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THE PATH TO PRESIDENCY: NEW ZEALAND'S REPUBLICAN OPTIONS

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ABSTRACT

The establishment of a New Zealand Republic has been described by some commentators as inevitable. They argue that New Zealand's quest for identity and nationhood will lead to the supplanting of the Sovereign with a President. Establishing a New Zealand Republic will raise a number of constitutional issues and this paper seeks to examine those issues which might result if New Zealand takes up the challenge. The paper is divided into two main parts; the first part identifies and evaluates whether there are any constitutional obstacles preventing New Zealand from becoming a republic and the second evaluates what role a President should play within New Zealand's constitution if a republic were to be formed.

In regard to the possible constitutional obstacles this paper looks at whether the Crown is a fundamental postulate of our legal system and if that is so whether it is beyond the purview of Parliament. Maori concerns in regard to the establishment of a republic are examined, particularly their concern that such a change might annul the Treaty of Waitangi. There is little doubt that establishing a republic will require constitutional reform. The constitutional requirements for reform in New Zealand are discussed, in particular the judicial requirements to receive 'practical sanctity.'

The second part of this paper examines what role a President should play within New Zealand's constitution focussing on the establishment of a New Zealand parliamentary republic, bearing in mind that the establishment of a presidential republic is beyond the scope of this paper. As a point of reference the present role of the Governor-General is outlined with particular focus on the reserve powers. In an attempt to determine what might be a suitable role for the New Zealand President this paper examines the process by which a president might be appointed and dismissed and furthermore what powers should be vested with the President. It also evaluates whether the President's reserve powers should be codified or divested to Parliament.

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THE PATH TO PRESIDENCY: NEW ZEALAND'S REPUBLICAN OPTIONS

I INTRODUCTION

In regard to New Zealand becoming a Republic, the Right Honourable Helen Clarke said:

> It's inevitable that New Zealand will become a republic and that would reflect the reality that New Zealand is a totally sovereign-independent 21st century nation 12,000 miles from the United Kingdom.[1]

Such sentiments are supported by the Right Honourable Jim Bolger who said New Zealand will become a republic "because the tide of history was going in one direction"[2] While it may be inevitable that ultimately New Zealand becomes a republic it has often appeared only as a distant possibility. However, recently, various institutions, which have symbolised New Zealand's inheritance as a former dominion of the British Empire, have been deposed. Institutions, such as the Privy Council and the British Honour system have all been replaced with New Zealand equivalents. There appears to be a developing impetus towards building indigenous institutions with an increasing momentum towards New Zealand becoming a republic.

Whether it will occur in the near or distant future the transition from democratic monarchy to democratic republic will raise numerous constitutional issues. One will be whether it is possible for New Zealand to establish itself as a republic. The disposing of the Sovereign will be revolutionary and will rupture the legal continuity which has existed since the formation of New Zealand. The Crown has always been an implied constant within New Zealand's legal order and its displacement will raise many questions about the very nature of New Zealand's legal system. Does the Crown occupy a special innate position within our legal system? If this

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[1]Interview with the Right Honourable Helen Clark, Prime Minister (Today Programme, BBC Radio 4, 22 February 2002).
[2]The Honourable Jim Bolger, Prime Minister, Parliament Debates 121 (8 March 1994).

is so does the Crown occupy an innate position which renders it beyond the reach of Parliament?

The removal of the Crown, as a signatory to the Treaty of Waitangi raises numerous political and constitutional issues. Many Maori commentators believe that the deposing of the Crown will alter the status of the Treaty of Waitangi. As Maanu Paul states: "Republicanism would definitely affect the status of the Treaty. The constitutional basis of the Treaty would disappear."[3]

Becoming a republic will not only be the disposing of the Crown but also the establishment of a president. If the position of president is to be established it is necessary to ascertain what the role of a New Zealand President should be. How should a president be appointed? Should the president's powers be purely ceremonial or should they be vested with considerable executive powers?

The process of appointing a president is a contentious feature of any proposed presidential model. The process of how a president should be appointed was debated at length in the Australian republic referendum, with the general populace seeming to prefer an elected president [4] Some commentators have stressed the interrelationship between the process of a president's appointment and the powers vested within the position.

Palmer and Palmer have expressed apprehension in the consideration of what powers a New Zealand President should be given. They have stated that "[we] should not simply replace the Queen with a President. The legal powers of that person would be awesome and unacceptable unless an exercise was done to define and confine the powers."[5] The president as Head of State will occupy an important role in New Zealand society. It is

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[3] Interview with Maanu Paul (Derek Fox, Mana News, National Radio,10 March 1994).
[4] Mark McKenna and Wayne Hudson *Australian Reader*, (Melbourne University Press, Melbourne 2003)226.
[5]Geoffrey Palmer, and Mathew Palmer, *Bridled Power*, Oxford (4th ed, Australia, Oxford University Press 2004) 65.

important, therefore, that such powers and responsibilities are considered carefully.

This paper attempts to identify and clarify the constitutional issues which will arise from New Zealand becoming a republic. The potential constitutional obstacles to New Zealand becoming a republic are examined. It considers whether the Crown is a fundamental postulate of our legal system and if so, whether it is beyond the purview of the legislature It also examines Maori concerns relating to the establishment of a republic, particularly in regard to the Treaty of Waitangi.

The establishment of a republic will require the reform of New Zealand's constitution. New Zealand has no codified procedure for constitutional reform and commentators have argued that any such reforms must meet certain prerequisites to receive 'judicial legitimacy.'[6]

This paper evaluates what role a New Zealand President should have within our constitution. The position of president is evaluated including the process by which he or she should be appointed and dismissed. It also evaluates what powers should be vested within a New Zealand President.

II SETTING THE SCENE

A Establishing a New Zealand Republic

A republic is defined as: "A system of government in which the people hold sovereign power and elect representatives who exercise that power."[7]

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[6] Sir Robin Cooke, Detheridge Memorial Address reprinted in Council Brief 111 (October 1984) 4. ["Detheridge Address"].
[7] Brian A Garner(Ed) *Black's Law Dictionary* (7th ed, West Group, St. Paul, Minnesota ,1999) 1306.

There is no standard republican constitution; instead there is a myriad of different constitutional arrangements with varying forms of governments. Even though there are many varieties of republican constitutions, each one constitution can be placed within one of three categories .They are the Parliamentary Republic, the Presidential Republic and the Semi- Presidential Republic.[8]

Of these, the parliamentary republic is the most similar to New Zealand's Westminster system of government. A parliamentary government is described in Rod Hague & Martin Harrop's *Comparative Government and Politics* as having three main features:

> (1)The governing parties emerge from the assembly. Government ministers are usually drawn from, and remain members of, the legislature.
>
> (2) The head of the government (called prime minister, premier or chancellor) and the council of ministers can be dismissed from office through a vote of no confidence by parliament.
>
> (3) The executive is collegial, taking the form of a cabinet in which the prime minister is traditionally just first among equals.[9]

All of these features can be found within New Zealand's present constitutional arrangements. As the features of a parliamentary republic are already present in New Zealand's constitutional arrangements there is no need for substantial reform. The Australian Republican Advisory Committee's statement in reference to Australia is applicable to New Zealand:

> It is both legally and practically possible to achieve a republic without making changes which will in any way detract from the fundamental constitutional principles on which our system is based. The major issues are few how should the head of state be appointed (and removed if

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[8] Rod Hague and Martin Harrop *Comparative Government and Politics, An Introduction* (6th ed, Palgrave Macmillian ,Hampshire 2006) 268.
[9] Hague and Harrop, above n8, 268.

necessary): what sort of powers and functions should the head of state have ?[10]

In summary, becoming a Republic would not require substantial reform of our constitutional arrangements. However, as we shall soon see the establishment of the republic is often accompanied with considerable constitutional reform.

B Constitutional Development and the Full Agenda Republic

The transition from monarchy to republic will represent a rupture in New Zealand's legal continuity. Such breaks with legal continuity are generally accompanied with the establishment of what Andrew Ladley terms as a 'full agenda republic.'[11] As Philip Joseph states "[a] break in legal continuity inspires a political community to symbolise a new order in an identifiable and quotable constitutional document." [12] This break in continuity is usually perceived as an opportune time to construct a new constitution as an expression of nationhood. There are numerous examples of nations adopting a full agenda republic. Examples of these include the United States of America (1787), France (1789), Ireland (1936) and South Africa (1996).

The construction of new legal order is fraught with difficulty. As John Stuart Mill wrote constitutions "are the work of men. Men did not wake up on a summer morning and find them sprung up"[13] Drafting a new constitution is often a process of compromise and negotiation between opposing political interests. S Finer describes the formation of the American Constitution of 1787:

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[10] The Report of the Republic Advisory Committee "An Australian Republic: The Options-The Report Volume 1" (1993) Commonwealth of Australia 10. ["RAC Report"]
[11] Andrew Ladley, "Who should be Head of State' in Colin James (ed) Building the Constitution (Institute of Policy Studies, Wellington, 2000) 78, 78.
[12] Joseph See above *Constitutional and Administration Law in New Zealand* (2nd ed, Wellington, Brookers, 2004) 121.
[13] Hague and Harrop, above n8 212.

> The constitution was a thing of wrangles and compromises. In its complete state, it was a set of incongruous proposals cobbled together. And furthermore that is what many of its framers thought.[14]

In New Zealand many commentators believe that the establishment of a Republic is also a suitable time to construct a new constitutional document. Professor Jock Brookfield, of Auckland University said: "The constitution is broke and something has to be done about that. And the right time to do it is when we move from a Governor-General to a President."[15] The adoption of a full agenda republic is contrary to New Zealand's approach of constitutional development which has been described as: "to fix things when they need fixing, without necessarily relating them to any grand philosophical scheme."[16] New Zealand's constitutional reform has generally refrained from idealism and constitutionalism which are exhibited in other countries.

The establishment of a full agenda republic will meet with obstacles other than New Zealand's tendency towards pragmatism rather than constitutionalism. To establish a new legal order for New Zealand would require that some agreement is reached to the nature and content of this new constitution. It is also questionable whether a consensus could be achieved in regard to what a New Zealand constitution should contain. The "Building the Constitution" conference in 2000 was intended to crystallise the issues for constitution reform. The conference failed to reach any form of agreement.[17] The differences of opinion suggest that social and racial divisions are too deeply entrenched for the New Zealand people to reach any agreement on a new constitutional document. With such division of opinions in regard to the nature of a new constitution the possibility of full agenda republic appears slight.

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[14] Hague and Harrop, above n8 212.
[15] The Republican Newsletter <www.republic.org.nz.> (Last accessed 19 August 2006)
[16] Constitutional Arrangements Committee "Inquiry to Review New Zealand's Existing Constitutional Arrangements" [2006] AJHR I.24A. 12.
[17] Joseph above n 12, 128.

II OBSTACLES TO BECOMING A REPUBLIC

New Zealand, in contrast to Australia, has an unwritten constitution and hence has no specified requirements for constitutional reform. In the absence of any statutory requirements for constitutional reform it would seem safe to assume that there would be no constitutional obstacles restricting New Zealand from becoming a republic. However, academic debate has focused predominantly on constitutional obstacles to New Zealand becoming a republic. It is questionable as to whether these obstacles are substantive or not

A *The Crown as a Fundamental Postulate of Our Constitution*

Lord Cooke, in his article, *The Suggested Revolution against the Crown,* argues that deposing the Crown would be unconstitutional and illegal.[18] He postulates that any move to become a republic will be found to be illegal and would not be enforceable by the Judiciary (unless it could satisfy the conditions for political legitimacy). Lord Cooke[19] argues that there are various obstacles to New Zealand establishing itself as a republic. The foremost of these is that the Crown is a fundamental postulate of New Zealand's legal system. The concept of fundamental postulates is an extension of common law rights theory. The common law rights theory postulates that there are rights which are so ingrained in common law that the legislature can not override them. Common law jurisprudence came to prominence with the decisions of Murphy J, serving in the High Court of Australia. In a number of cases Murphy J extrapolated from the Australian constitution an implied Bill of Rights which could invalidate legislation. These implied rights include freedom of speech, freedom from slavery and

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[18] Sir Robin Cooke 'The Suggested Revolution Against the Crown' in PA *Joseph(ed) Essay on the Constitution* (Bookers, Wellington,1995) 29.

[19] Sir Robin Cooke above n 18 29. This article includes three other arguments concerning why a republic is unconstitutional but these arguments are very technical in nature and for brevity have not been included.

freedom from arbitrary discrimination on the grounds of sex. The concept of common rights was established in New Zealand in the case of: *Taylor v NZ Poultry,* where Cooke J stated that:

> I do not think that literal compulsion, by torture for instance, would be within the lawful powers of Parliament. Some common law rights lie so deep that even Parliament could not override them.[20]

Despite this judicial acknowledgment there is yet to be a case in New Zealand where statute has been declared invalid for breach of common law. As an extension of common law rights Lord Cooke (extra-judicially) developed the concept of fundamental postulates. The fundamental postulates of the constitution are principles which, if contravened by statute, would be invalidated by the Courts. There are three fundamental postulates of New Zealand's constitution: they consist of the operation of a democratic legislature, an independent judiciary and the existence of the Crown. Lord Cooke believed that throughout the development of common law the role of the Crown has been pivotal.[21] The Crown exists as a fundamental postulate and that the abolishment of the Crown is beyond the purview of Parliament. Such legislation would only be rejected by the Judiciary.[22]

It is however, questionable whether the Court will find that the Crown performs a fundamental function. The Crown does not perform a function in New Zealand's constitution which is comparable to the democratic legislature or an independent judiciary. The role of the Governor-General, while important, is simply not comparable to these institutions and it is certainly questionable whether it is at all fundamental.

There has been much discussion recently between Parliament and the Judiciary in relation to the role of parliament supremacy. Michael Cullen has reasserted Parliament's authority to pass legislature unrestricted, stating that the:

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[20] *Taylor v NZ Poultry Board* [1984] 1 NZLR 394, 398, per Cooke J.
[21] Sir Robin Cooke above n18 31.
[22] Sir Robin Cooke above n18 33.

"The sovereignty of Parliament is not an historical artefact, which could be proved to be bogus. Unlike the sovereignty of a monarch, it is not dependent upon establishing proof of lawful succession. It is less an 'assumption' than an 'assertion'; but in that respect it is the assertion that has been the major driving force of Western constitutional history, namely that executive and legislative power should be exercised by a representative and democratically elected body, rather than a monarchy, aristocracy or even a meritocracy." [23]

It would seem that doctrine of the supremacy of Parliament is still a vital part of our constitution. As such Parliament is free to enjoy unlimited powers of legislation, which would include the establishing of a New Zealand republic.

It is disputed whether the Courts will recognise the Crown as a fundamental postulate of the common law. There have been numerous former British colonies which have made the transition from monarchy to republic, for example Ireland, South Africa, India, Mauritius and Pakistan. The Judiciary of these nations did not find that the abolishment of the Crown was beyond the scope of Parliament. As there is no judicial authority that recognises the Crown as a fundamental postulate it is unlikely that the New Zealand Courts will find the establishment of a republic beyond the scope of the Legislature.

B The Treaty and a New Zealand Republic

Maori and the constitutional status of the Treaty of Waitangi have been described by Andrew Ladley as the rock by which a New Zealand republic will flounder upon.[24] Many Maori commentators have argued that if New Zealand became a republic it would be contrary to Maori interests and will affect the status of the Treaty of Waitangi. Andrea Trunks

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[23] Honourable Michael Cullen, Solicitor General, (Public Law Conference: "Parliament: Supremacy over Fundamental Norms ,29 October 2004)
[24] Ladley above n11,82.

identified that Maori have two main concerns regarding a republican proposal. Firstly, Maori are concerned with the displacement of the Crown, due its significant symbolic and spiritual importance. Secondly, Maori are concerned that establishing a republic would diminish the constitutional status of the Treaty.

1 The Symbolic and Spiritual Importance of the Crown

For Maori, the Treaty of Waitangi has great spiritual and symbolic significance. The Crown, as a signatory to the Treaty, also has significant symbolic and spiritual importance. Maori also believe that responsibility for the Treaty of Waitangi is ultimately vested with the Sovereign, the Queen.[25] In regard to treaties, Maori custom stresses the ongoing facilitation of a relationship with the other party.[26] In accordance with protocol Maori attempted to facilitate relations with the Monarchy, particularly in relation to early breaches of the Treaty. Between 1882 and 1924 four Maori delegations were sent to the Sovereign to lay Maori complaints they had with the Settler Government, They attempted to appeal to the Monarch in regard to breaches of the Treaty of Waitangi.[27] These delegations were either turned away or informed that the Sovereign would not interfere on their behalf. Despite the Monarch's refusals there is still much affection for the Crown. Sir James Henare, a leading Maori elder, has said:

> It is a moot point whether the Maori people do love governments in New Zealand because of what they have done in the past...The Maori people really have no great love for Governments but they do for the Crown.[28]

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[25] Janine Hayward 'Who Should be Head of State' in Colin James(ed) Building the Constitution (Institute of Policy Studies, Wellington, 2000) 266, 268.
[26] Andrea Trunks "Mana Tiriti" Luke Trainor: *Republicanism in New Zealand* (The Dunmore Press Ltd, Palmerston North, 1996) 113,115.
[27] Trunks, above n26, 116.
[28] Affidavit of Sir James Henare (1 May 1987) referred to in the *New Zealand Maori Council v Attorney General* [1987]1 NZLR 641 (CA).

The Maori belief that the British Sovereign was obligated under Treaty of Waitangi was due to cultural misperception. As the Privy Council has ruled in *New Zealand Maori Case Council v Attorney General* the "obligations of her Majesty, the Queen of England under the Treaty are now those of the Crown in right of New Zealand."[29] The Treaty obligations have always rested with the New Zealand Government and not the Sovereign.

Janine Hayward argues that if the Sovereign is to be replaced then it should be replaced with an institution that caters to Maori original perceptions of the Crown.[30] She suggests that a new Head of State should be an individual or an institution which; "replaces the layer of accountability as originally envisaged in the Treaty.[31]" She suggests that the model proposed by the New Zealand Maori Council should be adopted, with the Head of State being a quasi-judicial body, consisting of two former Governor-Generals, who would administer the Treaty of Waitangi settlements.[32] The establishment of the Head of State as a quasi-judicial body would most likely politicise the position making the Head of State unsuitable to fulfil many of the presidential functions. It would seem more appropriate to establish a separate body for arbitration of the Treaty of Waitangi settlements.

Maori reverence for the Crown though maybe in decline. Shane Jones, Labour MP, has said: "The priority for many Maori is dealing first with Treaty grievances, but younger Maori are increasingly likely to value their identity as both Maori and as citizens of an independent Pacific nation.[33]" He suggests that Maori reverence for the Crown will fade and with it the concerns of becoming a republic. There is some evidence that this has already begun to occur. In 1999 the only poll to have compared Maori and Pakeha support for a republic showed 63% support from Maori,

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[29] *New Zealand Maori Case Council v Attorney General [1994]* NZLR 513, 517.
[30] Hayward, above n25 265.
[31] Hayward, above n25264.
[32] Hayward ,above n 25 264.
[33] Jonathan Milne "The People vs. the Crown" (30 May 2004) Sunday Star Times, Wellington 18.

considerably more than the 38% recorded for Pakeha.[34] It could be argued that the Maori concerns relating to the spiritual status of the Crown have been overstated and Maori are less concerned with the disposing of the Crown than Pakeha. As Andrea Tunks states:" only a small proportion of Maori are sentimental about the relationship with The Queen ...Most though are concerned with the enforcement of the Maori Treaty text..."[35]

2 *Establishing a Republic and its Effect on the Status of the Treaty*

The predominate concern of Maori about New Zealand becoming a republic is the possible effects it might have on the legal status of the Treaty. Many Maori are distrustful of New Zealand Government intentions, and perceive that the removal of the co-signatory of the Treaty of Waitangi would result in the annulment of the Treaty. Maanua Paul confirms this fear when she states:

> Republicanism would definitely affect the status of the Treaty. The constitutional basis of the treaty would disappear. On that basis it would endanger... [the Government's] accountability to Maori. [36]

The fear that the Treaty of Waitangi could be annulled by New Zealand becoming a republic is not valid. The Treaty of Waitangi is an international instrument and as such is governed by international law. International Law has a recognised principle of continuity which holds that despite any change in the form of government all international obligations remain. As Judge William H Taft in the *Costa Rica Arbitration* states:

> Changes in the government or the international policy of a state do not as a rule affect its position in international law. A monarchy may be transformed into a republic or a republic into a monarchy: absolute principles may be

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[34] Jonathan Milne above n33 18.
[35] Trunks, above n23 116.
[36] Maanu Paul n3.

> substituted for constitutional or the reverse: but though the government changes the nation remains with rights and obligations unimpaired.[37]

Maori Lawyer, Moanna Jackson has acknowledged this:

> The precedent is now established that the effective to the Treaty is actually Kawanantanga or government. So whether that government takes the form of a constitutional monarchy is, in my view, irrelevant. They are still bound by the terms of the agreement in 1840.[38]

Maori reservations in regard to the Treaty of Waitangi and New Zealand becoming a republic are without foundation. The establishment of a Republic will not alter the legal status of New Zealand's founding document.

Whilst acknowledging that the status of the Treaty of Waitangi would not be affected by New Zealand becoming a republic many Maori commentators see the inception of a New Zealand Republic as a suitable time to fully entrench the Treaty of Waitangi. Professor Jock Brookfield, of Auckland University, said that in regard to Treaty matters, "the constitution is broke, and something has to be done about that. And the right time to do it is when we move from a Governor-General to a President."[39] Many Maori perceive the disposing of the Crown, as a suitable to time to entrench the Treaty of Waitangi in New Zealand. This would be an indication that Maori are pursuing the full republic model in which the Treaty of Waitangi is entrenched in statute. However, there is nothing about becoming a republic that requires an accompanying entrenchment of the Treaty of Waitangi.

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[37]Mark W. Janis, John E. Noyes. *International Law Cases and Commentary: Digest of International Law* (West Publishing Company St Paul, Minnesota 1997) 249.

[38]Interview with Moanna Jackson, (Derrick Fox, Mana News, Radio New Zealand , 10 March 1994).

[39] The Republican Newsletter (May 2000)/ <www.republic.org.nz.> (Last accessed 19 August 2006)

C The Requirements for Constitutional Reform and a New Zealand Republic

Predominately, most nations have a codified constitution that specifies the procedural requirements which have to be met for any constitutional reform. In Australia, any reform of the constitution must be sanctioned by a national referendum with the majority of four out of the five states in support [40] Sweden requires that any amendment to the constitution must be passed by successive governments two terms apart.[41] New Zealand, unlike other nations, has an "unwritten' constitution and so has no prescribed procedure for constitutional reform. The Constitution Arrangements Committee described it as such: "There is minimal legal prescription for the way constitutional change occurs in New Zealand."[42]

In the absence of any statute, it has been proposed that the Judiciary will only uphold constitutional reform if it meets certain requirements. Lord Cooke in his, *Detheridge Memorial Address,* dismissed "legal logic" as being all that was necessary for judicial acceptance. He postulated that with any fundamental constitutional change the Court must ascertain the will of the people to receive judicial acceptance.[43] For the constitutional reform to receive 'practical sanctity' the statute must be: "Supported by either a referendum or a fully representative constitutional conference or a virtually unanimous vote in the House."[44] In the White Paper, *A Bill of Rights for New Zealand* the Government acknowledged that concept of 'practical sanctity.' [45] Therefore, any constitutional reform to be upheld by the judiciary will have to meet the above requirements.

However, F Brookfield has argued that in establishing a New Zealand republic there are further prerequisites to receive practical sanctity.

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[40] Commonwealth Constitution of Australia Act 1901, Section 128.
[41] Art 16, Sweden Constitution 1976.
[42] Constitutional Arrangements Committee above n6.
[43] Detheridge Address, above n6 4.
[44] Detheridge Address, above n6 4.
[45] Ministry of Justice "A Bill of Rights for New Zealand: A White Paper" (1985) 57.

Instead, he insists, there must be two separate referendums, one for Maori and one for Pakeha. Maori, he believes, have a special right of consultation in regard to the disposing of the Crown due to the symbolic importance of being a signatory to the Treaty of Waitangi. Lord Cooke in support of this maintains that:

> Whatever the precise legal, sufficient Maori concurrence, the yielding of Kawanatanga was to the Queen. As has been seen, sufficient Maori Concurrence was treated by her United Kingdom advisers as essential to the annexation of New Zealand. As a matter of elementary fairness, good faith, and national honour, it is hard to see how we could cut our links without a similar occurrence.[46]

As earlier discussed the legal status of the Treaty of Waitangi will be unaffected if New Zealand becomes a republic. It will not rescind or lessen the constitutional status of the Treaty and because the Treaty rights will be unaffected by the change there seems to be no moral reason for Maori to be granted a special voting privilege.

Brookfield argues for parallel referendums as a matter of fairness and not as an obligation under the Treaty. Nevertheless the Treaty of Waitangi sets out a principled approach for considering Maori interests. In regard to the Treaty of Waitangi the Court of Appeal has held that the Government is obligated to consult with Maori.[47] The Court has also held that there are limits to this right of consultation. The Waitangi Tribunal, in considering Maori Land, has stated that the Crown is not required "in protecting Maori citizenship rights to political representation, to go beyond taking such action which is reasonable in the circumstances" [48] Having a separate Maori referendum would be essentially anti–democratic, in that it would give preference to a minority of Maori voters over the general

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[46]Cooke, above n11, 34

[47] New Zealand Māori Council v. Attorney-General [1987] 1 NZLR 641, 663 per Cooke P, "The Lands Case.".

[48] Waitangi Tribunal (Wai 413):,Report Maori Electoral Option Report 7 (Brookers Wellington ,1994) 3.8.

populace. Certainly such anti-democratic actions would deem to be beyond the limits of reasonableness and consequently there is no duty of consultation.

The pre-eminent international treaty on civil rights, of which New Zealand is a party, is the International Covenant on Civil and Political Rights (ICCPR). International Civil and Political Right Treaty,Article 25 provides:

> "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country.[49]

This Article guarantees a right to very citizen to have access to public affairs. In the application of this Article the Human Rights Committee in ruled in *Marshall (Mikmaq Tribal Society) v. Canada* that a referendum was included with this right to 'public affairs' and as such could not discriminate in regard to sex, race and religion.[50]

Separate referendums for Maori and Pakeha would be in breach of New Zealand's international obligations. A referendum which politically privileged Maori would be incredibly divisive. The separate referendum for Maori and Pakeha can not be justified as it is beyond the rights guaranteed within the Treaty of Waitangi and would arguably be contrary to the ICCPR.

The 1986 Royal Commission on Electoral Reform proposed that a referendum should be held on any major constitutional issue. As a referendum involves the general public in the drafting of the Constitution it

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[49] International Covenant on Civil and Political Right Treaty (19 December 1966) 99 UNTS 171. art 25.
International Covenant on Civil and Political Right Treaty, Art. 25.
[50] *Marshall (Mikmaq Tribal Society) v. Canada*, Human Rights Committee (No. 205/1986, CCPR/C/43/D/205/1986.)

would suggest that in a political and legal sense a referendum would be the most suitable means of determining a Head of State. It is also suitably symbolic when considering the symbolism of the President as New Zealand's Head of State and that the public should be involved in defining its role. There seems to be legal and political consensus that whether New Zealand becomes a republic or not it should be determined by referendum

In summary there are no constitutional obstacles which prevent New Zealand from becoming a republic. The Crown is not an innate part of New Zealand's legal order. Maori will not suffer any loss of Treaty rights if New Zealand becomes a Republic. However, establishing a republic must meet the requirements of practical sanctity. A single referendum would be sufficient to meet the requirements of practical sanctity and also fulfil the goal advanced by the Constitutional Arrangements Committee of stimulating constitutional debate among the public. Parallel referendums for Maori and Pakeha cannot be justified as the referendum would be contrary to both the principles of the Treaty of Waitangi and New Zealand's international obligations. Instead a single referendum is all that is necessary to establish a New Zealand republic.

IV THE OFFICE OF GOVERNOR-GENERAL

With the adoption of a Parliamentary Republic, the New Zealand parliamentary system of government would continue principally unchanged. The role of a New Zealand President in a parliamentary republic would be equivalent to that of the Governor-General. The role of the President would have to fulfil similar ceremonial, community and constitutional functions as the Governor-General. Therefore, in seeking to define the role of future New Zealand Presidents it would be prudent to examine the role of the Governor-General.

While the Office of Governor-General is established by the Letters Patent 1983, it is the Constitution Act 1986 which defined the role and

powers of the Governor-General. Section 2 of the Constitution Act 1986 provides that:

> (1)The Sovereign in right of New Zealand is the Head of State of New Zealand, and shall be known by the royal style and titles proclaimed from time to time.
>
> (2)The Governor-General appointed by the Sovereign is the sovereign representative in New Zealand. [51]

This statue further stipulates that the Governor-General exercises the royal powers on behalf of the Sovereign. The Governor-General is a member of the Executive Council, a body which is shared with other members of Parliament. The Executive Council carries out various functions the essential function being to ensure that the Governor-General has access to ongoing ministerial advice.[52]

A: Appointment and Recall of the Governor-General

The appointment process for the office of Governor-General is of great importance. The position requires that the Governor-General be neutral and above party politics in order to effectively discharge his or her functions. The non partisan nature of the office has been particularly emphasised since the advent of Mixed Member Proportional (MMP). As Philip Joseph states that "under MMP, the political detachment and neutrality of the office is a constitutional imperative."[53]

The Governor-General is appointed by the Queen on the advice of the Government.[54] The appointment is for the duration of five years. The opposition is generally consulted as to who the Governor-General should be. Such consultation is to ensure that the Governor-General has widespread and non-partisan support. Those persons appointed as Governor-General are

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[51] The Constitutional Act 1986, s2 (2).
[52] Palmer and Palmer, above n 5,53.
[53] Joseph, above n 12 694.
[54] Palmer and Palmer, above n 5, 53.

typically former members of the judiciary and are not tied to any political party. In spite of the usual practice of consultation there have, in the past, been partisan appointments. Examples of these include Sir Keith Holyoake, Sir Paul Reeves and Dame Catherine Tizard.[55]

Some commentators have questioned whether the present process of appointment is sufficient to prevent partisan appointments. They believe that a Government should not be able to appoint a Governor-General without full consultation. The right honourable Jim Bolger has acknowledged this concern stating that: "Given the importance of such decisions the public at large will want to feel comfortable that the decision made by the head of state is above partisan." [56] To ensure a non-partisan appointment commentators have proposed a more formal process of a parliamentary vote.

The Governor-General can be recalled (dismissed) as easily as he or she was appointed. As stated by Sir Michael Hardie Boys: "Just as I was appointed by Her Majesty on the advice of the Prime Minister, so can I be recalled on his advice. My fate can be decided by a telephone call."[57] The Prime Minister can simply request the Governor-General be recalled effectively resulting in dismissal. The removal of the Governor-General by Prime Minster fiat has been criticised as creating a 'high noon scenario.' This is where the Prime Minister or Governor-General is forced to take a pre-emptive strike to remove the other for fear of him or herself being disposed. Such a scenario forces the Governor-General to hastily exercise his or her reserve powers.

The dismissal of the Australian Prime Minister Whitlam is an example of a high-noon scenario.[58] The former Governor-General, Sir John Kerr's dismissal of Prime Minister Whitlam is the only time a reserve power has been exercised in Australia's history. The Australian Parliament consists of two houses – The House of Representatives and The

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[55] Joseph, above n 12, 694.
[56] Andrew P. Stockley "Becoming a Republic? Issues of Law" in Luke Trainor (ed): *Republicanism in New Zealand* (The Dunmore Press Ltd, Palmerston North, 1996) 81, 95.
[57] Sir Michael Hardie Boys, Governor "General Public Law Class" (General Public Law College House, Christchurch, 10 September 1997).
[58] Stockley, above n56, 95.

Senate. In 1974 the Whitlam Labour government was returned to office, but soon after the Liberal party gained control of the Senate. The following year, the liberal leader, Malcolm Fraser announced that the Senate would refuse supply due to the reprehensible activities of certain government ministers. (Several ministers had reportedly received loans from unknown Middle East Sources.).[59]

Frazer demanded dissolution of both houses and new elections, Whitlam refused. The Governor-General John Kerr, concerned for the finances of Government, approached the Chief Justice, Sir Garfield Barwick. Sir Garfield Barwick, advised that a Prime Minister who was unable to secure supply should be dismissed. Kerr dismissed Whitlam two weeks before supply would have lapsed [60]Andrew Stockley contends that it was the growing suspicion between the Governor-General and Prime Minister that led John Kerr to dismiss the Prime Minster two weeks before federal finance had expired.[61]

To avoid such a high-noon scenario such as this, commentators have proposed that the Prime Minister's power of recall be reformed and replaced with a more formal process for dismissal.[62]

B The Role of the Governor-General

The Governor-General's role consists of three functions, the ceremonial, the community and the constitutional. [63]

1 *Ceremony*

[59] Several ministers had reportedly received loans from unknown Middle East Sources.
[60]Joseph above n12, 267.
[61] Stockley, above n 56 ,95.
[62] Joseph, above n 12 ,696.
[63] Governor-General's Website< http://www.gov-gen.govt.nz/role/functions.htm> (last accessed 28 August 2006).

The Governor-General as Head of State has many ceremonial duties. They include officiating at the opening of Parliament, welcoming diplomats, holding honorary ceremonies and greeting Heads of State.[64] The Governor-General is also the Commander Chief of the Armed Forces, although this is ceremonial position and does not actually instruct the armed forces.

2 Community

The Governor-General is to expected to provide non-partisan leadership in the community.[65]Dame Silvia Cartwright has written that the goal of the Governor-General is "to reflect their national values and identity and to work as a unifying mechanism..."[66]

3 Constitutionalism

The Governor-General's powers include a vast array of constitutional functions, which stem from a mixture of statute and convention. Such constitutional functions include formally appointing and dismissing prime ministers, dissolving and proroguing Parliament, assenting to bills and formally appointing and dismissing Court of Appeal and High Court Judges.[67] These constitutional functions are, however, regulated by the cardinal convention that the Governor-General must only exercise them on ministerial advice. [68] The convention, as stated by Viscount Esher, an adviser to George V, said:

> If the sovereign believes advice to him to be wrong, he may refuse to take it, and if his Minister yields, the Sovereign is justified. If the Minister persists ... a constitutional Sovereign must give way[69]

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[64]Governor-General's Website above n51.
[65]Governor-General's Website above n51.
[66]Dame Silvia Cartwright, Governor-General ,"The Role of the Governor-General", (New Zealand Centre for Public Law, Occasional Paper No 6, Wellington, October 2001).
[67] Palmer and Palmer above n 5 55.
[68] Joseph above n 13 659.
[69] Cited in George Winterton Parliament the Executive and the Governor General- A Constituitonal Analysis (Melbourne University, Melbourne, 1986) 156.

Even though the constitutional powers of the Governor-General appear vast and significant they are in fact greatly constrained. The Executive Council is the body through which the Governor-General receives Ministerial advice. The 1983 New Zealand Letters Patent explicitly states that "Our Ministers of the Crown shall keep Our Governor-General fully informed concerning the general conduct of the Government of Our said Realm."[70]

D The Reserve Powers

There are instances when the Governor-General can exercise discretionary powers. These discretionary powers are referred to as the reserve powers. Their name is a misnomer because the reserve powers are actually not powers at all but are exceptions where the Governor-General is not bound to act on ministerial advice. The instances giving rise to the exercise of the reserve powers are rare, arising only when there is a great political impasse which threatens the process of government. [71] In Commonwealth countries, the reserve powers have been used only five times in the last century, in Canada (1926) Pakistan (1955) Australia (1975) Grenada (1983) and in Fiji (1987).[72] The reserve powers although rarely used are considerable and their exercise is typically divisive. In regard to the exercise of the reserve powers Professor Quentin Baxter states "[t]he political fact is that the use of these draconian measures causes the constitution to shudder and may set in train evolutionary or revolutionary forces." [73]

As conventions, the reserve powers are defined by "precedence" and "generally accepted political practice." [74] The conventions of the reserve powers are broadly stated and have not been defined by precedence. As R Q Quentin Baxter elegantly states: "In the true tradition of an "unwritten

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[70] Latter Patent Constituting the Office of the Governor-General of New Zealand, at XV1.
[71] Jospeh above n 13 659.
[72] Jospeh above n 13 659.
[73] R.Q. Quentin-Baxter May "The Governor-General's Constitutional Discretions: An Essay Toward a Re-definition."(VUWLR 1980) 10 289, 309.
[74] J P Mackintosh *The British Cabinet* (3rd ed, Stevens, London, 1977)13.

constitution, it has been the British instinct to leave the rules at large, lest they become too cut-and-dry, or too foreshortened, to fulfil their high purpose."[75] The nature of what constitutes the reserve powers has been the subject of considerable debate. Whilst areas of substantial vagueness and uncertainty still exist there are, however, four generally accepted reserve powers. These are to appoint a prime minister, to dismiss a prime minister, to refuse to dissolve Parliament and, in certain circumstances, to force dissolution of Parliament.[76]

1 Appointment of the Prime Minister

The Governor-General's appointment of Prime Minister is determined by convention which does not "import a broad discretion." The convention is set out in the Cabinet Office Manual 2001 as: "Convention dictates that the Leader of the party or group of parties with the support of the House is chosen as Prime Minister."[77]

During the First Past the Post (FPP) system an election always resulted in a majority party who naturally had the support of the house. The introduction of Mixed Member Proportional (MMP) means it is rare that a single party will have a majority. Instead, parties have to enter into a coalition to form a government. It is more likely that the Governor-General will have to exercise personal discretion to determine who will be appointed Prime Minister. Sir Michael Hardie Boys, seeking to clarify the position of the Governor-General offered a general statement of principle.

> The formation of a government is a political decision and must be arrived at by politicians. My task as Governor-General is to ascertain where the support of the House lies. In an unclear situation that may require me to communicate with the leaders of all the parties represented in the new Parliament.

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[75] Quentin-Baxter May, above n 72+ 297.
[76] Palmer and Palmer n5, 57.
[77] *Cabinet Manual 2001* (Wellington, 2001) para 4.10

> Once political parties have reached an adequate accommodation, and a government is able to be formed or confirmed. I expect that the parties will make that clear to me by appropriate public announcements of their intentions.[78]

The Governor-General will only exercise independent judgement in determining where support of the House lies when the debate between the political parties has been exhausted.

2 *Dismissal of Prime Minister*

The dismissal of a Prime Minister is a considerable power and its exercise has always been contentious and divisive. It is often perceived as a recourse of last resort, an ultimate weapon which is liable to destroy its user. There are, however, two accepted grounds for a Governor-General to dismiss a Prime Minister, these are when a Prime Minster has lost confidence or when the Government or prime minister is persisting in illegal or unconstitutional conduct.[79]

There are a variety of ways in which a Prime Minister can lose confidence. They include the Government losing a confidence vote in the House, when the Prime Minister is replaced as party leader and when a coalition Government nominates another party leader.[80]

In accordance with these conventions any Prime Minister who has lost confidence must resign. If the Prime Minister does not resign the Governor-General is entitled to dismiss him or her. This dismissal should only occur when the Governor-General has frustrated all avenues to induce the Prime Minister to act in accordance with convention.

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[78] Hardie Boys, Governor General "Harkness Henry Lecture: Continuity and Change"(Wellington, 31 July 1997).

[79] The Report of the Republic Advisory Committee, An Australian Republic The Options- The Appendages Volume 2 (1993) Commonwealth of Australia. ["RAC Appendages"]

[80] Joseph above n12 670.

The more contentious ground for dismissing a Prime Minister is illegality. An implied role of the Governor-General is to act as a constitutional guardian.[81] As described by F. Forsey:

> [T]he reserve powers, under our Constitution, are an absolutely essential safeguard of democracy. It takes the place of the legal and judicial safeguards provided in the United States by written constitutions, enforceable in the courts.[82]

The Governor-General acts as a 'constitutional guardian' dismissing the Prime Minster or Government for persisting in illegal or unconstitutional conduct. These grounds for dismissing a Prime Minister are considerably broad and ambiguous; it is unclear as to what constitutes a breach of the constitution sufficient to dismiss a government. Prolonging the life of Parliament and obtaining a general election by fraud are obvious examples of a fundamental breach of the constitution.

The Governor-General, acting as a constitutional guardian, must still persist and attempt to convince the Prime Minister to desist with his or her illegal behaviour before he or she is dismissed.[83] The dismissal of a Prime Minister for unconstitutional actions must only be a recourse of last resort, when all other possibilities have been exhausted. In the role of constitutional guardian the Governor-General must not interfere or pre-empt the Courts by pre-determining illegality. This issue of pre-empting the Courts was raised in the dismissal of the New South Wales Premier, Mr Lang. The State Government of New South Wales was facing financial ruin and in an attempt to evade making repayments to the Federal Government it directed its officers to act contrary to the Federal regulation. The Governor, Sir Phillip Game, drew this breach of law to the attention of the Premier but he refused to retract the orders and was promptly dismissed. The actual illegality of the actions though was never determined prior to the Premier

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[81] Joseph above n 12 678.
[82] Evatt Forsey *Freedom and Order*(, McClelland and Steward, Toronto, 1974), 46.

being dismissed. Commentators believe that Governor-General can not pre-empt the Courts. Instead, the illegality must be determined by the Judiciary.

Despite these conventions the Governor-General's powers to dismiss the Prime Minister (and Parliament) for a fundamental breach of the constitution are broad and ill-defined and give cause for concern. This is particularly so if such a broad power is to be transferred to a President.

3 Refusal of a Request of Dissolution

The Prime Minister may request a dissolution of the House but the Governor-General may refuse to grant an early dissolution of Parliament. Such a reserve power was acknowledged by the Right Honourable Jim Bolger:

> [S]ome believe that would enable me to ask the Governor-General for her consent to call a general election. I could ask, but that consent may or may not be given. She could judge it appropriate to call on the leader of the next largest party Labour to see whether it was able to form a government." [84]

The Governor-General may believe that, following a Prime Minister's request, it is in the best interests of the nation to not dissolve Parliament. This is usually because the Governor-General believes a general election could be averted the formation of new coalition forming and becoming Government. The Canadian Governor-General, Lord Byng, refused to grant a resolution mistakenly believing that the opposition parties could form a government. Sir Ivor Jennings says: "A sovereign who thought that the power of dissolution was being put to serious abuse could refuse to allow a dissolution."[85] There are particular circumstances when it is appropriate for the Governor-General to refuse a request for dissolution. These exist
(1). where a coalition party transfers its allegiance to the opposition giving it a majority

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[84] Stockley, above n56, 95.
[85] Sir Ivor Jennings ,The British Constitution (4th Edition, Cambridge, 1961),114.

(2) when a Prime Minster is replaced as a party leader in a coalition or minority government that still has the confidence of the House.
(3) when a Prime Minister who is defeated at the elections does not resign but instead requests dissolution and
(4) when an election provides no clear result and the Prime Minister requests fresh elections without summoning Parliament and testing where the confidence of the House lies.[86]

5 *Dissolution of Parliament*

The grounds for which a Governor-General can dismiss a Government is when it persists in illegal or unconstitutional conduct. The grounds of unconstitutional conduct are identical to those already discussed above for dismissal of a Prime Minister.

D REFORM OF THE RESERVE POWERS

Robert Quentin Baxter in his paper, *The Governor-General's Constitutional Discretions: An Essay toward a Re-definition,* argues that the reserve powers are presently too vague and ambiguous and in desperate need of further definition. The advent of MMP has further increased the need for reform of the reserve powers. Caroline Morris in her essay *The Governor-General ,The Reserve Powers, Parliament and MMP: A New E*ra states:

> If the Governor-General is required to exercise reserve powers more often, it is vital that they be credible and effective. Credibility can only be effectiveness can only come; it has been submitted, by the powers being exercised according to clear guidelines, soundly based in principle. These principles are those of Crown neutrality and democracy [87]

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[86] Joseph above n12, 674.
[87] Caroline Morris "The Governor-General, The Reserve Powers, Parliament and MMP: a new era." (1995) 25 VUWLR 345, 371.

Dr. H Evatt has advocated codification of the reserve powers, believing that a written code will clarify and define them. He states that codifying the conventions would be difficult and would lose flexibility but believed that there is a "greater danger in leaving things how they are."[88] The attempts at further defining and the clarifying the reserve powers through codification has proved problematic. Because the reserve powers are ambiguous and intricate the codification of the conventions has resulted in rigid and overly complex definitions. The question of whether the reserve powers should be codified is still contested.

As the President will expect to inherit these reserve powers the establishment of a New Zealand republic will require the review and possible reform of them. As Professor George Winterton states:

> The advent of a republic, which necessitates a re-examination of the role of the head of state in our constitutional system, is obviously an opportune occasion for reconsidering what, if any, reserve powers ought to have, and how such powers should be defined. [89]

III APPOINTING A NEW ZEALAND PRESIDENT

The fundamental issue in establishing a New Zealand republic is to determine what role a President should play within New Zealand's constitution. The establishment of a parliamentary republic will not substantially alter the system of Government and the role of the President will, in many ways, be similar to that of the Governor-General. The role of the President, like the Governor-General, will consist of similar duties

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[88] H Evatt, *The King and His Dominion Governors* (Frank Cass, London, 1967)120.
[89] George Winterton "Reserve Powers in an Australian Republic" (1993) 12 Uni Tas LR. 249,253.

including ceremonial, community and constitutional functions. To effectively discharge his or her duties the President must appear impartial and above party politics. While the position of the President is similar to the Governor-General's role, the establishment of a Presidency with its higher status and greater mandate would present new challenges and issues. The important factors of any proposed presidential model are:

(1) The process by which a President is appointed.
(2) The process by which a President is removed.
(3)The powers and duties vested in the President.

Andrew Ladley points out that these factors are inherently interrelated. The process of appointment typically determines what powers are vested with a President.[90] The process of dismissal also reflects the process of appointment.[91] Because these factors are so interrelated it is prudent not to consider them separately. In construction of the Australian referendum proposal each factor was considered separately and this resulted in a flawed presidential model. While this division is in many ways artificial it is justified in that it serves to elucidate the possible roles of the President.

The process of appointing a President is a contentious feature of any proposed presidential model. In the Australian referendum the process of appointment of the President was so divisive that it resulted in splitting the pro-republican vote. [92] Some commentators have argued that the appointment process directly effects how a president performs.[93]

A president can be appointed through a variety of ways. The Presidents of Iceland and Austria are decided by general election, the

[90] Ladley above n11 78.
[91] Republican Advisory Committee n10, 127.
[92] McKenna and Hudson above n4 225
[93] David Soloman "Parliament and Executive in a Republic" (1994) 8 Legislative Studies 44.

Presidents of Germany and India are by Electoral Committee and the Presidents of Israel and Greece are chosen by parliamentary election. The appointment process typically consists of two parts, the nomination process, of choosing the presidential candidates, and the selection process, which determines which candidate will be President. In consideration of determining an appropriate process of appointment it is important to consider the functions of the president, such as ceremony, community and the need for impartiality. The possible options in appointing a President are:

(1) Appointment by Prime Minister.
(2) Appointment by Electoral College.
(3) Appointment by Popular Election.
(4) Appointment by election of Parliament.

A Appointment by Prime Minister

In his essay, *Who Should be Head of State?* Andrew Ladley outlines a minimalist republican model in which the Governor-General's powers and process of appointment are simply transferred to the New Zealand President. [94] This proposal would be the slightest departure from New Zealand's present constitutional arrangements. The President would be appointed by the Prime Minister directly rather than consultation with the Sovereign. [95] As in accordance with present practice, opposition parties would be consulted to ensure a non-partisan appointment. This process of appointment does not guarantee consultation with the opposition. Whilst opposition parties are generally consulted there have been occasions where the opposition was not consulted. There have been a variety of partisan

[94] Ladley above n 9, 79.
[95] Ladley above n 9, 79.

appointments in relation to the Governor-General, including Sir Keith Holyoake, Sir Paul Reeves and Dame Catherine Tizard.[96]

In a situation where there has been no consultation the opposition party will have had no avenue of complaint. Nor will it have had any means by which it can secure government consultation in the appointment of a president. Since the introduction of MMP the appearance of being non-partisan and above party politics is essential and it would seem that a more formal process requiring opposition consultation is needed. At present there is no formal obligation to consult with the opposition. The process of Prime Ministerial appointment does not sufficiently guarantee a non-partisan appointment. The appointment of a President requires a more formal mechanism that secures a non-partisan appointment.

B Election by Electoral College

Presidents are appointed by electoral college in numerous countries such as India, Germany and Italy. An electoral college is a body which is designated to elect a person to a particular office.[97] Electoral colleges were first conceived as a means to mitigate the public will by electing a body rather than holding a direct election. They are principally used in federal republics to obtain an electoral college which is representative of both state and federal legislatures. In Germany, the Federal Assembly determines who will be President. [98]The Federal Assembly comprises an equal number of Federal Parliament and State Parliament ministers. [99] This composition gives a greater proportional influence to State Parliament. The Federal Assembly then elects the president with a simple majority.

New Zealand is a unitary rather than a federal state and does not have a strong regional government. There also seems little demand to cater for regional voices and local differences. As such, there is little need to

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[96] Joseph above n11,659.
[97] Oxford Dictionary (2nd Edition Clarendon Press, Oxford 1986).
[98]The Basic Law for Federal Republic of Germany, Art. 54
[99] The Basic Law for Federal Republic of Germany, Art. 54

establish a body to cater for federal or regional voices in appointing a President. In view of this an electoral college is not a suitable means by which to appointment a New Zealand President.

C Appointment by Popular Election

An appointment of a president by popular election has come to prominence post the Australian Republican Referendum. The referendum's negative result has been partly blamed on the general public's preference for a President appointed by direct election rather than by Parliament. The Right Honourable Jim Bolger has referred to the desirability of an elected President.[100] The nations of Iceland, Portugal, Austria and Ireland all appoint their Presidents through democratic elections.

Appointment of a president by popular election has a number of advantages. It is truly democratic and involves the public directly in determining who will be their Head of State. This gives the position of president greater publicity and also gives greater gravitas to the performance of community and ceremonial functions. The direct election method of selection has the additional popular appeal in that it excludes politicians from the process of appointment.[101] It should be remembered, however, that the appointment of a president by popular election has in the past been dominated by former politicians.[102]

Whilst the direct election of a president is at present the preferred option it is not without its critics. They argue that any general election will result in a president who is a political appointment and it will be dominated by candidates affiliated to a political party resulting in the president being linked to a single political party. Such criticism is confirmed with the appointments of the Presidents of Ireland and Austria who are dominated by

[100] Andrew P. Stockley "Becoming a Republic? Issues of Law" Luke Trainor: *Republicanism in New Zealand* (The Dunmore Press Ltd, Palmerston North, 1996) 61 102.
[101] Republic Advisory Committee above n80 70.
[102] Republic Advisory Committee above n80 70.

former politicians affiliated to particular political parties. As non-partisanship is required for a President to successfully exercise his or her reserve powers then the possibility of a politically affiliated president could lead to a constitutional crisis.

Another criticism of the electoral option is that a president elected by general election would believe he or she has a democratic mandate and is more likely to intervene in the workings of government. This argument is outlined by Phillip Shannon who says that:

> A president, with a popular mandate of a majority of votes, may become too powerful. He or she might be encouraged to attempt to enter the political arena in competition with the government, especially if backed by a greater majority in voter support than that government[103]

A president with a democratic mandate would then be inclined to exercise his or her reserve powers and hence interfere with Parliament and increase the risk of constitutional crisis. It must be noted that the democratically elected presidents of Ireland, Austria and Iceland have considerably less discretionary powers than our Governor-General to intervene in the workings of Parliament. So it cannot be confirmed whether an elected president would be more inclined to exercise his or her reserve powers.

There is also a financial concern. Popular elections are considerably more expensive. The total amount spent in the 2005 general election was over three million dollars.[104] As the president only performs minimal constitutional duties it is questionable whether such an expense can be justified. The cost of the Presidential election would be considerably less if it was held in conjunction with a general election but this would only further politicise the Presidential appointment.

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[103]Phillip J Shannon *Becoming a Republic: Law Reform Options for New Zealand* (LLM Research Paper Victoria University of Wellington, 1995).
[104] Electoral Commission ,Annual Report (Wellington, June 2005)17.

A nomination process is an essential part of any direct election of a president. There exists a variety of different nominee processes. In Iceland and Portugal a possible presidential candidate must be sponsored by a specific number of voters[105] and in Austria any candidate can nominate themselves.[106]

Ireland's electoral system is often put forward as an ideal republican model for New Zealand to adopt. Ireland's nomination process is a particularly complex one. The Irish Constitution provides that an election only occurs when there are contesting presidential candidates.[107] If the election is not contested then the sole nominee is appointed President. There were no presidential elections between the period of 1973 and 1990[108] The Irish Parliament generally attempts to avoid presidential elections, hence there is considerable consultation between political parties to nominate a candidate with wide spread non-partisan support. When the Irish political parties cannot come to a consensus they each nominate competing candidates which results in a general election. Ireland's candidate nominee process would not be a suitable choice for New Zealand to adopt for two reasons. Firstly the Irish system of having a parliament conspire to avoid a general election is not a suitably transparent mechanism. Secondly if a New Zealand President is to be elected then it should be at regular intervals and the candidate selection process should be open to all. Furthermore, this process results in a general election for presidency at a time when parliament is most divided.

Another consideration in electing a president is what electoral system should be used. The presidential elections voting systems in Iceland

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[105]Portugal the nomination must be sponsored by non less than 7500. In Iceland the figure is no fewer than 1500.

[106] There is a single restriction in that no one related to the Austrian Monarchy can be nominated.

[107] Article 26 prescribes the process by which an Irish President is appointed. All potential Presidential candidates are required to be nominated. A Candidate can either be nominated by 12 members of the Lower Parliament or by the four county councils (or the presiding President can also nominate him or herself.)

[108] David Gwyynn Morgan, *Constitutional Law of Ireland*, (The Round Hall Press, Dublin 1985)52.

and Austria are elected by First Past the Post. Austria differs from Iceland's in that a President elect has to receive the majority of the vote. If no single candidate gains a majority then the leading two candidates enter into a second election.[109] If there is only one presidential candidate then the election takes the form of a referendum confirming or refuting the candidate as President. In Ireland, the President is elected through the proportional Single Transferable Vote (STV) electoral system.[110] The STV voting system allows voters to rank their preferences allowing a president to be appointed with broad general support.[111] The STV electoral system results in the selection of a president who represents the populace's general preference rather than the preference of the majority as under FPP. [112] As the appearance of non-partiality is important for a President to fulfil constitutional functions it would appear that STV is a preferable electoral system.

It is expected that a referendum will determine whether New Zealand becomes a republic or not and if so what form that republic will take. The appointment of a president through popular election has considerable public appeal and is a likely favourite to win in a referendum. Nonetheless there are substantial criticisms of appointing a president through a general election. An elected president with a democratic mandate is more likely to challenge Parliament and be more inclined to exercise the reserve powers. The proclivity of an elected president to exercise the reserve powers should be accounted for when considering what powers should be vested with the President.

If New Zealand does decide to appoint a president by popular election then there needs to further discussion as to which election and candidate process should be adopted. As evidenced above there is a diversity of systems by which a President is elected by which New Zealand

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[109] RAC Appendages, above n 75 23.
[110] RAC Appendages, above n 75, 23.
[111] Hague and Harrop above n6 148.
[112] Hague and Harrop above n6 148.

can choose from. A preferable model for a popular election would need to be transparent and held at regular intervals, a requirement that would exclude the adoption of the Irish electoral system. The candidate process should not be restricted by the political parties. An open process like Austria's has which allows any person to be nominated would be preferable. The most appropriate voting system for the presidential election would be STV which would reflect the populace's general preference rather than the simple majority.

D Election by Parliament

A common method of appointing a president is election through parliament. The Presidents of Israel, Greece, Malta, and Mauritius are appointed though election by parliament.[113] This system has several advantages. The Parliament is democratically elected and is, therefore, representative of the public. A president appointed by Parliament would not be under the impression that he or she has a mandate to exercise the reserve powers. It also avoids the cost of having a general election.

A criticism of this is that an election by Parliament would simply see a President who is affiliated to the government appointed. The appointment of a partisan president who might be associated with a political party is avoided by the requirement of a higher threshold than a simple majority. Greece and Mauritius requires a presidential nominee to receive over two thirds majority support.[114] Such a threshold requires the Government to consult and acquire opposition support for a candidate to be appointed president.

Some commentators have criticised a supermajority threshold arguing that it results in the appointment of the least contentious rather than the most

[113] Republic Advisory Committee above n6, 66.
[114] The Constitution of Greece 1976 art.32

able. David Solomon, an Australian commentator, opposes the election by parliament process. He argues that:

> The danger is that the appointee will be the common denominator not the person most suited to the job, but the person least dangerous. He or she would most likely be apolitical or even ignorant of politics, never having publicly made a statement which offended one side of politics or the other ....[S]urely it would be positively dangerous to have someone so ignorant of politics that decisions were influenced (or even determined) by unelected and perhaps unknown advisor.[115]

The belief that presidential appointments by parliament will be lacking calibre is misplaced. Presidents appointed by parliament are no less educated or experienced than other appointed presidents. Most tend to be former politicians who are well versed in politics.

There are a variety of different procedures for a parliamentary election to appoint a president. In Israel presidential candidates have to be nominated by 10 members of parliament.[116] The President is elected by a process of secret ballots where he or she has to secure an absolute majority in Parliament on the first two ballots. If by the second election, no presidential candidate has secured an absolute majority then, with each further ballot, the candidate with the least votes is removed until a absolute majority is secured.[117]

In contrast Greece requires that only one presidential candidate be put forward. The nomination of two or more candidates in the house risks political grandstanding and invites a political impasse regarding suitable candidates.[118] Such a single nomination with consultation would seem the most appropriate process for nominating a candidate. To have contested

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[115] David Soloman "Parliament and Executive in a Republic" (1994) 8 Legislative Studies 44 44.
[116] Israeli Basic Law: The President of the State, 6th Tamuz, 5724 (16th June 1964)
[117] Israeli Basic Law: The President of the State, 6th Tamuz, 5724 (16th June 1964)
[118] Joseph above n 13, 696.

nominations in Parliament would risk a divisive debate which might damage the impartiality of the presidential nominee.[119]

The nature of how New Zealand will select its president will probably be determined by referendum. In deciding the referendum options care must be taken with the actual specifics of the process of presidential appointment. As is illustrated above there is a variety of different processes within each method of appointment.

In summary, the preferable options for appointing a president would be by general election and election by Parliament. Of these options the election by Parliament is preferable because of the financial cost of the general election and also because a President elect, would have a democratic mandate and is more likely to conflict with Parliament. The choice will probably be determined by the New Zealand public.

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IV REMOVAL OF A PRESIDENT

In evaluating the role of a president the process of dismissal is often disregarded. It is, though, a vital component in defining the role of a president. The process of dismissal, like the other factors, can not be considered in isolation but in the context of how the President was appointed and which powers are vested within. The process of removing a president varies greatly from one country to another. Some use a judicial body, others use a parliamentary process and some use a referendum. To remove a president in Sri Lanka it requires a supermajority in Parliament while in Austria a president may be removed by a referendum of recall.[120]There is a general equivalent process for appointment and removal. In considering how a president might be removed it is important to take

[119] Joseph above n 11, 696.
[120]

account of the process of appointment and the powers vested within the position.

The present process for the removal of the Governor-General is a simple recall by the Prime Minister. Such ease of dismissal can be problematic if the president has reciprocal powers to dismiss the Prime Minister. Such reciprocal powers encourages the Prime Minister or President to a pre-emptive strike, in attempt to secure their own position by first dismissing the other. This high noon scenario is illustrated by Kerr-Whitlam affair. Such expedient executive actions should be avoided.

If the President is to act as "constitutional guardian" and have powers to dismiss then there should be no process of arbitrary removal. However, if the President is not vested with any discretionary executive powers then a "high noon scenario" will not arise and there is no need for a formal process for dismissal.

Before a discussion of the merits of procedures for the removal of a President it is necessary to consider what would be suitable grounds for the removal of a President. The grounds for dismissal have to meet sufficient criteria and should be broad enough to cover situations that cover general mal-administration and high enough that the president can not be dismissed on a whim. In consideration of these factors the removal of a president could be compared to the removal of a High Court Judge. A High Court Judge can be dismissed under section 23 of the New Zealand Constitution Act, which provides:

> **23. Protection of Judges against removal from office—** A Judge of the High Court shall not be removed from office except by the Sovereign or the Governor-General, acting upon an address of the House of Representatives, which address may be moved only on the grounds of that Judge's misbehaviour or of that Judge's incapacity to discharge the functions of that Judge's office.[121]

[121] The New Zealand Constitution Act 1996, s23.

In accordance with this statute the president can be dismissed if the misbehaviour or incapacity can be proved. This seems a sufficient threshold by which to dismiss a President.

A variety of different processes exist for the dismissal of the President. These include a referendum of recall, parliament hearings and also a prime minister's discretion. A referendum for recall of President, used in Iceland and Austria, would be an expensive and lengthy process. It is also doubtful whether the general populace is suitable to determine whether a president has 'misbehaved' or is 'incapable of discharging' his or her functions.

The most appropriate process for removal is by Parliament. To avoid the dismissal of a President being decided upon partisan lines a super-threshold is required. A partisan dismissal could be excluded by having a 2/3 threshold or by Parliament establishing a Parliamentary Commission of Inquiry to determine an alleged misconduct.

In regard to dismissal, George Winterton has argued that to properly restrain a president, the exercise of the reserve powers should result in the resident's dismissal. [122]Winterton uses the analogy of a bee-sting, which results in the death of the bee when it stings. Whilst this would dissuade a president from exercising the reserve powers the possible simultaneous dismissal of both the President and the Prime Minister would lead to a constitutional crisis. As both the Prime Minster and Governor-General would be dismissed the question exists as to who would appoint the others successor. The dismissal of a president for the exercise of a reserve power appears to cause more problems than it solves.

In summary, if the President is to retain the reserve powers then dismissal by prime ministerial demand must be removed. Instead, a formal process should be introduced. The most appropriate process is removal by

[122] Winterton, n88,262.

vote of parliament following a parliamentary inquiry into whether the President is guilty of misconduct.

VI THE POWERS OF A NEW ZEALAND PRESIDENT

The Head of a State in a parliamentary democracy as opposed to a presidential republic is vested with minimal executive powers. However, these discretionary powers are still considerable as their use can determine who will be appointed or dismissed as Prime Minister and whether Parliament should be dissolved. As such these Presidential powers still need to be carefully considered and defined.

In considering what powers should be vested with the President, it is important to consider how the president will be appointed and possibly dismissed. As George Winterton states:

> The reserve powers appropriate to a republican head of state cannot be determined in abstract. Since much will depend upon the features of the Office, above all the method of selection.[123]

Therefore the manner of how a President is appointed and also dismissed should be considered in regard to what powers a President should have. The powers of a president should not be defined separately but in regard to other aspects of the office.

While it is tempting to simply transfer the reserve powers to a New Zealand President it is important realise that the role of the Governor General are subtly different. There are several factors which will increase a president's independence and status A president will be the actual Head of State as opposed to a mere representative also unlike the Governor-General, a President, would not feel constrained by a need to protect the monarchy. This is more likely to give the President "greater status and self

[123] Winterton above n88, 258.

assurance" [124] Such independence and higher status will increase the proclivity of a president to exercise the reserve powers. This mandate of the president will increase exponentially if he or she is directly elected. Such a democratic mandate would require that a president be restrained, so as not to exercise his or her reserve powers excessively. As Angela Macdonald in her paper, *Restraining a President,* highlights that a president directly elected is more likely to misuse the reserve powers and hence require have to reserve powers have to be restrained. [125]If a President is to be directly elected then there is a need to restrain them from misusing the reserve powers. This raises the question of, how should a president be restrained?

There are four options as to what constitutional powers should be vested with a New Zealand President: These are to:

(1) Retain the Reserve Powers.
(2) Retain the Reserve Powers accompanied with clarifying resolution.
(3) Codify the Reserve Powers.
(4) Divest the Reserve Powers to Parliament.

A Retaining the Present Reserve Powers

In establishing a President, the most minimal reform would be to simply transfer the present reserve powers. The constitutional powers of a Governor-General could be transferred without difficulty by substituting the position of President in place of the Governor-General in the pertinent statute and standing orders. While the constitutional powers of the Governor-General can easily be transferred the conventions which restrict their exercise may not. With a transition to a Republic "the present conventions governing the exercise of the reserve powers might not

[124] Winterton above n88, 258
[125] Macdonald above n 96, 14.

subsist,"[126] The present conventions might be perceived as relating to the Monarchy and not a President. In establishing a Republic the present constitutional arrangement of specifying the powers of the Governor-General, and relying on the conventions to restrict their exercise can not continue. Instead the conventions must be explicitly sited and transferred in a provision which would require that the President exercise his or her powers in accordance with the constitutional conventions that governed the Governor-General. South Africa adopted such a provision in its Constitution of 1961 (this has since been repealed): The Constitution of South Africa 1961, s7(5) provided that:

> The Constitutional conventions which existed immediately prior to the commencement of this Act shall not be affected by the provision of this Act.[127]

A more suitable provision (because it allows for the possibility of further development of the conventions) was drafted by G Winterton: It provides that:

> The Head of the State shall exercise his or her powers and perform his or her functions in accordance with the constitution conventions which related to the exercise of the powers and performance of the functions of the Governor-General, but nothing in this section shall have the effect of converting constitutional developments into laws or of preventing the further developments of these conventions.[128]

This provision makes it explicit that the president is to act on the advice of the responsible minister and hence clarified the role of the president.

Chief Justice of the High Court, Sir Gerard Brennan believes even this statutory transference will result in the reserve powers becoming

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[126] Winterton above n88, 254.
[127] The Constitution of South Africa 1961, s7(5)
[128] Republican Advisory Commission, above n6, 94.

judiciable[129] This would render the exercise of the reserve powers reviewable by the Courts, who could then be asked to determine a political issue, for which they are ill equipped to do. George Winterton believes that the problem of judiciablity can be avoided by a proposed provision specifying that the section is non-judiciable.[130]

However, retaining the present reserve powers will also retain the current criticisms of them. The reserve powers, as shown by Professor Quentin Baxter are presently too ambiguous and are in need of definition.[131] The President's misuse of the reserve powers will not be attached to any sanction or possibility of review. Also in the case of an elected President, due to possible stronger mandate and greater politicisation, the need for reform is even more pressing. Retaining the reserve powers will not sufficiently restrain an elected president.

2 *Formulation of Written Conventions*

Professor Quentin Baxter proposes to clarify the reserve powers by Parliament passing a resolution which would provide an authoritative statement on the reserve powers. This authoritative statement would serve to clarify and educate a president on what his or her reserve powers would be. Such a resolution has the benefit of clarifying the reserve powers but avoids the problems of rendering them judicially reviewable. The resolution could also be amended as the convention further develops.

The Republic Advisory Committee believes there is difficulty in formulating a statement which is inclusive of the perceptions of the reserve powers. They give the example of the Australian Advisory Committee on Executive Government which since 1975 has endeavoured to formulate agreed conventions. It has yet to reach consensus on a formulation.[132]

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[129] Sir Gerard Brennan "Reserve Powers in a Republican Constitution" (2004) 7 Const Law and Policy Review 3, 51.
[130] Winterton above n88, 254.
[131] Republican Advisory Commission above n6, 95
[132] Republican Advisory Committee above n6, 95.

It is questionable whether a resolution is sufficient to restrain a president from misusing the reserve powers. A president may breach the terms of the resolution and would be no sanction. To what extent a President should be restrained depends on the nature of presidential influence and independence. A clarifying resolution is unsuitable when a president has a greater mandate and is required to be restrained. A clarifying resolution, while sufficient to elucidate the reserve powers, cannot restrain a president from their misuse. If the president is elected then a clarifying resolution is not a sufficient restraint on his or her powers.

2 Codifications of the Reserve Powers

The codification of the reserve powers has long been debated. Codification has been argued as a means to clarify the vagueness and uncertainty of the reserve powers. It has been proposed as a means to provide certainty. Dr Evatt in his book on *The King and his Dominion Governors* has argued for the codification of the conventions, so as to provide a "definite constitutional rules enforceable if necessary, by the ordinary courts of law." Such codification would provide certainty in defining the reserve powers. Evatt agreed that codifying the reserve powers would be difficult as there would be a loss of flexibility but he believed that there was a "greater danger in leaving things how they are."[133]

Although many commentators advocate codification there are also many opposing such reform. Those opposing codification believe that the reserve powers are unable to be effectively codified because such codification would only serve to belittle the reserve powers. Lord Radclife, in reference to codifying the reserve powers, held that "some conventions

[133] H Evatt, *The King and His Dominion Governors* (Frank Cass London, 1967), 120.

are too shapeless or diffuse to codify."[134] An attempt to codify a convention with such a diffuse nature will only result in the codification being either too technical or an overly broad definition.

A mere general statement, Dr Eugene Forsey argues, would be worse than useless. [135] A broad definition of the reserve powers would fail to clarify and define, "leaving the whole field of argument open."[136] A general definition of the reserve powers would fail to adequately restrain a president giving him or her wide discretion.

In contrast an overly detailed approach to codifying the reserve powers would result in a rigid and inflexible definition. As Sir Robert Garrant states: "To try to crystallise this fluid system into a hard and fast code of written law would spoil its chief merit: we must be careful to lay down only the essential principles of popular government, leaving the details of form as elastic as possible."[137] A rigid definition though would not be able to account for all political situations and those that fall outside the rules would result in uncertainty and would render the rules unworkable. Hence the two approaches to codifying the reserve powers are inherently problematic

However the Republican Advisory Committee, in considering these challenges, have proposed a new approach called partial codification which they refer to as a 'middle ground' approach. It is a compromise between a broad and an overly detailed definition. Partial codification attempts to codify only the reserve powers which are generally agreed upon, leaving the contested conventions unresolved. The Republican Advisory Committee has proposed that the president be only granted such powers where it is:

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[134] Abeghenro v Akintola[1963] AC 614 (PC).

[135] H.V. Evatt, E. A. Forsey *Evatt and Forsey on the reserve powers* (Legal Books, Sydney 1990)xxxiii

[136]Evatt and Forsey, above n 128, xxxiii.

[137] Advisory Committee to the Constitutional Commission *Executive Government*(Commonwealth Publishing, Canbera, June 1987) 14.

"absolutely necessary to preserve the rule of law and protect the operation of responsible government from abuse by the executive." [138] The partial approach seems to overcome the codifying difficulties of generality and rigidity. Partial codification has been criticised by Angela Macdonald who purports that it fails to codify the powers to act as a constitutional guardian. She further states that this lack of codification leaves too much discretionary power in the hands of the President. She states that a: "[P]resident should not retain such sweeping personal discretion to subvert the democratic process by referring only to his judgement."[139]

There is nothing inherent in a partial codification approach which states that the powers of a Governor General, as a constitution guardian, can not be codified. This would seem to be a simple oversight by the Republican Advisory Committee not to include the codification of these powers. Angela Macdonald proposes that the President must consult a Judiciary in the exercise of these reserve powers. [140] Such powers with a duty to consult the Judiciary in its exercise could be codified with little difficulty.

By codifying the reserve powers they will become judicially reviewable. As the reserve powers relate to Government and the House of Parliament. To make this reviewable would be contrary to the principle as stated by Blackstone who wrote " that whatever matter arises concerning either the House of Parliament, ought to be examined, discussed, and adjudged in that House to which it relates and not elsewhere." [141]

Some have argued, as Justice Garfield Barwick does, that Judges are unsuitable and ill-equipped to make political decisions. Judges are though called on to make political decisions, from time to time. The political repercussions of the Courts will be immense and should be discouraged. A suitable process would be to obligate the President to consult with the

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[138] Winterton above n 88, 256.
[139] MacDonald above n36 49.
[140] MacDonald above n36 49.
[141] Sir William Blackstone, Commentaries on the Laws of England (17th ed, 1830) vol 1, 163 Winterton above n 88, 255.

Supreme Court in the exercise of his or her reserve powers. This approach is suggested by Angela MacDonald and the Republican Advisory Committee. [142]

While there are inherent difficulties with codification it is certainly preferable than allowing the reserve powers to be undefined. There is a great need for urgency considering that an elected president is more likely to be partisan and will have a greater public mandate. In regard to a democratically elected president the codification of the powers seems the suitable option.

D Divesting the Powers to Parliament

In considering what powers a president should have it is important to ask whether there should be any powers vested with the position at all. The parliament democracies of Europe have predominantly divested their presidents of all reserve powers. The Head of States of Japan and Sweden have no discretionary constitutional powers, while the Presidents of Austria, Ireland, Germany, Italy and Israel only have residual reserve powers.

In such European constitutions the reserve powers have been divested from the President and entrusted within Parliament. In contrast to Commonwealth countries, European constitutions do not perceive the Head of State as a constitutional guardian, and hence do not impart the position with powers to dismiss Prime Ministers or Government. Europe has, instead, preferred to vest such powers in parliament as a representative of the people as it is believed to be a suitable organ to determine such powers. Their constitutions essentially adopt a more democratic perspective, entrusting critical political decisions to parliament, believing that parliament is cable of resolving political crisis.[143]

In European countries the Prime Minister is usually appointed by the Legislature through a vote of investiture. There are two forms of investiture

[142] Macdonald above n 96, 14.
[143] Winterton above n88, 255.

vote, a positive and a negative investiture vote. Germany has a positive investiture vote, where to take office a Government must obtain a majority support in parliament. Sweden has a negative investiture where a government takes office unless voted down by the majority vote. [144] In Sweden the Speaker of the House acts as a formature, facilitating the formation of a Government.[145]

In European parliamentary republics, a Prime Minster or Government can be dismissed if parliament passes a motion of no-confidence. In the German constitution it specifies that there can only be a constructive vote of no confidence. A constructive vote of no confidence requires that a Chancellor's government can only be brought down if assembly has selected a Chancellor to replace the incumbent. The purpose of a constructive no confidence vote is to prevent legislatures from acting destructively without thought to its successor. [146] Germany also restricts the Prime Minister (Chancellor) from dissolving Parliament and seeking a new election. The Chancellor can only dissolve Parliament and seek new elections if the Chancellor has lost a vote of confidence.[147] Such rules are designed to ensure Government longevity and stability.

Should New Zealand, having adopted Germany's electoral system, also adopt its rules for forming and dismissing Government? The adoption of such a system would have certain advantages. Such a system would free the President of having to be concerned with the formation and dismissal of government, allowing the President to focus on performing his or her ceremonial and community functions. The exercise of the reserve powers in the formation of, or the dismissal of a Government has, political repercussions which can tarnish the position.

Divesting the reserve powers away from the President will rid the position of the role of constitutional guardian. As New Zealand has no

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[144] Hague and Harrop above n 8, 276.
[145] Hague and Harrop above n 8, 276.
[146] Hogue and Harrop above n 8, 278.
[147] Hogue and Harrop above n 8, 278.

supreme Bill of Rights by which a Court can strike down unconstitutional laws or executive decisions, the role of a Head of State as a constitutional backstop is a vital part of our constitution.

Divesting the President of any reverse powers will not only rid the constitution of its constitutional guardian but will rid the Parliament of an adjudicator. The President will have no power to intervene in Parliament if there is a political impasse which has resulted in legislative gridlock. It is questionable whether the New Zealand Parliament is responsible enough to manage itself without ending in deadlock.

In New Zealand there could be dangers in applying the representative electoral system of MMP which determines the make up of the House, but then does not adopt the regulations which regulate the German Parliament. Whether New Zealand Parliament will be unstable due to the lack of these rules can only be made clear with time and after further observation.

E The Royal Prerogative

In New Zealand, becoming a republic an important issue is how the royal prerogative will be affected by the deposing of the Monarchy. New Zealand, as a former colony, inherited the royal prerogative from the United Kingdom. These prerogative powers include: powers over foreign affairs, the power to declare war and make peace, the ability to conduct inquiries and enter into contracts,[148] the appointment of Ministers and the proroguing Parliament.[149]

The removal of the Monarch will also remove the common law basis of the Crown prerogative. The removal of the royal prerogative would

[148] G Winter, *Parliament the Executive and the Governor General*, Melbourne University Press, 1986) 6.
[149] Phillip Joseph *Constitutional and Administration Law in New Zealand* (4th ed, Wellington, Brookers, 2004) 22

detrimentally affect the effective working of government and hence should be preserved.

There are two proposed methods by which the royal prerogatives can be preserved. Firstly, the prerogatives could be codified to vest in the executive of the republic. However all attempts to define the prerogatives of the Crown have only very met with only limited success. An attempt to precisely define the prerogatives only serves "to limit their flexibility and adaptability."[150]

The second way to preserve the prerogative powers would be to simply transfer the prerogative powers to the new head of state. Such a provision can be found in the Irish Constitution. The Irish Constitution article 49 provides:

All powers, functions rights and prerogatives whatsoever exercisable in or in respect of Saorstat Eireann immediately before the 11th day of December, 1936, whether in virtue of the Constitution then in force or otherwise by the authority in which executive power of Saorastat was then vested are hereby declared to belong to the people.[151]This provision would preserve the prerogative without the problem of definition.

VI CONCLUSION

The establishment of a New Zealand republic is considered by many commentators to be inevitable. It is a belief that is confirmed by the growing support of the general public for a republic. However, as Angela MacDonald has pointed out, New Zealand's jurisprudence on becoming republic is

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[150] Angela Jane MacDonald Constraining A President- A Republican Challenge for Australia and New Zealand (LLM Research Paper, Victoria University of Wellington) 2005 40.

"fledgling and republican scholarship is limited."[152] Presently constitutional debate has focused on possible obstacles and the procedural requirements of establishing a republic. The purported constitutional barriers, under closer observation, are found not to have substance. This paper concludes that there is no constitutional barrier which prevents New Zealand from becoming a Republic.

If New Zealand is to make the constitutional jump to become a republic then there needs to be considerable public discussion about what type of republican constitution it would prefer. This is not simply a moral imperative but also a legal one. For the Judiciary to accept any constitutional reform it will have to determine the 'will of the people.' Certainly the best way to promote debate and to ascertain the will of the people is to hold a national referendum.

In the consideration of these options set out in a republican referendum the role of the future president needs to be carefully considered. This essay stresses the interdependence between the aspects of a presidential role. The manner of appointment, dismal and the powers vested with in the President are interconnected in ways that on first impression are not obvious. The legislator who will define the role of a New Zealand president should refrain from considering factors separately, believing they options are simply interchangeable. The faults of such an abstract approach can be seen in Australian referendum proposal.

Therefore in consideration of the role of New Zealand president it is necessary to consider all factors; the process of the appointment, the process of dismissal and what powers that should vested with the President. Given the popularity of a system where a president is appointed by general election it would seem highly likely that a New Zealand will have a President appointed by a general election. A president-elect would have a considerable democratic mandate and would most probably be politically affiliated. There

[152] Macdonald above n 96, 14.

is, therefore, a great urgency to restrain him or her from the misusing the reserve powers. Such misuse can only be prevented if the reserve powers are codified, partial codified

The adoption of a republic will not be a fundamental change to New Zealand's form of government. It will, though, be a constitutional change and for this reason great care needs to be taken. Establishing a republic will grant New Zealand a New Zealand Head of State; it would seem prudent, therefore, that the New Zealand public choose what role that President has.

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