regulation.”<sup>47</sup> Put simply the Courts dispatched of a number of Federal Acts<sup>48</sup> containing regulatory measures. This culminated in a 1938 Supreme Court

<sup>41</sup> See above n 40, 2.

<sup>42</sup> See above n 41.

<sup>43</sup> Government of Canada *The Constitution and You* (1982) Ottawa.

<sup>44</sup> *The Concise Columbia Encyclopedia* (Columbia University Press, Columbia, 1991)  
<http://www.pitt.edu/~mawst55/canada/history.html>

<sup>45</sup> See above n 40, 5.

<sup>46</sup> See above n 40, 6, at note 1.

<sup>47</sup> See above n 40, 7.

<sup>48</sup> *Bennett New Deal 1935; Employment and Social Insurance Act 1935; Natural Products Act, The Weekly Rest in Industrial Undertakings Act, The Minimum Wages Act and The Limitation of Hours of Work Act 1936-37.*



decision,<sup>49</sup> which held that provincial legislation (though not federal legislation) could be judged on merits if it were bad enough. This was comparable to the civil libertarian approach of the US and the assessment of such legislation was taken without the aid of a BOR.

### C. *The Canadian Bill Of Rights*

Though judicial activism was evident prior to WWII, there were other events such as treatment of Canadians of Japanese origin and Nazi atrocities which purportedly provoked more debate for the need to protect fundamental rights and freedoms. In 1947 a petition with 500,000 names was tabled which supported a BOR. With the advent of the cold war, the emotive argument presented was that in the United States, communism could not be introduced without a change to the Constitution, but under the Westminster political structure, it could be introduced by will of the present Government.

Two major stumbling blocks to the BOR surfaced: that a BOR would interfere with provincial jurisdiction; and, the Premier of Quebec, who argued that until Canada was able to amend its own constitution thus reaching "full maturity", no discourse on a BOR was possible. As a result of the continuing debate three decisions of the Supreme Court during the 1950's found it warming to the idea of constructing its own constitutional BOR, though they never quite achieved the majority necessary for an implicit BOR.

With the influence of a post war United States being felt everywhere and the election of the Progressive-Conservative government, the *Canadian Bill of Rights* (hereafter the "CBOR") was introduced. The CBOR was applicable only to federal government, which though it may have overcome the first stumbling block, remained a position criticised by legal academics.

In a view that typifies a judicial activism approach, Laskin, Faculty of Law of the University of Toronto, who would later as Chief Justice of Canada be connected closely

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<sup>49</sup> *Re Alberta Statutes* [1938] S.C.R 100.



with the entrenchment project, stated that:<sup>50</sup>

“[t]he proposed Bill is unfortunate in its limited application to the federal government...It would be better that no Bill be proposed so that the common law tradition be maintained through the unifying position of the Supreme Court of Canada. And better too, in such case, to continue unaided in developing constitutional doctrine which has already pointed to legal limitations on the legislative encroachment on civil liberties.”

#### *D. The Constitution Act 1982 – Finally.*

The debate continued over Canada's inability to amend its constitutional arrangement without an application to the United Kingdom because it was an Act of the British Parliament. In 1978, Prime Minister Trudeau introduced a Bill that would be applicable to both federal and provincial government, but only at their option. The central feature of Bill C-60 was a constitutional Charter of Rights. The rallying cry was for Canadian unity. This was in part due to Quebec's call for independence and though Trudeau's Liberal government was defeated in May 1979 it was 'unexpectedly' back in office in February 1980.

With a majority government Trudeau began the final push for an entrenched Constitution. He had only two pre-conditions: “a strong federal government and a Charter with language rights: we consider everything else to be negotiable.”<sup>51</sup> There ensued a predictable lack of agreement between the provinces, but the major point of contention was Trudeau's second pre-condition.

Manitoba for example had a “relatively large and linguistically mistreated French minority.”<sup>52</sup> Any constitution that included recognition of minority or language rights had the corollary of creating a responsibility upon the particular government. Yet paradoxically it was Trudeau's intention to entrench English language rights in order to

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<sup>50</sup> See above n 40, 14.

<sup>51</sup> *House of Commons Debates* May 21, 1980: 1264.

<sup>52</sup> R Sheppard and M Valpy *The National Deal: The Fight for a Canadian Constitution* (Fleet Books, Toronto, 1982).



have a Charter claim against Quebec.<sup>53</sup>

When no unity was forthcoming, Trudeau attempted by Resolution of Parliament to unilaterally ask the United Kingdom to repatriate the constitution. Opponents<sup>54</sup> to the Resolution focused their efforts on three fronts; parliamentary, diplomatic and legal. In relation to the latter of the two there was diplomatic lobbying of British Parliamentarians that was so successful that representatives of Prime Minister Margaret Thatcher urged Ottawa to drop the Charter. It was suggested that particularly without the consent of the provinces, the Resolution would risk defeat in the British House of Commons.<sup>55</sup> Despite such 'interference' it was the legal front that proved to be the most decisive.

The Supreme Court<sup>56</sup> was presented with the issue of whether a convention existed that required provincial consent to patriate the constitution. Commentators submit that everyone knew such a convention existed but that it was extraordinary to refer the question to the courts.<sup>57</sup> The Court upheld the convention stating in essence that though Trudeau's unilateral action was legal it was nonetheless unconstitutional.<sup>58</sup> The Court also noted that there was nothing it could do to interfere with what amounted to a "mere request by the Canadian Parliament to the UK Parliament."<sup>59</sup> What the Court could not quantify was whether support from the provinces needed to be unanimous or a special majority. If it was special majority then what sort of majority?

In 1981 national polls confirmed that between 72 - 82% of the population surveyed supported the Charter. Eventually when only Quebec withheld consent and because the wording of the Supreme Court decision was vague, it was considered that nine provinces would be a sufficient mandate to pursue the Constitutional change. An accord that would

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<sup>53</sup> See above n 40, 29-30.

<sup>54</sup> Manitoba, Quebec and New Foundland.

<sup>55</sup> Sir Anthony Kershaw in research for the UK Parliament had found that Parliament was "bound by historical practice to automatically on a request from Ottawa" to amend the constitution of Canada without the consent of the provinces.

<sup>56</sup> *Reference re Amendment of the Constitution of Canada* (1981) 125 DLR (3rd) 1.

<sup>57</sup> See above n 40, 24.

<sup>58</sup> See above n 19, 243.

<sup>59</sup> See above n 40, 26.



become Canada's constitution was worked out between the federal and nine provincial governments then presented as a *fait accompli* to Quebec's Premier.

In 1982 the *Canada Act 1982 (UK)* was enacted by the British Parliament, which resulted in constitutional amendment powers residing in the Canadian government. Furthermore it stated that no Act of the UK Parliament shall extend to Canada as part of its law. The same Act was passed in Canada but called the *Constitution Act 1982*, and as per Trudeau's intention included the *Canadian Charter of Rights and Freedoms*.

### E. Summary

I submit that whether we like it or not, New Zealand has closely mirrored certain aspects of the Canadian experience. For example *New Zealand Constitution Act 1852*, whilst establishing a representative legislature in this country contained s.68 which "provided that Bills for altering the Act be reserved for Her Majesty's assent and laid before both Houses of the British Parliament."<sup>60</sup> Consider too that the NZBORA is an Act analogous to the CBOR and thus the incremental approach of the Canadians, in which first a BOR and then an entrenched Constitution were enacted, can be a process mirrored in this country. It was originally intended for a supreme, entrenched statute to be enacted, therefore any revisitation of the White Paper issues must conclude that the Canadian approach bears some scrutiny.

Post-Charter, commentators have decried that the power has not been transferred to the people but to the law profession. Mandel notes that the legal profession is **not** a "more democratic technique for resolving political issue"<sup>61</sup> because they attempt to hide the political nature of a decision through abstractions. "The Charter exalts courts even more. I think they should be cut down to size. That is why I wrote this book. I know we can do better than this."<sup>62</sup>

<sup>60</sup> See above n 19, 88.

<sup>61</sup> See above n 40, 4.

<sup>62</sup> See above n 40, x.



He believes the Charter weighs heavily on the side of power and undermined popular movements effectively strengthening inequalities. For this he cites an example where in 1985 an objection to cruise missiles was not even allowed to go to trial.<sup>63</sup> I submit the view that these concerns do not negate an entrenched constitution, rather they provide us with sufficient questions that need to be addressed when as New Zealanders we inevitably face the issue ourselves.

#### A. Introduction

The main issue of this paper is whether the Treaty should be incorporated into an entrenched Constitution. It was clearly Palmer's intention that the Treaty be so incorporated yet in the final Act, amongst other omissions, no reference to the Treaty is found.

The Committee stated that Maori were opposed to incorporation.<sup>64</sup> This section considers the substance of the so-called Maori opposition by first examining the submissions made to the Committee in relation to Article 4. The implication of this approach is that these submissions constitute the main backdrop against which exclusion would be justified. Though this may seem a little simplistic, it appears that other than anecdotal evidence including newspaper articles etc, there is very little else of sufficient authoritative status to warrant specific mention. As a result of this lack, this paper will consider responses to a questionnaire sent to various Maori individuals around the country.

#### B. Maori Consultation

##### 1. Reasons for consultation with Maori

Inclusion of the Treaty into the Bill was intended to have a threefold effect.<sup>65</sup> It was

<sup>63</sup> *Operation Dismantle et al. v The Queen* (1985) 18 DLR (4th) 481 Per Dickson J., Estey, McIntyre, Chouinard and Lamer JJ., concurring: For appellants to be entitled to proceed to trial, their statement of claim must disclose facts, which, if taken as true, would show that the action of the Canadian Government could cause an infringement of their rights under s. 7 of the Charter. The causal link between the actions of the Canadian Government, and the alleged violation of appellants' rights under the Charter was too uncertain, speculative and hypothetical to sustain a cause of action. Thus, although decisions of the federal Cabinet are reviewable by the courts under s. 32(1)(a) of the Charter, and the government bears a general duty to act in accordance with the Charter's dictates, no duty is imposed on the Canadian Government by s.7 of the Charter to refrain from permitting the testing of the cruise missile.



#### IV. INCORPORATION OF THE TREATY

##### A. Introduction

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##### B. Maori Consultation

###### 1. Reasons for consultation with Maori

Inclusion of the Treaty into the Bill was intended to have a threefold effect.<sup>65</sup> It was necessary for effective consensus because the Bill must also "embrace Maori."<sup>66</sup> Inclusion

<sup>64</sup> Interim Report of the Justice and Law Reform Committee *Inquiry into the White Paper: A Bill of Rights for New Zealand* (1987) AJHR I 8A.

<sup>65</sup> See above n 6.

<sup>66</sup> See above n 65.



would go towards remedying "past failure to honour fully the Treaty."<sup>67</sup> Finally, "no law or document that refused to give proper recognition to it could fairly claim to be a Bill of Rights for all New Zealanders."<sup>68</sup> Despite this type of rhetoric there was no such recognition provided in the NZBORA.

Though it is fair to note that any New Zealand citizen could make comments in relation to the White Paper, the views of Maori in particular were sought by both Sir Geoffrey<sup>69</sup> and the Committee. In their Interim Report, the Committee stated that:<sup>70</sup>

"[i]n any event, in our view it would be inappropriate to delete the provisions in the draft bill relating to the Treaty without consultation with the Maori people"...

"In our view, the views of the Maori community on the bill of rights proposal in general and the incorporation of the Treaty of Waitangi in particular cannot be said to be settled".

From this statement it is clear that consultation with Maori was necessary in order to establish whether deletion of Article 4 was appropriate as opposed to inclusion. I am not suggesting that the government would have included the provision in the face of Maori opposition, but that if the Article was to be excluded it would be as a result of opposition discovered through consultation. This statement of the Committee would therefore pose few problems were it not for the fact that it is notably silent as to the *extent* of consultation i.e. how far either party was expected to go in order to be able to assert that consultation had occurred.

## 2. *The extent of consultation*

The Committee noted that the Minister of Justice had established a Maori advisory group and further that if it was decided to delete

"Articles 4 and 26 it would seem appropriate to include a provision to the effect that the bill does not affect any of the rights of the Maori

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<sup>67</sup> See above n 65.

<sup>68</sup> See above n 65.

<sup>69</sup> See above n 3.

<sup>70</sup> See above n 69, 32 - 33.



Article 4 people under the Treaty of Waitangi".<sup>71</sup>

The next comment is a brief explanation by the Committee in its Final Report on the White Paper as to why the Articles relating to the Treaty were omitted.<sup>72</sup>

"One reason for including the Treaty is that it must be seen as an essential part of any supreme constitutional law which might be enacted. As the bill recommended by the Committee would not be supreme law this reason no longer applies. Indeed, to include the Treaty might suggest that it is no more than an ordinary statute. Further, the Committee notes that questions about compliance with the Treaty are increasingly being addressed effectively by individual statutes, the Waitangi Tribunal, and the courts. For these reasons the Committee recommended against including an equivalent to article 4 of the White Paper draft."

I submit that this result gives rise to a number of questions. Is it reasonable to believe from the Committee's recommendation that: as a result of consultation, it was settled, that the Maori people, were opposed to the Treaty's incorporation into the Bill? If so, then we must assume that Maori had also settled on the view, that exclusion of Article 4 (and 26) also precludes **any** reference to rights of Maori under the Treaty being included as part of such an important piece of legislation.

An alternative question might then be asked about whether the existence of a Maori advisory group constitutes sufficient consultation? It is my submission that whilst such a group may form the starting point, the consultation process was inadequate. For the State to hold otherwise may go some way to understanding the approach to the signing of the Treaty, during which it is said that not all of the Maori Chiefs were signatories. More contemporarily the Sealords deal signed by only 43 signatories representing 17 of the 75 distinct Maori tribes in New Zealand.

The Committee observed that "very few Maori availed themselves of the select committee process"<sup>73</sup> and this constitutes a wonderful understatement. In relation to

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<sup>71</sup> See above n 70, 33.

<sup>72</sup> Final Report of the Justice and Law Reform Committee *On a White Paper on a Bill of Rights for New Zealand* (1988) AJHR 1 8C.

<sup>73</sup> See above n 3, 124.



Article 4 the Committee received only four submissions from groups or individuals that identified themselves as Maori.<sup>74</sup>

“We the descendants of Wi Parata – former Maori MP for Southern Maori in the New Zealand House of Representatives – object to the Treaty of Waitangi being incorporated in the Bill of Rights, because it does not need ratifying.”<sup>75</sup>

“The Ngati Te Ata Trust opposes the Bill of Rights and wishes to be heard in support of this injection.”<sup>76</sup>

“The Huakina Development Trust opposes the Bill of Rights and wishes to be heard in support of this objection.”<sup>77</sup>

Submission 63 though much longer than the rest was making an entirely different point.

This submission was prepared by the Heke Arahura Maori Komiti for what appears to be the Poutini Kaitahu iwi. Effectively they assert that sovereignty has always resided with their iwi having never been surrendered by them to anyone. They viewed the inclusion of the Treaty as “a sinister move by an oppressive Pakeha dominated government”. Sinister because they considered that:<sup>78</sup>

“if the Treaty is included in a Bill of Rights, the Treaty which defines the original inhabitants of the islands of Aotearoa, will become entrenched in law, which means that “sovereignty” *still being debated, is settled* [emphasis added], although the majority original inhabitant Maori tribes of Aotearoa were not part of negotiations on the Treaty or of the signing of the Treaty of Waitangi”.

Whatever the common perception of sovereignty may be, it is clear that these submissions would not of their own weight constitute a mandate from Maori sufficient to imply wholesale opposition to inclusion. In fact two of them simply state that Maori (for reasons below) oppose the White Paper.

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<sup>74</sup> Though I confess that this comment is based upon some reference to Maori organisation titles or reference to whakapapa links.

<sup>75</sup> *Submissions on A Bill of Rights for New Zealand: A White Paper Volume 2* (Victoria University, Wellington, 1985) Submission 128W.

<sup>76</sup> See above n 34, Submission 232.

<sup>77</sup> See above n 76, Submission 233.

<sup>78</sup> *Submissions on A Bill of Rights for New Zealand: A White Paper Volume 1* (Victoria University, Wellington, 1985) Submission 63.



The Committee also noted that "the select committee process does not lend itself easily to customary Maori consultation processes".<sup>79</sup> From the result the Committee obviously chose to ignore its own observations in relation to consultation or lack of it. I would suggest that it is unreasonable under any circumstances to believe that four submissions and a Maori advisory group could constitute sufficient consultation. The next question is whether Maori and non-Maori were opposed to incorporation.

## C. *The Submissions*

### I. *Relevant Statistics*

There were 431 submissions to the Committee:

- 243 oppose the bill,
- 84 oppose the right to life provision,<sup>80</sup>
- 56 make other suggestions and
- 35 support the bill.

There were only four Maori submissions directly to the Committee otherwise information received by the Committee is second-hand. These submissions refer only to the White Paper not Article 4. However, the *New Zealand Bill of Rights Act* is enacted, Article 14 is now section 8, and any reference to the Treaty is nowhere to be seen.

The nature of the so-called objections raised by Maori in relation to Article 4 are outlined below. If the facts indicate (which they do not) that the Maori people objected to inclusion of the Treaty, then the statistics are a glowing example of the weight attached to Maori objections. That is, despite the fact that there was overwhelming opposition to the Bill it was still enacted. However if Maori did not object, then I submit that only logical conclusion is that the Treaty was sacrificed in order to demonstrate some sort of

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<sup>79</sup> See above n 3: see also *Submissions on A Bill of Rights for New Zealand: A White Paper Volume 5* (Victoria University, Wellington, 1985), Submission 424 per Jane Kelsey...

"The process of consultation and calling for submissions is, itself, exclusive and totally eurocentric".

<sup>80</sup> Originally Article 14 now s 8 *New Zealand Bill of Rights Act 1990*.



recognition of the will of the people in the face of an act of Parliament that was contrary to such will.

## 2. *The Kelsey Perspective*

Kelsey<sup>81</sup> notes four Maori objections to the White Paper debate. The first is that the Treaty itself is a BOR for New Zealand, which I will address below. The second concerned the status of ordinary legislation which:

“in an electoral system of Pakeha majority rule where the bill could be amended by referendum or 75 percent parliamentary vote there was a danger of the treaty being rewritten.”

I believe this objection is a proverbial ‘red herring’. Under the Westminster doctrine of parliamentary sovereignty – which the NZBORA did not replace – Parliament is able to ignore or legislate contrary to the Treaty. In the event that the Treaty has been incorporated into a statute it is theoretically possible for Parliament to change the wording of the Treaty itself. The relevant question – though outside the scope of this paper – is whether Parliament *would* as opposed to whether it *could*? Indeed I submit that incorporation into the NZBORA would have actually decreased the [non-existent] likelihood of an alteration as opposed to making it vulnerable to unwanted interference.

Kelsey’s assertion also raises procedural questions. For example Anderson states:<sup>82</sup>

“As already noted (para 1.4, 1.6 above), Article 4 does not expressly establish the Treaty as part of the “supreme law”, but merely “[recognises] and affirms” the rights of the Maori people under the Treaty. The two versions of Treaty are, of course, contained in the Schedule. In terms of article 4, therefore, it is possible to argue that the Treaty, not being itself granted any precise legal status but merely being as to one aspect “recognised and affirmed” and been furthermore relegated to the Schedule, the does not itself form part of “this Bill of Rights”.

If we take Kelsey’s concern to its logical conclusion, that would mean by mere inclusion in a Schedule the ‘governing’ Act is now empowered to make substantive alteration to

<sup>81</sup> As cited by S.A. Shortall “Aboriginal Self-Government in Aotearoa/New Zealand: A View Through the Canadian Lens” (1996) LLM Thesis, 135; J. Kelsey *A Question of Honour?: Labour and the Treaty 1984 – 1989* (Allen & Unwin, Wellington, 1990) 54.

<sup>82</sup> *Submissions on A Bill of Rights for New Zealand: A White Paper Volume 5* (Victoria University, Wellington, 1985) Submission 423, 14, para. 2.3.



the 'mentioned' Act. Therefore a reference to the *Electoral Act* in the Schedule of the *Crimes Act* for example, would be sufficient empowerment to override its entrenchment clause. In this situation, I submit that Parliament could not rewrite the Treaty nor any other Act merely because it was included in the Schedule of the NZBORA. Though the intention of the White Paper was to incorporate the Treaty, it would be contrary to the status of a supreme Act and the purported importance attached to the Treaty by Palmer and the Committee, to then allow for such an easy process of change.

The third objection concerned the interpretation of the Treaty in the Pakeha courts which had historically failed to uphold its guarantees. Unlike Kelsey I have the benefit of NZBORA history on my side, during which Maori have shown themselves to be litigiously inclined. Since 1987 and the New Zealand Maori Council case<sup>83</sup> the Courts in my opinion have been the source of a number of favourable decisions in relation to Treaty claims. However that aside, some commentators suggest that Maori still have reason to be distrustful of the New Zealand Courts.<sup>84</sup> Kelsey's final argument was that the Treaty by inclusion will be subjected to the limitations of Article 3 - now s 5 - which again I will address below.

### 3. *The Treaty As A Bill Of Rights*

The most authoritative submissions included in the five volumes of submissions made to the Select Committee on behalf of Maori was that of Manuka Henare.<sup>85</sup> Mr Henare was a representative of Maori from two hui held at the Turangawaewae marae in 1984 and 1985. Previously Sir James Henare had requested that the Maori Council of Churches organise these gatherings in order to "discuss once and for all the Treaty of Waitangi".

The mandate of these hui comes not only from the organising group, but from the cross-Kelsey notes that if the Treaty had been included into the Bill of Rights, it would have been subjected to the justifiable limitations provision. Article 3 now section 3 states

<sup>83</sup> *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641.

<sup>84</sup> See Appendix, Questionnaire 2.

<sup>85</sup> New Zealand Section of the International Commission of Jurists "A Transcript of the Seminar on Bill of Rights: The Pros and Cons" (Parliament Buildings, 10 May 1985) 61.



section of Maori 'society' that were in attendance.<sup>86</sup> Mr Henare notes:<sup>87</sup>

"We [the Maori Council of churches] convened a wider group of people which included Maori organisations like the 28<sup>th</sup> Maori Battalion, the four Maori members of parliament, Maori university students, Maori Wardens, Maori Women's Welfare League, Maori writers and artists, the New Zealand Maori Council, the race relations conciliator was involved and Mana Motuhake, along with all the Maori churches."

Mr Henare states that on the proposed Bill of Rights the hui said that the "hui is suspicious of the passing of a Bill of Rights because we believe we already have one, i.e. the Treaty of Waitangi."<sup>88</sup>

The immediate question is whether the 'we' applies simply to Maori, or to all New Zealanders, including Maori? On the one hand it must apply to the former given the nature of the gathering; on the other hand it *could* apply to the latter due to the nature of the Treaty. Whatever interpretation of 'we' one prefers, this comment is significant not because it supports the exclusion of Article 4 from the NZBORA, but because it objects to the White Paper itself. But even this objection is qualified given that it was couched in terms of a 'suspicion' as opposed to 'rejection'. If we also consider 75 percent of the other Maori submissions voice no opposition to *inclusion*, but the White Paper itself.

Even though Maori did *not* support the White Paper per se, in the event of the it being passed Maori would have preferred that the NZBORA still contain some reference to the Treaty. It seems anomalous to suggest that Maori could believe in the pre-eminent status of the Treaty as a BOR, and yet conclude that they would not or did not support the incorporation of Article 4 into a BOR. This is particularly true given that the White Paper purported to fulfil the same BOR function that Maori perceived the Treaty entailed.

#### *4. Justified In A Free And Democratic Society*

Kelsey notes that if the Treaty had been included into the Bill of Rights, it would have been subjected to the justifiable limitations provision. Article 3 now section 5 states:

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<sup>86</sup> See above n 85, 63.

<sup>87</sup> See above n 85, 62

<sup>88</sup> See above n 85, 65.



*Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject to only such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*

Her view was that this Article amounts to "protection of the existing state"<sup>89</sup> and that there are aspects of the two societies (Pakeha and Maori) that are intrinsically incompatible.

Though it is intuitively reasonable to believe Maori would object to this section, it certainly did not seem evident from the submissions. However as stated above if Maori uphold the Treaty as a BOR then to see it being made subordinate to this section would constitute a violation their ideological stance. If we accept that Maori did formulate this objection, then it appears to support the idea that inclusion was the preferable option to exclusion. The construction of this objection presupposes that some reference to the Treaty would be contained in the NZBORA.

We must also accept that it was open for the government to come back with an alternative arrangement which did *not* involve exclusion on this point we can again look to the Canadians. For example in the original draft of the Charter, aboriginal peoples were mentioned in the same manner that minorities are referred to in our section 20 the NZBORA. The clause that is now section 26 of the Charter stated:<sup>90</sup>

*The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that existed in Canada including any rights or freedoms that pertain to the native peoples of Canada.*

After a general outcry from the aboriginal groups section 35<sup>91</sup> was situated in Part II of

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<sup>89</sup> See above n 79, 14.

<sup>90</sup> The emphasis is added and now excluded from s 26 of the Charter.

<sup>91</sup> Section 35 of the Rights of the Aboriginal Peoples of Canada

- (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
- (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
- (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.



the Charter which place it outside the override of section 33<sup>92</sup> and the "reasonable limits" of section 1.<sup>93</sup>

The New Zealand government could have adopted this approach with little difficulty. If we consider also, that a number of non-Maori submissions spoke of the Treaty as being able to stand on its own merits,<sup>94</sup> then we are left with the idea that the Treaty has a special place that should appropriately be given special recognition.

#### D. Summary

The so-called Maori objections have been inappropriately used as the justification for excluding reference to the Treaty of Waitangi from the NZBORA. It was intended by the State that Maori should be consulted on the issue of the Treaty's inclusion and though the extent of this consultation was never clear, what is apparent is that the process was minimal at best. The corollary is that even the submissions I have posited may be premature given that the will of the Maori people in relation to this issue has not adequately been explored.

Even if we accept the idea that this process was sufficient to establish the will of the Maori people, the response by the State has been to act in a contrary manner. Maori considered that the Treaty was a BOR for all New Zealanders. Three of the four submissions and the mind of the people from the Turangawaewae hui state categorically

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<sup>92</sup> Section 33 of the Charter provides:

- (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
- (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration
- (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration
- (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).
- (5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

<sup>93</sup> This is identical in all material respects to s 5 of the *New Zealand Bill of Rights Act 1990*.

<sup>94</sup> See Submissions 59; 60; 239, para. 2.3; 373W para. 9; 417. I confess though that the context of these submissions saw the Treaty as being excluded because of its status rather than included as I am proposing.



that Maori were opposed to a BOR - point blank. I have submitted that it would be anomalous to believe Maori would uphold the pre-emptive status of the Treaty and yet desire no reference to the Treaty in an Act that actually was a BOR. Saying no to the White Paper cannot be interpreted as saying no to Article 4. To do so derogates from the right Maori have to comment upon anything not pertaining exclusively to Treaty or Maori issues. This in my opinion equates to a minimisation of the Maori view point and is contrary to the principle of partnership between Maori and the State that the Treaty is now understood to represent. This partnership "creates responsibilities analogous to a fiduciary duties"<sup>95</sup> with a reciprocal responsibility "to act towards each other reasonably, 'with utmost faith', commensurate with the duty which in civil law, partners owe to each other."<sup>96</sup> Therefore Maori must be seen as have a view relevant to both members of the partnership and not merely to Maori.

Ultimately the challenge for a new call to incorporation of the Treaty would depend upon ascertaining what Maori are saying on this issue. It would involve a process that incorporated the customary approach of Maori to these issues and then an accurate interpretation of this will. During the next section I consider the response to questionnaires sent to a select sample on the issue of incorporation.

<sup>95</sup> *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641, 664 per Cooke P.

<sup>96</sup> See above n 19, 71.



## V. QUESTIONNAIRE RESPONSES

### A. Introduction

There is a decidedly lack of authoritative sources that provide an indication of the nature of Maori objections to the incorporation. In order to gauge whether the situation has changed in the seven years from enactment to today, questionnaires were sent asking six questions.

1. Do you think that New Zealand should implement an entrenched Constitution?
2. Should the Treaty of Waitangi be incorporated into such a Constitution? Please outline reasons.
3. Please explain your answer. If you answered 'Yes' to Question 2, what form should such incorporation take? For example should both English and Maori texts be incorporated? Alternatively should we adopt Cooke's 'principles' approach?
4. There has been a common perception that Maori opposed incorporation of the Treaty into the *New Zealand Bill of Rights Act 1990*, when originally proposed by Sir Geoffrey Palmer. What is your understanding of Maori opposition at that time? Please use more paper if necessary.
5. In your opinion, are the above concerns still relevant in 1997? Please give reasons.
6. Do you have any further comments that may be relevant?

There were fourteen written and one oral response to this questionnaire. It is not the intention of this paper to suggest that these responses constitute sufficient Maori consultation, but merely to provide a sample of Maori opinion.

Like the Turangawaewae hui, the responses were submitted from Maori in a range of different vocations and ages. These included two college students - Darren Huatahi and Levi Mary-Church; a youth worker - Shaun Anderson; controversial author - Alan Duff; Members of Parliament - Hon. Tau Henare and Hon. Alamein Kopu; Professor of Maori



Studies at Massey University - Mason Durie; Wellington lawyer - Maui Solomon; law lecturers - Annie Mikaere (Waikato University) and Anne Philips (Victoria University); community worker - Maraea McMillan on behalf of Te Kotahitanga Incorporated Society; and Auckland lawyers - Joe Williams and Moana Sinclair. The oral submission was from Moana Jackson of Nga Kaiwhakamarama I Nga Ture.<sup>97</sup>

## *B. Should New Zealand Implement An Entrenched Constitution?*

### *I. Submissions in favour*

Of the written submissions, ten were in favour of an entrenched Constitution being enacted. Sinclair for example emphatically states: "Yes! [A] written constitution like that of the US Constitution must be implemented in Aotearoa (NZ) with the Treaty of Waitangi 1840 in a superior position."<sup>98</sup> Philips suggests that:<sup>99</sup>

"It is important for the political stability of New Zealand that an entrenched Constitution is implemented. There is an expectation that such a Constitution would be implemented after careful research on other countries constitutions (such as Germany and Canada) and wide consultation within New Zealand."

Professor Durie supports an entrenched Constitution because "[t]he constitutional conventions under which we operate are essentially an adaptation of Britain's former conventions."<sup>100</sup>

Mikaere's support is conditional upon a Constitution "which has been negotiated between the Crown and Maori, one which brings about structural change to present constitutional structures."<sup>101</sup> This is interesting because as we will see below Jackson opposes incorporation because the issue of Constitutional structures is very much at the heart of Maori opposition and though the question they are answering is different, it is apparent that both see the discourse on the Treaty as necessitating Constitutional change.

<sup>97</sup> Recording made 30 October 1997.

<sup>98</sup> See Appendix, Questionnaire 14.

<sup>99</sup> See Appendix, Questionnaire 3.

<sup>100</sup> See Appendix, Questionnaire 1.

<sup>101</sup> See Appendix, Questionnaire 2.



Henare also considered the issue of a Constitution as being the herald for change. Whilst not answering either way, in his view a "constitution comes from being a republic."<sup>102</sup> In this case the limitation of a written questionnaire is highlighted because there is little to indicate what more the Honourable Minister might have meant by this comment. For example one might consider that Henare is implying that only those countries that are republics, are eligible candidates for an entrenched Constitution. This position is untenable because as has already been noted Canada operates under a semi-entrenched Constitutional monarchy and is not yet a republic.

The alternative interpretation available to Henare's comment is one submitted by Professor Brookfield. Brookfield sees "the coming republic as the occasion for basic constitutional reform that would establish in some form the dual Maori-Pakeha polities within New Zealand that [Kelsey] has long advocated."<sup>103</sup> Whether New Zealand will move to a republic is outside the scope of this paper, what is significant is that in a sense the republicanism debate might constitute the greatest mandate to revisit the issues of the White Paper.

## 2. *Submissions against*

Of those who opposed implementation only McMillan provides an indication as to reasoning and even then her opposition is equivocal. McMillan notes that "[i]f the powers that be cannot adhere to the present documentation it leaves no doubt that these situations need to be addressed first."<sup>104</sup> By this it is assumed that she desires for the Government to uphold those obligations stipulated by the various Articles of the Treaty. In a sense this is simply a restatement of why the Treaty might need to be incorporated - because there is no enforcement mechanism for a violation of the State's duties. Graham summarises the situation that I suggest McMillan is trying to address by noting:<sup>105</sup>

"What can perhaps be reasonably assumed was that each party recognised

<sup>102</sup> See Appendix, Questionnaire 4.

<sup>103</sup> F.M. Brookfield "REVOLUTIONS, REFERENDUMS AND THE TREATY" [1997] NZLJ 328, 331.

<sup>104</sup> See Appendix, Questionnaire 9.

<sup>105</sup> D. Graham *TRICK OR TREATY?* (Institute of Policy Studies, Wellington, 1997) 11.



that the future relationship between Maori and the Crown would very much depended on trust. But it is probable Hobson knew, but Maori did not appreciate, that in the event of a breach of the Treaty by either party, the relative positions of the parties would not be the same. If Britain were in breach, it would continue to exist sovereign power, but the loss to Maori flowing from that breach would not be able to be addressed fairly unless Maori had somewhere to go to argue their case and to try to ensure further breaches did not occur. When this happened, to their dismay Maori soon found that there was nowhere for them to go, and I consider that the failure to ensure the existence of an institution in which Maori could seek justice was one of the greatest acts of betrayal in New Zealand's history. It meant that not only were Maori exposed to the risks of unconscionable behaviour by the Crown – which clearly occurred – but also that for a very long time they could do nothing about it.”

McMillan then goes on to state that “[p]erhaps there is no harm in working towards an [entrenched Constitution]”<sup>106</sup> and in doing so impliedly recognises that the only way towards Maori redress is the higher authority of an entrenched Constitution.

### C. *Should The Treaty Be Incorporated?*

#### I. *Submissions against*

Kopu, Mikaere, Henare, and Duff were opposed to the Treaty being incorporated into an entrenched Constitution. Joseph somewhat cynically has commented that “[s]ome drew from the Treaty a spiritual or mythical force which already constituted the Treaty to supreme law...”<sup>107</sup> and this is still the case for three of the objectors.

Kopu who opposed the idea of an entrenched Constitution itself, was equally opposed to the Treaty being incorporated into any statute because:<sup>108</sup>

“[w]e have had 150 [years] plus to try and implement the wairua of the Treaty agreement put in place for us to protect the future generations of Maoridom. There is no doubt that our Tipuna of the time saw us today. I can honestly say is a great-grandmother, that I cannot see the same future generations, what with the imposition of other police and the [disposition] of a proud people. Whilst te Tiriti o Waitangi remains in its present form, we as Maori have a better chance of being here in charge of our future rather than reading about ourselves in the past tense.”

<sup>106</sup> See above n 104.

<sup>107</sup> See above n 19, 62.

<sup>108</sup> See Appendix, Questionnaire 6.



Mikaere stated that:<sup>109</sup>

“[t]he Treaty should form the basis of such a constitution, it should not be ‘incorporated into’ it, as this implies that the constitution is the framework into which the Treaty might be conveniently slotted.”

Henare’s opposition was on the basis that the Treaty is “the founding document of this nation and as such shall have that [constitutional] recognition. You don’t need to incorporate the Treaty into another ‘Treaty’ or constitution.”<sup>110</sup>

That the Treaty is the founding document of this country is not in dispute, however I am inclined to support Joseph’s conclusion in that:<sup>111</sup>

“[c]laims that the Treaty is a ‘founding’ or ‘basic’ document do not elevate it into supreme law, or indeed law simpliciter. The Treaty lacks entrenchment or statutory adoption and wants for any judicial recognition as fundamental law.”

Duff’s opposition was on a completely different tangent to other three. He notes:<sup>112</sup>

“I’d be bloody careful here! The can of worms will surely turn to a colony of seething, vicious large snakes! If we fail to mature our thinking beyond ‘Maori’ and ‘non-Maori’ we are locking ourselves into a prison doing a generational life sentence of limited outlook and, thus, outcome. In 30-40 years being ‘Maori’ will be meaningless”

The latter part of this comment either perpetuates colonial notions of assimilation or more charitably, suggests that integration through cross-cultural ‘breeding’ is the future reality of this country. It appears for Duff like the adage ‘if you remember the 60’s, you weren’t really there’ to suggest that if one in the future needs to ask ‘how much Maori blood do you have?’ the issue of ‘Maori and ‘non-Maori’ is moot - and all that remains is a New Zealander. In this view Duff is not alone because the White Paper notes that “the Treaty gives legitimacy to the presence of pakeha, not as a conqueror or interloper, but as a New Zealander, part of a new tangata whenua.”<sup>113</sup>

<sup>109</sup> See above n 101.

<sup>110</sup> See above n 102.

<sup>111</sup> See above 19, 62.

<sup>112</sup> See Appendix, Questionnaire 10.

<sup>113</sup> See also F.M. Brookfield in I.H. Kawharu (ed.) *Waitangi: Maori & Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 5.



## 2. *Submissions in favour*

Interestingly a number of the written submissions desire incorporation *because* of the Treaty's status as the 'founding document' or because of its 'constitution-like' nature. For example Solomon notes simply that it should be incorporated "because it forms the basis of [New Zealand's] constitutional framework. Durie states:<sup>114</sup>

"As the foundation of the modern state, the Constitution should recognise the Treaty as a starting point. Some might argue that it is itself the Constitution. However, it is a little light on detail to be the sole constitutional document."

Phillips notes:<sup>115</sup>

"In my view the Treaty of Waitangi should be included in the Constitution as it is the founding document of this country. The Treaty cannot be ignored. An agreed set of principles should be reflected in the Constitution itself, as the basis for founding constitutional changes to legislation. At present, the Treaty is included on an ad hoc and informal basis, in the legislative process as Cabinet papers identify the implications of proposed policy recommendations in terms of the Treaty and all proposals for legislation must report on the consistency with Treaty principles. That, in my view, fails to give the Treaty its proper place in Government. That approach fails to address the broader issues of Maori disadvantage in education, health, employment and welfare dependency."

Therefore contrary to those views that Joseph cynically decries for drawing a constitutional status from the Treaty, these proponents consider (correctly) that such status is inherent within the Treaty, but needs to be affirmed through incorporation. The implication of this is that the Treaty cannot stand on its own as being sufficiently constitutional.

Other respondents were in favour of recognition because "people have huge arguments over the [T]reaty and if it is incorporated then maybe these arguments can be settled."<sup>116</sup> Anderson notes that "I think it should as far as landrights or fishing goes but I don't know enough about the Treaty to comment further."<sup>117</sup> Darryn Huatahi was keen to see incorporation occur because "[b]oth sides need equal speaking rights"<sup>118</sup> and yet was

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<sup>114</sup> See above n 100.

<sup>115</sup> See above n 99.

<sup>116</sup> See Appendix, Questionnaire 7.

<sup>117</sup> See Appendix, Questionnaire 8.

<sup>118</sup> See Appendix, Questionnaire 11.



concerned that incorporation "could cause more friction between Maori and Pakeha."<sup>119</sup> Rod Huatahi too wanted to provide "both sides an equal opportunity to put forward each [other's] point of view through a mediator."<sup>120</sup>

Williams almost militantly considers incorporation as a weapon against the State. The Treaty should be incorporated:<sup>121</sup>

"[t]o ensure in the end that Maori always have a stick to beat the Crown with if it refuses to comply with Treaty [principles]. As matters currently stand there are very few areas in which the Crown is bound by statute to act in compliance with the Treaty. The Treaty settlement process relies on the 'grace and favour' of the Crown and thus is no real way to force a Maori oriented prospective into the process."

Though smacking somewhat of Maori radicalism, Williams's submission states the very same principle espoused by Palmer when he discussed the implementation of a BOR.<sup>122</sup>

#### D. *What Form Should Incorporation Take?*

##### I. *A brief explanation*

Two versions of the Treaty were signed on 6 February 1840 with the overwhelming majority of the Chiefs signing the Maori translation. There has been a lot of discussion in the past about the differences between the two texts and this paper does not intend to enter into that debate. However in the event that the Treaty is incorporated the question of what to incorporate is inevitable.

In 1987 the Court of Appeal affirmed that discourse on the Treaty now employs the language of 'principles'. These principles are essentially that:<sup>123</sup>

"The Crown acquired sovereignty in exchange for the protection of rangatiratanga;<sup>124</sup>

That the Treaty requires a partnership and the duty to act reasonably and in

<sup>119</sup> See above n 118.

<sup>120</sup> See Appendix, Questionnaire 12.

<sup>121</sup> See Appendix, Questionnaire 13.

<sup>122</sup> See above section "*ENTRENCHMENT: Introduction*"

<sup>123</sup> See above n 4, 351.

<sup>124</sup> For discussion on this see I.H. Kawharu (ed.) *Waitangi: Maori & Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) xix.



good faith, the responsibilities of the parties being analogous to fiduciary duties;

The freedom of the Crown to govern for the whole community without unreasonable restriction;

Maori duty of loyalty to the Queen, full acceptance of her Government through her responsible Ministers and reasonable co-operation;

The duty of the Crown is not merely passive but extends to effective protection of the Maori people in the use of their lands and other guaranteed taonga to the fullest extent practicable;

The obligation to grant at least some form of redress for grievances where these are established;

Maori to retain chieftainship (rangatiratanga) over their resources and taonga and to have all the rights and privileges of citizenship."

The questionnaire implies that there are three options available. (1) That only one translation be incorporated; (2) that both versions be incorporated; (3) that the principles be incorporated. By way of conclusion to this brief history, Article 4(3) of the White Paper would have included both versions in the Schedule to the BOR.

## 2. *Incorporation of one text*

Duff would not incorporate the Maori text "unless in context."<sup>125</sup> This response is difficult to disseminate. What 'context' is appropriate? The Concise Oxford Dictionary notes "out of context without the surrounding words or circumstances and so not fully understandable."<sup>126</sup> For example Mikaere might consider that because nearly all the Chiefs signed the Maori version that the only appropriate context is the Maori translation. She very briefly states that "[t]he Maori text only should form the basis of a new Constitution."<sup>127</sup>

One can only assume from Mikaere's brevity that she considers only the Maori version to have any worth or authority, but this clearly runs contrary to the bilateral nature of the Treaty in that it was signed between two parties. However it does leave open the

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<sup>125</sup> See above n 112.

<sup>126</sup> R.E. Allen (ed.) *The Concise Oxford Dictionary of Current English* (8 ed, Clarendon Press, Oxford, 1990) 248.

<sup>127</sup> See above n 101.



possibility that even if the Maori version forms the basis of a new Constitution, could the English version be included as part of the Constitution's development?

Sinclair too would incorporate the Maori version.<sup>128</sup>

"The Maori text must be the principal guide.

The Maori text should be translated into English. The [current] English text should be thrown out. Cooke's 'principles' should be thrown out because they have only reduced the status of the Treaty of Waitangi, these principles have been watered down as the case law demonstrates EG: (1980's – 1990's). The basic rule in Treaty law, Contra [Proferentum] would insist that the English version be thrown out or only be referred to in a minimal way."

Part of this task has already been undertaken. Kawharu has translated the Maori text into English<sup>129</sup> and this has been noted favourably by a number of commentators.<sup>130</sup>

However what is most significant is the notion of contra proferentum which holds that the interpretation given to a document should be that which is least favourable to the side which drew up the document. In this context it would indeed be the Maori version that prevailed rendering the English translation unnecessary save as a reference point – which is exactly Sinclair's point.

### 3. *Incorporation of both texts*

Six of the responses preferred that both texts should be incorporated. Durie considered that "the original Main texts should form the foundation statement but operational implications might refer to the 'principles' – as defined by the Waitangi Tribunal and the Courts."<sup>131</sup> This position is much the same as Solomon.<sup>132</sup>

"I would support both versions being entrenched but where there was any conflict then the Maori vision would prevail. It would also make practical sense to have the principles which have developed over the last decade used as a secondary level of interpretation where the meaning was not clear from the plain words of the Treaty or dispute/uncertainty."

McMillan would incorporate both versions because it provides recognition of both parties

<sup>128</sup> See above n 98.

<sup>129</sup> See above Kawharu, 319 – 320.

<sup>130</sup> For example D. Graham, see above n 106, 99 – 101.

<sup>131</sup> See above n 100.

<sup>132</sup> See Appendix, Questionnaire 5.



to the Treaty. The “Maori [text] as it is the indigenous/native tongue of [New Zealand]” and the “English [text] as that is the mainstream language.”<sup>133</sup>

#### 4. *Incorporation of the ‘principles’*

Phillips notes that:<sup>134</sup>

“[I]t would be inappropriate to adopt Justice Cooke’s principles approach as stated in *New Zealand Maori Council v Attorney-General* (1987). The principles of the Treaty as defined by the judiciary have always been confusing and unsatisfactory. Of more merit would be a consultative approach, with a set of principles being agreed by consensus after a series of meetings and hui. The fundamental principle is partnership and we need to explore what we mean by partnership.”

In contrast Williams states:<sup>135</sup>

“I have changed my mind on this in the last 10 [years]. I now think that the focus should be had on the underlying principles – because the context within which the Treaty must be applied has changed so radically in 157 [years]. Wording like ‘The Crown shall at all times act toward Maori in a manner which is consistent with the principles of the [Treaty of Waitangi]’ would suit me.”

#### E. *The Perception Of Maori Opposition To Incorporation & Are Those Concerns Relevant In 1997?*

##### 1. *Rationale behind the question*

It has previously been noted that there is a real lack of authoritative Maori commentary on the so-called opposition to incorporation at the time of the White Paper. Having drawn the conclusion that to suggest Maori would be opposed to any mention of the Treaty in an Act that purported to fulfil the same BOR function that Maori intimate the Treaty represents, it seemed appropriate to test this conclusion out. Again let me add that these questionnaires do not of themselves constitute ‘authoritative’ Maori commentary, but do represent a reasonable collection of Maori views. During this section Question 4 and 5 will be considered together because the latter makes little sense unless the former is

<sup>133</sup> See above n 104.

<sup>134</sup> See Appendix, Questionnaire 3.

<sup>135</sup> See above n 121.



read with it.

## 2. *The various views*

Jackson in a recorded interview qualified his ability to comment by stating:<sup>136</sup>

"My work takes me on the road a lot. I like to think I've got a fairly good feel of where our people are coming from. But I don't think that things have that fundamentally changed since the debate on the Bill of Rights Act which was really the last time that I think this issue was discussed.

I don't think that the reasons have changed that much either. The reasons that we gave in a hui of Maori lawyers and with Geoffrey Palmer were quite simple.

He then went on to provide three reasons that they objected to incorporation.

First: that the Treaty was a bilateral agreement and that one party did not have the right to unilaterally either incorporate it, make it a nullity, or whatever.

The second was: that the Crown should not incorporate or seek to ratify by legislation the Treaty as a whole, until the ongoing debate about what the Treaty means, its context as a text within the process of colonisation is clarified.

The third reason that we gave was that, even if it was ratified or incorporated in statute with an entrenched provision, there is no guarantee under the Westminster system that it would be completely safe from change.

What is apparent about Jackson's position is that the Treaty did not create a constitutional structure that intended for Maori to live in subordination to the Crown. Thus in Jacksonian terms, it might be said that the fiduciary duty that the Court of Appeal has noted as being a responsibility of the State, is in fact one that extends to both parties.

In being a bilateral agreement, a horizontal or pluralistic constitutional structure was envisaged. That is envisaged by Maori, because the doctrine of Crown indivisibility and parliamentary sovereignty does not recognise such a notion. Notwithstanding these doctrines, for Jackson the Treaty should have provided an environment within which dialogue which possible. Therefore until proper communication between the parties was resolved there could be no accepting the Crown's proposal to incorporate.

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<sup>136</sup> See above n 97.



The lack of Maori trust in the Government implicit in Jackson's third reason is a recurring feature of various written submissions. Mikaere states

"Primarily that the all-white, all-male judiciary could not possibly be trusted to interpret the Treaty correctly.

Also that statutory incorporation of the Treaty would in fact demean it, and render it liable to statutory repeal."

She observes that there has been no change because the "nature of the judiciary has not changed. The damage done by the judiciary with their interpretation of the principles of the Treaty is immeasurable."

Williams opined that Maori considered the Treaty would be demeaned by incorporation:<sup>137</sup>

"Maori opposition was ill-advised and sentimental – in my view. They took the view that that treaty was too tapu to be incorporated into law. The Crown undoubtedly couldn't believe it luck. In the event, a significant opportunity was lost to us."

Given this position, it is hardly surprising to find that he does not consider Maori concerns to be relevant today that in fact "entrenchment is needed all the more now as the Pakeha electoral pendulum swings back to the conservative viewpoints of the 60's."<sup>138</sup>

Philips comments that:<sup>139</sup>

"My understanding of Maori opposition to incorporation of the Treaty into the New Zealand Bill of Rights Act 1990 was that it was a politicised response by a few tribal leaders and kau matua who in turn influenced Maori Members of Parliament. There were several reasons for the Maori opposition:

- 1) that the mana of the Treaty of Waitangi would be diminished by incorporation. This view has merit as subsequent events revealed that the Act was not supreme law.
- 2) That the rights contained in the Treaty could not be litigated. The Treaty would be a constitutional relic rather than a living document.
- 3) That a growing sense of unease existed in intellectual Maori circles which would not be addressed by the Labour [government]."

#### *Question 5*

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<sup>137</sup> See above n 121, Question 4.

<sup>138</sup> See above n 137, Question 5.

<sup>139</sup> See above n 99.



Yes the concerns are still relevant and will need to be addressed. To Maori the Treaty is a living document. My ancestors signed the Treaty of Waitangi, Kawati, Paraha, Kaka and Tamati Waka Nene. For Ngati Hine, for example, Kawati is the great warrior chief. To diminish the Treaty is to tread upon the whenua (land) and the wairua (spirit) of my ancestors without respect, carelessly and in ignorance of new hopes and aspirations for this country.”

Solomon considered that:

“It would depend on how the Treaty was entrenched and if it was accompanied by other constitutional reforms e.g. establishing an Upper House comprising equal numbers of Maori and Crown [representatives]. That way [the] Treaty could only be repealed with support of both partners. There could be better ways of protecting the entrenchment provisions. In any event I still don't think the concern is completely valid as the common law does not recognise the [Treaty of Waitangi] unless it is incorporated into statute – so there would seem to be little to lose in interpreting it. Even if Parliament could repeal the entrenchment provision, I doubt that this would effect the historic status of the Treaty.”

Sinclair notes:<sup>140</sup>

“The reason why Maori opposed the incorporation of the Treaty into the [New Zealand] Bill of Rights Acts 1990 was,

- 1) The Act could be repealed by simple majority
- 2) The Treaty of Waitangi would therefore be in the vulnerable position of being wiped out completely
- 3) Incorporation of the Treaty into an Act reduced the superior status of the Treaty which was for Maori a sacred kawenata for ALL TIME, not something that could be tossed around at the whim of transient politicians.”

In another emphatic statement he is “absolutely!” convinced that these concerns are still relevant in 1997 for the following reasons:<sup>141</sup>

- 1) “We are witnessing a reduction if not an extinguishment of the rights inherent in the Treaty of Waitangi 1840.
- 2) Tangata Whenua rights are inherent and Treaty law simply [gives] expression to them.
- 3) Chief Judge Edward Durie speaks of Tangata Whenua rights ‘springing from the earth’, he uses the Latin term ‘Lex situs’ which specifically speaks of these rights.
- 4) Future Generations of Maori and non-Maori will find it essential to have knowledge of these constitutional issues which connects with a growing global Indigenous Rights movement now finding voice at the United Nations, Geneva and Environmental forums, to name but a few.

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<sup>140</sup> See above n 98, Question 4.

<sup>141</sup> See above n 140, Question 5.



Any talk of establishing a Republic must first deal with the unfinished business of the Maori and Crown Partnership inherent in the Treaty of Waitangi.”

Point 4 is something I would like to take up below because the issues both Sinclair and Duff raise are manifested in three of the responses.

### 3. *Those ruddy academics*

Duff suggests that “none of the current trends reflect long term thinking – as can be expected and it’s mediocrities, academics, theorists, self-serving consultants etc who are the debate.”<sup>142</sup> Whilst vitriolic, this response is interesting because it suggests that the only people interested or concerned about issues of incorporation are the academics and so on and to a certain degree, Duff’s response might be appropriate. If we bear in mind the responses from the likes of Darryn Huatahi, Marychurch and Anderson - young Maori males either attending or recently completed their college education - most of their responses indicated a considerable lack of informed opinion on these issues.

For example Huatahi simply responds “Don’t know” to Question 4. Marychurch notes,<sup>143</sup>

“I’m not sure about Maori opposition and Maori’s opposing the Treaty into the NZ Bill of Rights [Act] but maybe Sir Geoffrey Palmer didn’t know what he was talking about.”

As to whether those concerns are relevant he says “Maybe, if Sir Geoffrey is still alive.”<sup>144</sup>

Anderson states honestly that he “wouldn’t have a clue” about the nature of the Maori opposition at the time as does Darryn Huatahi<sup>145</sup>, which is not surprising because not many people really do. However Anderson then either intuitively or accidentally stumbles upon this response. “Maybe Maori people had no trust in the government to hand over the Treaty to [be] filtered, tampered with etc.” To Question 5 he simply notes “Pass”.

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<sup>142</sup> See above n 112.

<sup>143</sup> See above n 116, Question 4.

<sup>144</sup> See above n 143, Question 5.

<sup>145</sup> Darryn writes “Don’t know.”



Might I note that this comment is not intended to derogate from the views held by these young men, but to illustrate that what continues to be developed are a generation of young people who know very little about these issues. In this sense Duff's earlier comment that in "30 – 40 years "being a 'Maori' will be meaningless"<sup>146</sup> may be prophetic to the extent failing to properly educate will bring about this 'reality'. As far as Sinclair concern the future generation will have a knowledge of 'constitutional issues – well the result here may possible speak for itself.

#### *F. Further Comments*

To finish the questionnaire responses let us look at the few submissions that availed themselves of the opportunity to make further comments. Durie considers that "[e]ntrenchment and/or a Constitution for [New Zealand] should be preceded by a Constitutional debate – possibly by way of a Royal Commission."<sup>147</sup>

Mikaere states that we:<sup>148</sup>

"require fundamental constitutional change, no amount of mere tinkering with the present Westminster system, e.g. by creating a 'Constitution' as Pakeha lawyers understand that term will get Maori anywhere. It will merely allow Pakeha law to continue defining and denying Maori tino rangatiratanga."

Philips advises that "the task ahead is essential if this country is to remain politically stable and secure."<sup>149</sup> Henare too looks to the future but notes that "[y]ou can't have a nation without a history, and you can't have a nation if it doesn't know where it has come from and is going."<sup>150</sup>

Solomon in a pragmatic statement notes that any "entrenchment would need to take account of the obvious changes in the Treaty relationship since 1840 and the steps that

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<sup>146</sup> See above 142.

<sup>147</sup> See above n 100.

<sup>148</sup> See above n 101.

<sup>149</sup> See above n 99.

<sup>150</sup> See above n 102.



have been taken to settle Treaty claims to date.”<sup>151</sup>

Finally Sinclair says that “this whole area of tangata Whenua Rights needs wider debate especially in light of new economic trade agreements e.g. M.A.I which implicate resources which are potentially Maori-Iwi resources if not existing Iwi resources.” Sinclair notes that his thesis is on “Globalisation and Maori” which for a fuller explanation of his final comment would be an appropriate source.

### *G. Summary*

Of fourteen written submissions, ten support the implementation of an entrenched Constitution, one provides no indication either way, and three oppose the proposition. Even allowing for the limited sample these responses represent, they nonetheless indicate that there has been a fundamental shift from submissions stating essentially that ‘we are opposed to this BOR’.

The perception of Maori concerns at the time of the White Paper debates were generally that maori did not trust the Government to Act properly on their behalf. Maori were purportedly concerned that the Treaty’s special status would be derogated from by incorporation both because of its incorporation and the suggestion that the House of Representatives could alter or tamper with the wording of the treaty.

In some respects the tampering concerned can be laid to rest by the suggestions that have emerged in relation to Question 2. For example Philips’ approach which would incorporate basic new principles with ‘partnership’ as the precept provides for a new paradigm which already indirectly tampers with the Treaty because the it might then be reduced to a historical document in light of the new arrangement. The Treaty remains the same, but the constitutional foundation is now shifted.

However it is also clear that the majority of the respondents with ten in favour and four

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<sup>151</sup> See above n 108.



against. This seems to confirm the submission made earlier that Maori desired some statutory recognition of the Treaty in *a* constitutional document and thereby making it a fundamental part of *the* Constitution.

## VI. CONCLUSION

Solomon correctly noted that a significant opportunity for Maori was lost when the Treaty was not incorporated into the NZBORA. There has been an undercurrent of discussions that suggest the next opportunity for Maori may arise during the debate on republicanism. I submit that this view derogates from potential inherent in Constitutional discourse *without* reference to republicanism. Canada, which in many respects has shared a similar constitutional development as New Zealand, has since 1982 operated as a Constitutional monarchy without becoming a republic. It is a working model that with the inevitability of this country's move towards an entrenched Constitution *can* be considered in order to learn from their experiences.

The role of the Treaty is a fundamental part of the constitutional discussion. Perhaps unfairly, Maori have been shouldered with the 'blame' or 'responsibility' for the Treaty's exclusion from the NZBORA. It is granted that there were concerns expressed by Maori about incorporation and as evidenced by the questionnaires, many commentators are of the opinion that those concerns *as* valid in 1987 as they were in 1987.

I would conclude this paper by submitting that the time has come for *te kaitiaki* - face to face. There are many issues to be dealt with but they will not go away simply because nothing is said.



VI. CONCLUSION

Solomon correctly noted that a significant opportunity for Maori was lost when the Treaty was not incorporated into the NZBORA. There has been an undercurrent of discussions that suggest the next opportunity for Maori may arise during the debate on republicanism. I submit that this view derogates from potential inherent in Constitutional discourse *without* reference to republicanism. Canada, which in many respects has shared a similar constitutional development as New Zealand, has since 1982 operated as a Constitutional monarchy without becoming a republic. It is a working model that with the inevitability of this country's move towards an entrenched Constitution can be considered in order to learn from their experiences.

The role of the Treaty is a fundamental part of the constitutional discussion. Perhaps unfairly, Maori have been shouldered with the 'blame' or 'responsibility' for the Treaty's exclusion from the NZBORA. It is granted that there were concerns expressed by Maori about incorporation and as evidenced by the questionnaires, many commentators are of the opinion that those concerns are as valid in 1997 as they were in 1987.

I would conclude this paper by submitting that the time has come for talk. Kanohi ki te kanohi – face to face. There are many issues to be dealt with but they will not go away simply because nothing is said.



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Entrenchment of the Treaty  
Appendix

1. Do you think that New Zealand should incorporate the Constitution?

Yes. The constitution is a document which we regard as essentially an expression of our fundamental principles.

2. Should the Treaty of Waitangi be incorporated into the Constitution? Outline reasons.

As the 'foundation' of the nation, the Constitution should recognize the Treaty as a binding part. Some might argue that it is a treaty, not a constitution. However, I believe it should be the sole constitutional document.

3. Please explain your answer. If you answered 'Yes' in the first question, what form of such incorporation take?

For example should both English and Maori texts be incorporated? Should we adopt Cooke's 'principles' approach?

Both is the original Maori text should form the foundation statement but equivalent English text might refer to the 'principles' defined by the Waitangi Tribunal in the 1980s.



1.

## Entrenchment of the Treaty Questionnaire

Prepared by Quentin Duff  
LLM Student, Victoria University of Wellington, 1997

1. Do you think that New Zealand should implement an entrenched Constitution?

Yes. The constitutional conventions under which we operate are essentially an adaptation of Britain's former conventions.

2. Should the Treaty of Waitangi be incorporated into such a Constitution? Please outline reasons.

As the 'foundation' of the modern state, the Constitution should recognise the Treaty as a starting point. Some might argue that it is itself the Constitution. However, it is a little light on detail to be the sole constitutional document.

3. Please explain your answer. If you answered 'Yes' to Question 2, what form should such incorporation take?

For example should both English and Maori texts be incorporated? Alternatively should we adopt Cooke's 'principles' approach?

Both ie the original Maori texts should form the foundation statement but operational implications might refer to the 'principles' - as defined by the Waitangi Tribunal & the Courts.



4. There has been a common perception that Maori opposed incorporation of the Treaty into the *New Zealand Bill of Rights Act 1990*, when originally proposed by Sir Geoffrey Palmer. What is your understanding of Maori opposition at that time? Please use more paper if necessary.

That is true. Only the Chairman of the Waitangi Tribunal advocated to include the Treaty in the Bill of Rights. Others took the line that the Treaty was itself, a 'Bill of Rights'.

5. In your opinion, are the above concerns still relevant in 1997? Please give reasons.

No. The important point is entrenchment & as the issue of republicanism draws closer, the Treaty & the Constitution must be seen together.

6. Do you have any further comments that may be relevant?

Entrenchment and/or a Constitution for NZ should be preceded by a Constitutional debate - possibly by way of a Royal Commission.

**Disclosure Agreement**

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grant Quentin Duff permission to publish into a thesis, any and all of the comments I have made within this questionnaire.

Would you like to receive a proof of those comments prior to publication?  Yes  No

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# Entrenchment of the Treaty Questionnaire

Prepared by Quentin Duff  
LLM Student, Victoria University of Wellington, 1997.

1. Do you think that New Zealand should implement an entrenched Constitution?  
Yes, but only one which has been negotiated between the Crown and Maori, one which brings about structural change to present constitutional arrangements.

2. Should the Treaty of Waitangi be incorporated into such a Constitution? Please outline reasons.  
The Treaty should form the basis of such a Constitution, it should not be "incorporated into" it, as this implies that the constitution is the framework into which the Treaty might be conversely slotted.

3. If you answered 'Yes' to Question 2, what form should such incorporation take?  
For example should both English and Maori texts be incorporated? Alternatively should we adopt the 'principles' approach of the court (See *New Zealand Maori Council v Minister of Finance* [1987])?

The Maori text only should form the basis of a new Constitution.

Treaty  
that  
incorporate  
self,  
NZ  
ke-



4. There has been a common perception that Maori opposed incorporation of the Treaty into the *New Zealand Bill of Rights Act 1990*, when originally proposed by Sir Geoffrey Palmer. What is your understanding of Maori opposition at that time?

\* Primarily that the all white, all male judiciary could not possibly be trusted to interpret the Treaty correctly.

\* Also that statutory incorporation of the Treaty would in fact demean it, and render it liable to statutory repeal.

5. In your opinion, are the above concerns still relevant in 1997? Please give reasons.

Yes, the nature of the judiciary has not changed. The damage done by the judiciary with their interpretations of "the principles of the Treaty" is immeasurable.

6. Do you have any further comments that may be relevant?

We require fundamental constitutional change, no amount of mere tinkering with the present Westminster system, eg by creating a "Constitution" as Pakeha lawyers understand that term will get Maori anywhere. It will merely allow Pakeha law to continue defining & denying Maori *hino rangahatanga*.

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Would you like to receive a proof of those comments **prior** to publication?  Yes  No

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(date)

*AK Mikagee*



# Entrenchment of the Treaty Questionnaire

Prepared by Quentin Duff  
LLM Student, Victoria University of Wellington, 1997.

1. Do you think that New Zealand should implement an entrenched Constitution?

It is important for the political stability of New Zealand that an entrenched Constitution is implemented. There is an expectation that such a Constitution would be implemented after careful research on other countries constitutions (such as Germany and Canada) and wide consultation within New Zealand.

2. Should the Treaty of Waitangi be incorporated into such a Constitution? Please outline reasons.

In my view the Treaty of Waitangi should be included in the Constitution as it is the founding document of this country. The Treaty cannot be ignored. An agreed set of principles should be reflected in the Constitution itself, as the basis for founding constitutional challenges to legislation. At present, the Treaty is included on an ad hoc and informal basis, in the legislative process as Cabinet papers identify the implications of proposed policy recommendations in terms of the Treaty and all proposals for legislation must report on the consistency with Treaty principles. That, in my view, fails to give the Treaty its proper place in Government. That approach fails to address the broader issues of Maori disadvantage in education, health, employment and welfare dependency.

3. Please explain your answer. If you answered 'Yes' to Question 2, what form should such incorporation take?

For example should both English and Maori texts be incorporated? Alternatively should we adopt Cooke's 'principles' approach?

As I have addressed the question of incorporation being an agreed set of principles and the Treaty itself (Maori and English versions) as an appendice, I will not address the principles approach. It would be inappropriate to adopt Justice Cooke's principles approach as stated in NZ Maori Council v Attorney-General (1987). The principles of the Treaty as defined by the judiciary have always been confusing and unsatisfactory. Of more merit would be the consultative approach, with a set of principles being agreed by consensus after a series of meetings and hui. The fundamental principle is partnership and we need to explore what we mean by partnership.

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4. There has been a common perception that Maori opposed incorporation of the Treaty into the *New Zealand Bill of Rights Act 1990*, when originally proposed by Sir Geoffrey Palmer. What is your understanding of Maori opposition at that time? Please use more paper if necessary.

My understanding of Maori opposition to incorporation of the Treaty into the New Zealand Bill of Rights Act 1990 was that it was a politicized response by a few tribal leaders and kau matua who in turn influenced Maori Members of Parliament. There were several reasons for the Maori opposition:

- 1) that the mana of the Treaty of Waitangi would be diminished by incorporation. This view has merit as subsequent events revealed that the Act was not supreme law.
- 2) That the rights contained in the Treaty could not be litigated. The Treaty would be a constitutional relic rather than a living document.
- 3) That a growing sense of unease existed in intellectual Maori circles which would not be addressed by the Labour govt.

5. In your opinion, are the above concerns still relevant in 1997? Please give reasons.

Yes, the concerns are still relevant and will need to be addressed. To Maori the Treaty is a living document. My ancestors signed the Treaty of Waitangi, Kawati, Paraha, Kaka and Tamati Waka Nene. For Ngati hine, for example, Kawati is the great warrior chief. To diminish the Treaty is to tread upon the whenua (land) and the wairua (spirit) of my ancestors without respect, carelessly and in ignorance of new hopes and aspirations for this country.

6. Do you have any further comments that may be relevant?

The task ahead is essential if this country is to remain politically stable and secure.

### **Disclosure Agreement**

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grant Quentin Duff permission to publish into a thesis. ~~any and all~~ of the comments I have made within this questionnaire with acknowledgment of the source.

Would you like to receive a proof of those comments **prior** to publication?  Yes ~~xxx~~

18-11-97

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4.

# Entrenchment of the Treaty Questionnaire

Prepared by Quentin Duff  
LLM Student, Victoria University of Wellington, 1997.

1. Do you think that New Zealand should implement an entrenched Constitution?

A constitution comes from being a Republic in my view.

2. Should the Treaty of Waitangi be incorporated into such a Constitution? Please outline reasons.

No. I believe that this document is the founding doc: of this nation and as such should have that recognition. You don't need to incorporate the Treaty into another "Treaty" or constitution..

3. Please explain your answer. If you answered 'Yes' to Question 2, what form should such incorporation take?

For example should both English and Maori texts be incorporated? Alternatively should we adopt Cooke's 'principles' approach?

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- 4. There has been a common perception that Maori opposed incorporation of the Treaty into the *New Zealand Bill of Rights Act 1990*, when originally proposed by Sir Geoffrey Palmer. What is your understanding of Maori opposition at that time? Please use more paper if necessary.

As per answer to question 2.

- 5. In your opinion, are the above concerns still relevant in 1997? Please give reasons.

They are ~~not~~ ~~not~~ until we make the Treaty a living "partnership" document instead of being an "historic" document.

- 6. Do you have any further comments that may be relevant?

You can't have a nation without a history, and you can't have a nation if it doesn't know where it has come from and is going.

**Disclosure Agreement**

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grant Quentin Duff permission to publish into a thesis, any and all of the comments I have made within this questionnaire.

Would you like to receive a proof of those comments **prior** to publication?  Yes  No

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5.

# Entrenchment of the Treaty Questionnaire

Prepared by Quentin Duff  
LLM Student, Victoria University of Wellington, 1997.

1. Do you think that New Zealand should implement an entrenched Constitution?

Yes.

2. Should the Treaty of Waitangi be incorporated into such a Constitution? Please outline reasons.

Yes - because it forms the basis of the NZ's constitutional framework.

3. Please explain your answer. If you answered 'Yes' to Question 2, what form should such incorporation take?

For example should both English and Maori texts be incorporated? Alternatively should we adopt Cooke's 'principles' approach?

I would support both versions being entrenched but where there was any conflict then the Maori version would prevail. It would also make practical sense to have the principles which have developed over the last decade used as a secondary level of interpretation where ~~there was~~ meaning was not clear from the plain words of the treaty or dispute / uncertainty.

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4. There has been a common perception that Maori opposed incorporation of the Treaty into the New Zealand Bill of Rights Act 1990, when originally proposed by Sir Geoffrey Palmer. What is your understanding of Maori opposition at that time? Please use more paper if necessary.

They were afraid that the Treaty would be repealed with a 75% vote of Parliament.

5. In your opinion, are the above concerns still relevant in 1997? Please give reasons.

It would depend on how the Treaty was entrenched and if it was accompanied by <sup>other</sup> constitutional reforms eg establishing an Upper House comprising equal numbers of Maori and Crown reps. That way Treaty could only be repealed with support of both partners. There could be other ways of protecting the entrenchment provisions. In any event I still don't think the concern is completely valid as the common law does not

Do you have any further comments that may be relevant?

recognise the TOU unless it is incorporated into Statute - so there would seem to be little to lose in entrenching it. Even if Parliament could repeal the entrenchment provision I doubt that this would affect the historic status of the Treaty.

Any entrenchment would need to take account of the obvious changes in the Treaty relationship since 1840 and the steps that have been taken to settle Treaty claims to date.

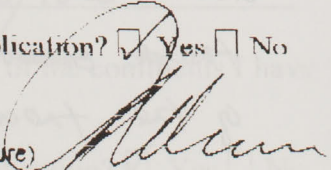
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Would you like to receive a proof of those comments prior to publication?  Yes  No

(date) 19/11/97

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6.

# Entrenchment of the Treaty Questionnaire

Prepared by Quentin Duff  
LLM Student, Victoria University of Wellington, 1997.

1. Do you think that New Zealand should implement an entrenched Constitution?

*No.*

2. Should the Treaty of Waitangi be incorporated into such a Constitution? Please outline reasons.

*We have had 150 yrs plus to try and implement the wairua of the Treaty agreement put in place for us to protect the future generations of Maoridom. There is no doubt that our Tipuna of the time saw us today. I can honestly say as a great grandmother, that I cannot see the same future generations what with the imposition of other beliefs and the dispossession of a proud people. Whilst the Te Tiriti o Waitangi remains in its present form, we as Maori have a better chance of being here in charge of our future rather than reading about ourselves in the past tense.*

3. Please explain your answer. If you answered 'Yes' to Question 2, what form should such incorporation take?

For example should both English and Maori texts be incorporated? Alternatively should we adopt Cooke's 'principles' approach?



4. There has been a common perception that Maori opposed incorporation of the Treaty into the *New Zealand Bill of Rights Act 1990*, when originally proposed by Sir Geoffrey Palmer. What is your understanding of Maori opposition at that time? Please use more paper if necessary.

*They were afraid that the Treaty would be repealed by Parliament.*

5. In your opinion, are the above concerns still relevant in 1997? Please give reasons.

6. Do you have any further comments that may be relevant?

**Disclosure Agreement**

I \_\_\_\_\_ of \_\_\_\_\_  
(name) (organisation)

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(address)

grant Quentin Duff permission to publish into a thesis, any and all of the comments I have made within this questionnaire.

Would you like to receive a proof of those comments **prior** to publication?  Yes  No

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(date)

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# Entrenchment of the Treaty Questionnaire

Prepared by Quentin Duff  
LLM Student, Victoria University of Wellington, 1997.

1. Do you think that New Zealand should implement an entrenched Constitution?

No

2. Should the Treaty of Waitangi be incorporated into such a Constitution? Please outline reasons.

Yes because people have huge arguements over the treaty and if it is incorporated then ~~maybe~~ these arguements can be settled.

3. Please explain your answer. If you answered 'Yes' to Question 2, what form should such incorporation take?

For example should both English and Maori texts be incorporated? Alternatively should we adopt Cooke's 'principles' approach?

PASS



4. There has been a common perception that Maori opposed incorporation of the Treaty into the *New Zealand Bill of Rights Act 1990*, when originally proposed by Sir Geoffrey Palmer. What is your understanding of Maori opposition at that time? Please use more paper if necessary.

I'm not sure about Maori opposition and Maori's opposing the Treaty into the NZ Bill of Rights Act but maybe Sir Geoffrey Palmer didn't know what he was talking about.

5. In your opinion, are the above concerns still relevant in 1997? Please give reasons.

Maybe; if Sir Geoffrey is still alive.

6. Do you have any further comments that may be relevant?

No.

#### **Disclosure Agreement**

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grant Quentin Duff permission to publish into a thesis, any and all of the comments I have made within this questionnaire.

Would you like to receive a proof of those comments **prior** to publication?  Yes  No

19/11/97  
(date)

Levi Marychurch  
(signature)



# Entrenchment of the Treaty Questionnaire

Prepared by Quentin Duff  
LLM Student, Victoria University of Wellington, 1997.

1. Do you think that New Zealand should implement an entrenched Constitution?

~~YES~~ YES

2. Should the Treaty of Waitangi be incorporated into such a Constitution? Please outline reasons.

I THINK IT SHOULD AS FAR AS LAND RIGHTS OR FISHING GOES BUT I DONT KNOW ENOUGH ABOUT THE TREATY TO COMMENT FURTHER.

3. Please explain your answer. If you answered 'Yes' to Question 2, what form should such incorporation take?

For example should both English and Maori texts be incorporated? Alternatively should we adopt Cooke's 'principles' approach?

PASS - BOTH UK TRANSLATION WAS FULLY ACCURATE



4. There has been a common perception that Maori opposed incorporation of the Treaty into the *New Zealand Bill of Rights Act 1990*, when originally proposed by Sir Geoffrey Palmer. What is your understanding of Maori opposition at that time? Please use more paper if necessary.

WOULDN'T HAVE A CLUE. MAYBE MAORI PEOPLE HAD NO TRUST IN THE GOVERNMENT TO HAND OVER THE TREATY TO FILTERED, TAMERED WITH ETC.

5. In your opinion, are the above concerns still relevant in 1997? Please give reasons.

~~NO~~ PASS

6. Do you have any further comments that may be relevant?

NAH.

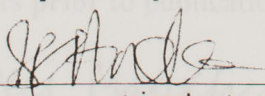
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grant Quentin Duff permission to publish into a thesis, any and all of the comments I have made within this questionnaire.

Would you like to receive a proof of those comments **prior** to publication?  Yes  No

20<sup>th</sup> 1997  
(date)

  
(signature)



9.

# Entrenchment of the Treaty Questionnaire

Prepared by Quentin Duff  
LLM Student, Victoria University of Wellington, 1997.

1. Do you think that New Zealand should implement an entrenched Constitution?

At this stage NO.

If the powers that be cannot adhere to the present documentation it leaves no doubt that these situations need to be addressed

2. Should the Treaty of Waitangi be incorporated into such a Constitution? Please first outline reasons.

By all means. Unless of course present situations are completely settled and complied with i.e. the Treaty. Perhaps there is no harm in working towards an E/Const.

Before entrenched Constitution is implemented.

3. Please explain your answer. If you answered 'Yes' to Question 2, what form should such incorporation take?

For example should both English and Maori texts be incorporated? Alternatively should we adopt Cooke's 'principles' approach?

Yes Both Text to be incorporated. Maori as it is the indigenous/native tongue of N.Z. English as that is the mainstream language.

Quentin Duff  
41 Camperdown Road, Miramar, Tel/Fax 388-9726.  
Email Q.Duff@xtra.co.nz



To: Alan D

4. There has been a common perception that Maori opposed incorporation of the Treaty into the *New Zealand Bill of Rights Act 1990*, when originally proposed by Sir Geoffrey Palmer. What is your understanding of Maori opposition at that time? Please use more paper if necessary.

- a) Trust in the powers that be.
- b) Interpretation of Documentation

5. In your opinion, are the above concerns still relevant in 1997? Please give reasons.

YES.

6. Do you have any further comments that may be relevant?

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10.

# Entrenchment of the Treaty Questionnaire

Prepared by Quentin Duff  
LLM Student, Victoria University of Wellington, 1997.

1. Do you think that New Zealand should implement an entrenched Constitution?

Yes, but difficult; no historical precedent, no layers of informed political will. It has to spring forth from, in the first instance, inspired, respected, visionary leadership.

2. Should the Treaty of Waitangi be incorporated into such a Constitution? Please outline reasons.

I'd be bloody careful here! The can of worms will surely turn to a colony of seething, vicious large snakes!

If we fail to mature our thinking beyond "Maori" and "non-Maori" we are locking ourselves into a prison doing a generational life sentence of limited outlook and, thus, outcome in 30-40 years being "Maori" will be meaningless.

3. Please explain your answer. If you answered 'Yes' to Question 2, what form should such incorporation take?

For example should both English and Maori texts be incorporated? Alternatively should we adopt Cooke's 'principles' approach?

No Maori text unless in context.



- 4. There has been a common perception that Maori opposed incorporation of the Treaty into the *New Zealand Bill of Rights Act 1990*, when originally proposed by Sir Geoffrey Palmer. What is your understanding of Maori opposition at that time? Please use more paper if necessary.

listen! Te hei mauri ora! a minority dictating is the virtual same as old South Africa - let reason rule!

- 5. In your opinion, are the above concerns still relevant in 1997? Please give reasons.

None of the current trends reflect long term thinking - as can be expected. ~~Maybe~~ it's mediocrities, academics, theorists, self-serving consultants etc who are the debate.

- 6. Do you have any further comments that may be relevant?

god save us from silly people!

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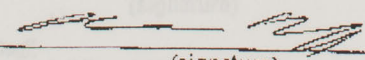
I Alan Duff of \_\_\_\_\_  
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11.

# Entrenchment of the Treaty Questionnaire

Prepared by Quentin Duff  
LLM Student, Victoria University of Wellington, 1997.

1. Do you think that New Zealand should implement an entrenched Constitution?

Yes

2. Should the Treaty of Waitangi be incorporated into such a Constitution? Please outline reasons.

Yes - But this could cause more friction between Maori and Pakeha.

Both sides need equal speaking rights.

3. Please explain your answer. If you answered 'Yes' to Question 2, what form should such incorporation take?

For example should both English and Maori texts be incorporated? Alternatively should we adopt Cooke's 'principles' approach?

Yes - Both to the Maori and the English.

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4. There has been a common perception that Maori opposed incorporation of the Treaty into the *New Zealand Bill of Rights Act 1990*, when originally proposed by Sir Geoffrey Palmer. What is your understanding of Maori opposition at that time? Please use more paper if necessary.

Don't know

5. In your opinion, are the above concerns still relevant in 1997? Please give reasons.

6. Do you have any further comments that may be relevant?

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D Huatahi  
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# Entrenchment of the Treaty Questionnaire

Prepared by Quentin Duff  
LLM Student, Victoria University of Wellington, 1997.

1. Do you think that New Zealand should implement an entrenched Constitution?

YES

2. Should the Treaty of Waitangi be incorporated into such a Constitution? Please outline reasons.

YES.  
Both sides need to have an equal opportunity to put forward each others point of view through a mediator.

3. Please explain your answer. If you answered 'Yes' to Question 2, what form should such incorporation take?

For example should both English and Maori texts be incorporated? Alternatively should we adopt Cooke's 'principles' approach?

Yes. Because both sides need to be represented.



4. There has been a common perception that Maori opposed incorporation of the Treaty into the *New Zealand Bill of Rights Act 1990*, when originally proposed by Sir Geoffrey Palmer. What is your understanding of Maori opposition at that time? Please use more paper if necessary.

I think these things were opposed for all the wrong reasons.

However this was because there was mis-trust, or rather Maori did not trust Government or decisions made earlier.

5. In your opinion, are the above concerns still relevant in 1997? Please give reasons.

Yes.

Because from a Maori perspective it appears that things are not moving as quickly as they would like. Realising that not much has changed for over 100 years.

6. Do you have any further comments that may be relevant?

No.

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12.12.97  
(date)

R. Huatahi  
(signature)



## Entrenchment of the Treaty Questionnaire

Prepared by Quentin Duff  
LLM Student, Victoria University of Wellington, 1997.

1. Do you think that New Zealand should implement an entrenched Constitution?

yes

2. Should the Treaty of Waitangi be incorporated into such a Constitution? Please outline reasons.

yes. To ensure - the end that Maori always have a stick to beat the Crown with if it refuses to comply with Treaty principles. As matters currently stand - there are very few areas - where the Crown is bound by statute to act in compliance with the Treaty. The Treaty settlement process relies on the "grace & favour" of the Crown - there is no real way to force a Maori oriented perspective into the process.

Please explain your answer. If you answered "Yes" to Question 1) what form should such incorporation take?

For example should both English and Maori texts be incorporated? Alternatively should we adopt Cooke's "principles" approach?

I have changed my mind on this in the last 10 yrs. I now think that focus should be had on the underlying principles - because the context within which the Treaty must be applied has changed so radically - 157 yrs. Would it like "The Crown shall at all times act towards Maori in a manner which is consistent with the principles of the Treaty" would suit me.



4. There has been a common perception that Maori opposed incorporation of the Treaty into the *New Zealand Bill of Rights Act 1990*, when originally proposed by Sir Geoffrey Palmer. What is your understanding of Maori opposition at that time? Please use more paper if necessary.

Maori opposition was ill advised & sentimental in my view. They took the view that the Treaty was too tough to be incorporated into law. The ~~com~~ <sup>com</sup> undoubtedly carried it believe its luck. In the event a significant ~~off~~ <sup>off</sup> was lost to us.

5. In your opinion, are the above concerns still relevant in 1997? Please give reasons.

No. Entrenchment is needed all the more now as the Pakia electorate pendulum swung back to the conservative viewpoint of the '60s.

6. Do you have any further comments that may be relevant?

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15/12/97 (date)

[Signature] (signature)



# Entrenchment of the Treaty Questionnaire

Prepared by Quentin Duff  
LLM Student, Victoria University of Wellington, 1997

1. Do you think that New Zealand should implement an entrenched Constitution?

Yes! a written constitution like that of the US Constitution must be implemented in Aotearoa (NZ) with the Treaty of Waitangi 1840 in a superior position.

2. Should the Treaty of Waitangi be incorporated into such a Constitution? Please outline reasons.

- a) The Treaty of Waitangi 1840 is the written Constitution of this country Aotearoa (NZ)
- b) Any incorporation of the Treaty of Waitangi must include the Declaration of Independence 1835 and the Treaty of Waitangi must be referred to in a way that necessitates all legislation to conform with its 3 main Articles. The Treaty must be in a superior position within any written Constitution lest it be re-written or reinterpreted.

3. Please explain your answer. If you answered 'Yes' to Question 2, what form should such incorporation take?

For example should both English and Maori texts be incorporated? Alternatively should we adopt Cooke's 'principles' approach?

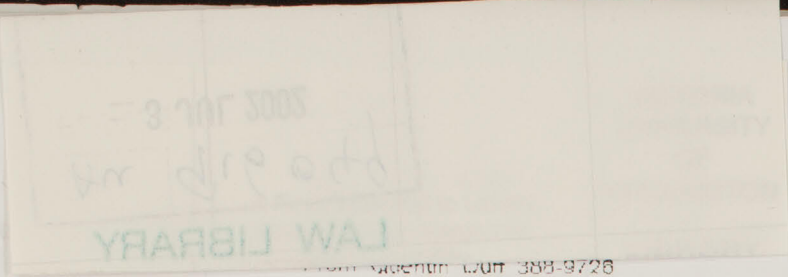
The Maori text must be the principle guide.

The Maori text should be translated into English. The English text should be thrown out. Cooke's 'principles' should be thrown out because they have only reduced the status of the Treaty of Waitangi, these principles have been watered down as the case law demonstrates eg: (1980's) 1990s. The basic rule in Treaty law, *Contra Proferentum* would insist that the English version be thrown out or only be referred to in a minimal way.

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4. There has been a common perception that Maori opposed incorporation of the Treaty into the New Zealand Bill of Rights Act 1990, when originally proposed by Sir Geoffrey Palmer. What is your understanding of Maori opposition at that time? Please use more paper if necessary.

The reason why Maori opposed the incorporation of the Treaty into the NZ Bill of Rights Act 1990 was,

- 1) The Act could be repealed by simple majority
- 2) The Treaty of Waitangi would therefore be in the unenviable position of being wiped out completely.
- 3) Incorporation of the Treaty into an Act reduced the superior status of the Treaty which was for Maori a sacred kawaeta for ALL TIME, not something that could be tossed around at the whim of transient politicians.

5. In your opinion, are the above concerns still relevant in 1997? Please give reasons.

absolutely -

- 1) We are witnessing a reduction, if not an extinguishment of the rights inherent in the Treaty of Waitangi 1840.
- 2) Tangata Whenua rights are inherent and Treaty law simply give expression to them.
- 3) Chief Judge Edward Tiorakuiwea Durie speaks of Tangata Whenua rights "springing from the earth," he uses the latin term 'Lex situs' which specifically speaks of these rights.
- 4) Future Generations of Maori and non-Maori will find it essential to have knowledge of these constitutional issues which connect with a growing global indigenous rights movement now finding voice at the United Nations Geneva and Environmental forums, not name but a law.

6. Do you have any further comments that may be relevant?

This whole area of Tangata Whenua Rights needs wider debate especially in light of new economic trade agreements eg. M.A.I. which implicate resources which are potentially Maori-lwi resources if not existing lwi resources.  
- My thesis is Globalisation & Maori for an L.M.

Any talk of establishing a Republic must first deal with the unfinished business of the Maori & Crown Partnership inherent in the Treaty of Waitangi.

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6. Do you have any further comments that may be relevant?

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