JANE HUBBARD

THE PRESIDENT OF THE REPUBLIC OF IRELAND: SOME LESSONS FOR CONSTITUTIONAL REFORM IN NEW ZEALAND

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I INTRODUCTION

"Public sentiment notwithstanding, a number of commentators have speculated that a New Zealand republic is inevitable..."[1] The move towards republicanism may not yet have gained momentum in New Zealand, but it seems clear that at some point its time will come. In the ongoing discussion regarding New Zealand's constitutional arrangements, the issue of republicanism must be addressed. In this regard, two questions need to be addressed: should New Zealand become a republic? and what form should a New Zealand republic take? This paper addresses the second of those two questions. Harris suggests "the prevailing view is that a President, who would not only step into the shoes of the Monarch, but would also assume all the powers of the Governor-General, should replace the Monarch".[2]

In discussing the form that a New Zealand Republic should take, it is necessary to consider the form and role of the Head of State. Currently, the Head of State in New Zealand is the Sovereign, with the Governor-General as the Sovereign's representative in New Zealand, but in a republic, that role would have to take a new form.

The Constitution of Ireland (Bunreacht na hÉireann) continues the system of Cabinet Government handed down from England, with a President in the place of the Monarch as the Head of State.[3] In 1995, Philip Shannon suggested: "the Republic of Ireland provides a model for a republican system of government that could be conceivably be adopted for use in New Zealand".[4] He argued:[5]

> The basis for choosing the Irish Republic is that it is a nation with a Westminster style executive government. In addition, it has a non-

[1] Noel Cox and Raymond Miller "Monarchy" in Raymond Miller (ed) *New Zealand Government and Politics* (3 ed, Oxford University Press, Melbourne, 2003) 50.
[2] V Harris "The Constitutional Future of New Zealand" [2004] NZLR 269, 299-300.
[3] Although the Constitution does not anywhere specifically state that the President is the Head of State, it is generally accepted that is what the position represents.
[4] Philip J Shannon "Becoming a Republic – Law Reform Options for New Zealand" LLM Research Paper, VUW, 1995, 35.
[5] Shannon, above n 4, 32.

executive president who fulfils a similar role to the New Zealand Governor-General.

The Irish model is indeed useful to consider because of these similarities. However, it seems necessary to further consider the Irish model of the Head of State to assess its suitability for New Zealand. Constitutions are, by their nature, products of the society in which they are developed. New Zealand and Ireland, while sharing some similarities, have their own unique political and social environments. This paper examines the Irish presidential model and the current role of the Governor-General in New Zealand and considers the suitability of such a model for New Zealand.

II SOCIAL AND POLITICAL BACKGROUND

A Population and Economy

The preliminary population total for the 2006 census of Ireland was 4,234,925. The average annual rate of population increase in the 2002-2006 period was two percent, which is the highest on record.[6] New Zealand has an estimated resident population of 4.14 million (at 30 June 2006). Permanent and long-term arrivals exceeded departures by 10,700 in the year to June 2006, an increase of one percent.[7]

The populations of Ireland and New Zealand are similar in size. Both New Zealand and Ireland are reliant on immigration for population growth. Immigration to Ireland is remarkably higher than to New Zealand, largely due to its membership of the EU (47 percent of immigrants to Ireland came from EU countries in the year to April 2005[8]). Therefore, the two countries are increasing in cultural diversity, although in significantly different ways.[9]

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[6] "Census 2006 Preliminary Report" (Central Statistics Office, Government of Ireland, 2006) <http://www.cso.ie/census/documents/2006PreliminaryReport.pdf> (last accessed 25 August 2006).

[7] "National Population Estimates – June 2006 Quarter" (Statistics New Zealand, 9 August 2006) <http://www.stats.govt.nz/products-and-services/hot-off-the-press/national-population-estimates/national-population-estimates-jun06qtr-hotp.htm> (last accessed 28 August 2006).

[8] Over a third of immigrants (38 percent) were nationals of the ten new EU accession states, that joined the EU on 1 May 2004, 17 percent of immigrants were from Poland, while nine percent were from Lithuania: "Population and Migration Estimates" (Central Statistics Office, Government of Ireland,

Irish society is considerably different from that of New Zealand. The Republic was founded on Roman Catholic principles. It was only in 1972 that Article 44.1.2, which recognised "the special position of the Holy Catholic and Apostolic Roman Church as the guardian of the faith professed by the great majority of the citizens", was removed from the Constitution.[10]

B Political Situation

Irish political culture has been described as "particularly characterized by Catholic dominance, authoritarianism, personalism, and obsessional loyalty".[11] Further, it has been said that there is "a powerful tendency to assume the local morality is universally valid ...[m]inority views can be dismissed as deviant and unworthy of consideration".[12]

It is acknowledged that over the last 15 years, Irish society has changed noticeably. The prohibition on divorce was removed from the Constitution in 1995, albeit after a very divisive campaign and an extremely close referendum result, showing that, although the Catholic Church's influence was steadily weakening,[13] considerable influence remained. Irish society has also diversified due to the high levels of immigration.

The tendency towards conservatism is reflected in Irish politics. The two largest parties, Fianna Fáil and Fine Gael, have very little ideological difference between them. It appears that the only basis for the division between these parties is the opposing sides taken at the time of the formation of the Republic. The Party system has "institutionalized or is the embodiment

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2005) <http://www.cso.ie/releasespublications/documents/population/current/popmig.pdf> (last accessed 28 August 2006).

[9] While many of Ireland's immigrants come from EU countries, New Zealand's immigrants tend to come from the Pacific and Asia.

[10] Fifth Amendment of the Constitution Act 1972.

[11] Basil Chubb *The Government and Politics of Ireland* (1970), quoted in Valerie Bresnihan "The Symbolic Power of Ireland's President Robinson" (1999) 29:2 Presidential Studies Quarterly 250, 255.

[12] J P O'Carroll "Bishops, Knights – Pawn? Traditional Thought and the Irish Abortion Debate of 1983" in Valerie Bresnihan, above n 11, 255.

[13] Lorna Siggins *The Woman who took power in the Park: Mary Robinson* (Mainstream Publishing, Edinburgh, 1997) 181.

of a conflict the occurred in the past" (that is, the civil war 1922-23).[14] Effectively, Ireland has two large centre-right parties that never co-operate. Ideological issues are left to the small or single-issue parties and independents.[15] More recently, those smaller parties have gained in influence. After the last election, in 2002, the Dáil was made up of Fianna Fáil (81 seats); Fine Gael (31 seats); Labour Party (21 seats); Progressive Democrats (eight seats); Green Party (six seats); and Sinn Fein (five seats).[16] That is, the smaller parties hold 26 percent of the seats in the Dáil, while the two major parties hold 74 percent. In comparison, in the 1977 Dáil, Fianna Fáil and Fine Gael held 127 seats, being 86 percent of the available seats.[17] The increase in influence of the smaller parties reflects the gradual change in society, and is made possible by the electoral system.

The Republic of Ireland is divided into 41 constituencies, each of which elects three, four, or five members according to its population. The elections are conducted using the single transferable vote system. This has resulted in a virtual monopoly of government by the Fianna Fáil party since 1937, providing a majority government in 14 out of the first 19 elections.

In New Zealand, the introduction of MMP has led to the two major political parties losing support in favour of the minor parties. In 1993, the two major parties held 95 of the 99 seats. In 2005, eight parties won seats in Parliament: ACT New Zealand (two), Green Party (six), Jim Anderton's Progressive (one), Labour Party (50), Maori Party (four), National Party (48), New Zealand First Party (seven), and United Future New Zealand (three).[18] In both Ireland and New Zealand, the increase in support for minor parties has increased the likelihood of the formation of coalition governments.

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[14] Brian Farrell "The Context of Three Elections" in Howard Penniman and Brian Farrell (eds) *Ireland at the Polls 1981, 1982, and 1987* (Duke University Press, 1997)1, 1.
[15] Farrell, above n 14, 1.
[16] Economist Intelligence Unit - Views Wire "Ireland: Political structure" (3 February 2006).
[17] Cornelius O'Leary *Irish Elections 1918-1977* (Gill and Macmillan, Dublin, 1979) 105.
[18] 2005 Election results <http://www.electionresults.govt.nz/e9/html/e9_part1.html> (last accessed 25 August 2006).

Both Ireland and New Zealand have two official languages.[19] On assuming office, Irish Presidents have chosen to make their declaration in Gaelic rather than English, even where they cannot themselves speak the language. In New Zealand, the present Governor-General, Anand Satyanand, chose to swear the oath in both English and Maori.

C *System of Government*

Ireland is a parliamentary democracy, reflecting its origins in the Westminster system. The President is the Head of State. The functions of that position are similar to those of the Governor-General in New Zealand. He or she acts on the advice and authority of the Government. The President has a largely ceremonial role, much like the Governor-General. Ireland has a system of Cabinet Government (although the word Cabinet is not used in the Constitution). The Taoiseach (Prime Minister) is the Head of Government. The Dáil (lower House) nominates the Taoiseach and approves the nomination of the other members of Government. The Government is responsible to the Dáil for the Departments of State administered by its members. The Taoiseach, Tánaiste (Deputy Prime Minister), and Minister for Finance must be members of the Dáil, as must all Ministers who are not members of the Seanad (Senate, the upper House). Not more than two Ministers may be members of the Seanad.

Bills may be initiated in either House, except Money Bills, which may only be initiated in the Dáil. Once one House has passed a Bill, it is sent to the other House. A Bill passed by the Dáil that the Seanad rejects or that the Seanad passes with amendments to which the Dáil does not agree, or a Bill that is neither rejected nor passed within ninety days by the Seanad, may subsequently be enacted into law by resolution in the Dáil. This resolution requires only an ordinary majority.[20] Therefore the Seanad has no effective power of veto of Bills passed by the Dáil.

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[19] Bunreacht na hÉireann, Article 8; Maori Language Act 1987, s 3.
[20] Article 27; see below V F 3.

III THE ROLE OF THE PRESIDENT

The President is the "ceremonial personification of the State".[21] Article 13.9 makes clear that the President performs most functions on the advice of the Government. The President is the Supreme Commander of the Defence Forces.[22] He or she appoints the Attorney-General on the advice of the Taoiseach, and the Comptroller and Auditor General on the advice of the Dáil.[23] The President also appoints Judges on the advice of the Government.[24] The President has "the right to pardon and the power to commute or remit punishment imposed by any court exercising criminal jurisdiction".[25] The Constitution makes no mention of the President's functions in relation to external relations. Ireland did not leave the Commonwealth until 1948, despite the Constitution being enacted in 1937. Section 3 of the Republic of Ireland Act 1948 provides that:

> The President, on the authority and on the advice of the Government, may exercise the executive power or any executive function of the State in or in connection with its external functions.

However, this provision is not reflected in the Constitution. The All-Party Oireachtas Committee on the Constitution recommended that this provision should be inserted into the Constitution[26], but this has not yet occurred.

The symbolic role of the President is also important. While many of the early Presidents were retired politicians who tended not to be particularly active, in 1990 a new type of President was elected. Mary Robinson ran on the platform "A President with a purpose". At her inauguration, the new President summarised the aims of her Presidency. She wished to unify the country, and to welcome people from all parts of society.[27] Reflecting this, she had

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[21] The All-Party Oireachtas Committee on the Constitution "Third Progress Report – the President" 3 <http://www.constitution.ie/publications/default.asp?UserLang=EN> (last accessed 28 August 2006). ["Third Progress Report"].
[22] Article 13.4
[23] Articles 30.2, 33.2.
[24] Article 35.1.
[25] Article 13.6.
[26] "Third Progress Report", above n 21.
[27] Siggins, above n 13, 127.

representatives of the homeless, people with disabilities and those associated with women's rights on her personal guest list for the inauguration. She also wished to develop "a confident sense of Irishness".[28] As the population diversifies, this becomes more difficult to achieve but more necessary to strive for. The current President, Mary McAleese is the first Northern Irish Catholic President, and her inauguration speech reflected her background. She said:[29]

> … I know to speak of reconciliation is to raise a nervous query in the hearts of some North of the border, in the place of my birth … In Ireland, we know only too well the cruelty and capriciousness of violent conflict. Our own history has been hard on lives young and old. Too hard. Hard on those who died and those left behind with only shattered dreams and poignant memories. We hope and pray, indeed we insist, that we have seen the last of violence. We demand the right to solve our problems by dialogue and the noble pursuit of consensus. We hope to see that consensus pursued without the language of hatred and contempt and we wish all those engaged in that endeavour, well.

The symbolic role has increased in importance during the terms of office of the last two Presidents. Mary Robinson signalled this change with her campaign slogan "A President with a Purpose",[30] and her election on that platform can be seen as a vindication of that role.

A The Role of the Governor-General

In New Zealand, the Governor-General is likewise the ceremonial Head of State. This role includes such duties as the opening of new sessions of Parliament, holding honours investitures, welcoming visiting Heads of State, receiving the credentials of foreign diplomats and attending Waitangi Day commemorations.

In New Zealand, Governors-General have also each made their mark on the office, particularly after it became the convention to appoint New Zealand-born persons to the office. New Zealand's first New Zealand-born Governor-General was Sir Arthur Porritt, who was appointed in 1967.

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[28] Siggins, above n 13, 128.
[29] Mary McAleese "Inauguration Speech" (11 November 1997) <http://www.president.ie/index.php?section=5&speech=6&lang=eng> (last accessed 28 August 2006).
[30] Siggins, above n 13, 127.

Sir Paul Reeves was the first Governor-General of Maori descent. In his farewell speech he spoke about the Treaty of Waitangi, and about Maori and Pakeha relations:[31]

> The Treaty is a framework for a partnership in which Maoris must be able to develop their culture and institutions, just as non Maoris have done, and to use the resources of the nation for this purpose.
> We don't always handle this process very well. Every now and then, we get confusion when people of one culture try to manage the affairs of people of another culture. If we get it right, often we get it right accidentally. We must learn from our experience.
> So name your fears. Move beyond guilt and confusion to mature and responsible action. If losing control frightens you, acknowledge it. If the unfamiliar threatens, or the cost of reconciliation seems too much, acknowledge that.

In 1990, the first female Governor-General, Dame Catherine Tizard, was appointed. Her swearing-in speech reflected the aims she had for her time in office:[32]

> I thank and applaud my predecessor in office, Sir Paul Reeves, who added so much to this debate by his forthright, thoughtful and determined discussion of matters of real importance to New Zealand's development as a truly bi-cultural partnership in an increasingly informed multi-racial community.
> I hope that I, in my turn, can make a contribution to furthering understanding, not only between Maori and Pakeha but also of those issues which polarise: - men and women; north and south; urban and rural dwellers.

However, it may be that Dame Silvia Cartwright was a more proactive Governor-General than Dame Catherine Tizard. At her swearing-in in 2001, Cartwright signalled that she was going to be outspoken on issues that she believed were important:[33]

> Pride in achievements here at home must be more muted. We may lead the world in family violence legislation and policy but at least on the face of it, we are also at the forefront in the perpetration of child abuse, family violence and serious sexual assaults. While there are many reasons for

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[31] Sir Paul Reeves "Commemoration of the Signing of the Treaty of Waitangi" (Waitangi, 6 Feburary 1987) <http://www.gov-gen.govt.nz/media/speeches.asp?type=current&ID=187> (last accessed 28 August 2006).
[32] Dame Catherine Tizard "At her Swearing-in Ceremony" (Wellington, 12 December 1990) <http://www.gov-gen.govt.nz/media/speeches.asp?type=current&ID=48> (last accessed 28 August 2006).
[33] Dame Silvia Cartwright "At her Swearing-in Ceremony" (Parliament House, Wellington, 4 April 2001) <http://www.gov-gen.govt.nz/media/speeches.asp?type=archive&ID=215> (last accessed 28 August 2006).

> these shameful statistics, how can we hold our heads up internationally as peace negotiators and peacekeepers unless we promote and practice peace in our own communities?

Again, in her farewell speech, Cartwright commented:[34]

> Sometimes when I listen to a foreign leader praise our efforts in the environment or our willingness to assist those in war-ravaged countries, I hope that our dark secrets – for they remain hidden to the rest of the world – will never become known internationally. I am concerned that these countries that so admire us might soon learn that we have a terrible rate of family and other violence, that although we have one of the finest, least corrupt Police Forces and Court systems in the world, this violence remains unacceptably high.

It is clear that the words of the fifth Irish President Cearbhall O Dalaigh, at his inauguration in 1974: "Presidents, under the Irish Constitution don't have policies. But ... a President can have a theme",[35] apply equally to Governors-General in New Zealand.

Sir Michael Hardie Boys' contribution was his articulation of the role of the Governor-General in the new MMP environment, which has been acknowledged by his successors as invaluable.[36] The current Governor-General, and the first Governor-General of Fijian-Indian descent, Anand Satyanand said at his swearing-in ceremony:[37]

> There are many families in New Zealand like mine, who share stories of journeys to reach this country. New Zealand's culture and identity is now a blend of Maori, European, Pacific Island and Asian influences. Our heritage is honoured, but new influences continue to come from those who have chosen to belong to New Zealand as the place to which they, as active citizens, will contribute … And let us strengthen, foster and encourage trust among the various communities that make up New Zealand. That will make us strong. Our ambition should be, may I suggest, to go forward on the basis of our communities trusting each other – not blindly, but with good judgement and liberal amounts of information, insight, understanding and goodwill.

The office of Governor-General is an important symbol of nationhood, with each Governor-General bringing his or her own particular perspective. In

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[34] Dame Silvia Cartwright "Address at her State Farewell" (Parliament House, Wellington, 2 August 2006) <http://www.gov-gen.govt.nz/media/speeches.asp?type=current&ID=275> (last accessed 28 August 2006).
[35] Quoted in McAleese "Inauguration Speech", above n 29.
[36] Cartwright "At her Swearing-in Ceremony", above n 33.
[37] The Hon Anand Satyanand "At His Swearing-in Ceremony" (23 August 2006) <http://www.gov-gen.govt.nz/media/speeches.asp?type=current&ID=276> (last accessed 28 August 2006).

Ireland, recent Presidents have taken a similar role. To be such a symbol is an important function of the Head of State. In New Zealand, the Governor-General may be carefully selected to be such a symbol, but where a President is elected, the country is in effect choosing which symbol they wish to represent them. The people may feel more connected to a symbol they have chosen.

IV PRESIDENTIAL SELECTION

A Election Not Selection

Article 12.2.1 of the Irish Constitution states that the President shall be elected by direct vote of the people. The presidential term is seven years. A President may not serve for more than two terms. Since 1937 there have been eight Presidents. On six occasions out of the 13 times a President has been chosen there has been no election because there was only one validly nominated candidate. There has been considerable debate about the desirability of this system. In 2004, the ability of the incumbent President, Mary McAleese, to nominate herself combined with the agreement of all parties in the Dáil not to nominate another candidate ensured the incumbent President was returned unopposed. Only four Presidents have nominated themselves for re-election. Three of these were returned unopposed. Sean O'Kelly was re-elected unopposed in 1952 and Dr Patrick Hillery was re-elected unopposed in 1983. Eamon de Valera nominated himself for re-election in 1966, but another candidate was nominated and an election took place, which de Valera won. Further, there was no contested election between 1973 and 1990 as only one candidate was nominated in each case. It seems that this system results too often in the President being in effect selected rather than elected. This seems to be too much of a compromise. If the President is to be elected, the people should be able to vote in every case; otherwise, the democratic principle of election is not being upheld. This situation results largely from the nomination process.

B Nomination Process

The nomination process is highly restrictive. The restrictions appear to have been designed to avoid the danger that small extremist groups might use the presidential election as a means of getting attention by running a candidate.[38] The nomination process has meant that there has often been only one candidate for the presidency. Where there is only one candidate for the office it is not necessary to proceed to a ballot for that candidate's election.[39] Article 12.4.2 sets out the process for nomination. Every candidate for election must be nominated either by 20 members of the Oireachtas (the legislature, which includes the Dáil and the Seanad), or by the Councils of four administrative counties. In effect, this has meant that the majority party has often been able to put forward a candidate unopposed. It is also of note that between 1945 and 1990, all of the Presidents were members of Fianna Fáil (the dominant political party), and the current President also has Fianna Fáil backing. As Kelly puts it, "the nomination requirement prescribed by Article 12.4.2 has the almost inevitable consequence of preventing the emergence of non-party candidates for election".[40] In 1990, a case was taken to the High Court seeking an injunction to prevent the election from taking place on the basis that the nomination process was contrary to the common good. The case was dismissed because of the plaintiff's delay in initiating it and no opinion was expressed on the argument.[41]

In 1995, the Constitution Review Group considered whether there should continue to be direct elections for the presidency.[42] They noted that the invocation by the President of a presumed mandate for a particular policy could create tensions between the President, Parliament and Government, and that indirect election, by a majority in Parliament or a special electoral college

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[38] Jim Duffy "Appendix 4 – Overseas studies: Ireland" in *The Report of the Republic Advisory Committee An Australian Republic: The Options Volume 2* (1993) Commonwealth of Australia 136.
[39] Article 12.4.5.
[40] John Maurice Kelly, Gerard W Hogan, Gerry Whyte *The Irish Constitution* (3 ed, Butterworths, Dublin, 1994) 52.
[41] *Lennon v Minister for the Environment* in Kelly, above n 40.
[42] Constitution Review Group "The Report of the Constitution Review Group" (Government of Ireland, July 1996) 22 <http://www.constitution.ie/publications/default.asp?UserLang=EN> (last accessed 28 August 2006). [Constitution Review Group].

could obviate this problem.[43] However, they concluded that, as there is no public demand for change, it may be inferred that the people wish to retain their right to vote directly for a President.[44] In fact, it seems the public would be highly unlikely to want to give up their right to vote and to hand over the appointing of the President to politicians. This was made clear in Australia by the referendum on the republican issue, in which it seemed the public would prefer to remain a monarchy rather than hand over the power of appointing the President to politicians. Public opinion is important in a democracy, and the fact that, even if there is a danger of politicising the office, the public would prefer to retain the right to vote must be taken into account. The Review Group also suggested the nomination procedures were too restrictive and in need of democratisation, and that some alternative mechanism ought to be considered.

The Third Progress Report of the All-Party Oireachtas Committee on the Constitution, dealing with the President, was published in 1998.[45] The Group looked at the issue of whether the nomination procedures were too restrictive.[46] They came to the conclusion that there should be reform in this area. They suggested that the provisions for indirect nomination should be altered so that only ten members of the Oireachtas would be required for a nomination. They also suggested that provision should be made for popular nomination. They were concerned that popular nomination could result in "the possibility that the office of President could be demeaned by the nomination of frivolous candidates or endangered by the nomination of inadequately qualified ones".[47] Therefore, they suggested that popular nomination should require nomination by 10,000 citizens. To carry out these recommendations would require amendment of the Constitution, which stipulates that such an amendment must be passed by both Houses of the Oireachtas and by a majority of the voters in a referendum.[48] As of yet, no steps appear to have been taken to implement these recommendations. This could be because,

[43] Constitution Review Group, above n 42, 22.
[44] Constitution Review Group, above n 42 22.
[45] "Third Progress Report", above n 21.
[46] "Third Progress Report", above n 21, 4-9.
[47] "Third Progress Report", above n 21, 6.
[48] Article 46.

despite all the concerns, there do not seem to have been any real problems with the system tending to produce Presidents from a particular party. However, it seems desirable to encourage elections to take place, and a New Zealand model should aim for this goal.

C *A Political President? – The Irish Experience*

In regards to direct election, Harris asserts "party politics would dominate the process, and the elected president would be overtly placed somewhere on the political spectrum".[49]

The President does not appear to have become politicised. The fact that the citizens have often not been able to exercise their constitutional right to vote may in fact have prevented the politicisation of the office. In 1985, David Gwynn Morgan suggested that where a President is elected, the "divisive, nationwide battle" would lead to the President being associated with the party that supported their campaign.[50] Jim Duffy also suggests that the lack of elections "has almost single-handedly helped to ensure that the presidency is not seen as a rival power base to the Government. Presidential elections have been so rare as to ensure the public, for most of the office's history, has been unable to identify with the office."[51]

The 1990 Presidential campaign, which was the first to be contested for 17 years, the first to be contested by three candidates since 1945, and was certainly divisive and controversial, resulted in the election of Ireland's first female President, Mary Robinson (who was nominated by the Labour Party although she was not a member of it). In the last two weeks before the election, Garret Fitzgerald, a former Fine Gael Taoiseach, accused the Fianna Fáil candidate Lenihan of making improper phone calls to the President following the collapse of the coalition Government in 1982 in which he asked the President to invite the leader of Fianna Fáil to form a Government without

[49] Harris, above n 2, 300.
[50] David Gwynn Morgan *Constitutional Law of Ireland: the Law of the Executive, Legislature, and Judicature* (Round Hall Press, Dublin, 1985) 53.
[51] Duffy, above n 38, 136, para 3.8.

an election. Lenihan denied this had occurred. However, three days later, Jim Duffy, a political science postgraduate student and former president of the Fine Gael branch (the author has been unable to clarify whether this is the same Jim Duffy who wrote Appendix 4 of *An Australian Republic: The Options*, but it seems possible) released a tape recording of an interview with Lenihan in which he unambiguously stated that he had made the phone calls. Lenihan continued to deny that the phone calls had been made. The Taoiseach sacked Lenihan from the Cabinet and the party after he refused to resign.[52] Other issues were raked up, with another member of Fianna Fáil alleging that Mary Robinson would allow abortion referral clinics in the President's residence should she be elected. The last newspaper poll before the election showed Lenihan and Robinson at 43 percent each, with Austin Currie, the Fine Gael candidate at 14 percent. What finally determined the election was the STV voting system. Seventy-seven percent of the people who voted for Currie as their first choice, made Robinson their second choice. It was noted that, ironically:[53]

> Mary Robinson was elected not by the left vote, the women's vote, or the 'progressive' vote, but by transfers from probably conservative Fine Gael voters for whom Mary Robinson's chief attraction was that she was not Brian Lenihan and not Fianna Fáil.

Despite the divisive election campaign, Mary Robinson seems to have been considered one of Ireland's best Presidents She was certainly the most active, making numerous public appearances and overseas visits, and the author has not found evidence that the campaign damaged her presidency in any way. There was tension between Robinson and the Taoiseach Charles Haughey, but Robinson appears to have been always aware of her constitutional position and of the need to keep her role free from controversy.[54]

Similarly, after Robinson's resignation in 1997, the presidential election was contested by five candidates, and was eventually won by Mary

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[52] Siggins, above n 13, 138-143.
[53] Jim Farrelly, quoted in Siggins above n 13, 143.
[54] See generally Siggins, above n 13.

McAleese, the first Northern Irish Catholic to hold the office. She was re-elected as President in 2004 without a vote, as she was the only validly nominated candidate.

It appears that until 1990, Presidents were elected and served their terms largely without controversy. Basil Chubb has described the first Presidents as "elderly, inert, and scrupulous in keeping themselves outside and above political argument".[55] The only real problem occurred in 1976 when the President resigned after the Taoiseach refused to disown the public criticism of the President by the Minister of Defence. President O Dalaigh resigned to prevent the office becoming associated with political controversy.[56]

It appears that direct election has not led to the politicisation of the office of President, although the nomination process clearly needs some work to increase the likelihood of the public having the opportunity to vote, in order to avoid the criticism that the Irish President is often selected rather than elected. The office has remained largely ceremonial and above controversy. It may be that the opening up of the nomination process recommended by the Review Group would indeed fix the problems, but this has not yet been tested. What the presidential selection process in Ireland seems to show is that it is not inevitable that direct election leads to politicisation of the office. However, New Zealand's political situation, and the desirability of elections being held in every case, means it is likely that a nomination process such as the one suggested by the Review Group would lead to highly politicised campaigns in New Zealand. Does this in fact matter? The Ireland experience seems to suggest that by keeping the office itself out of politics, the election process may not impact adversely on the presidential office. Andrew Stockley argues that it is a mistake to pretend the holder of the office of Governor-General is divorced from politics: the Governor-General is appointed, by convention, on the advice of Prime Minister, and there is nothing to stop there being a political appointee: "the claim that NZ's governor-general is above and

[55] Basil Chubb *The Government and Politics of Ireland* (2 ed, Stanford University Press, California, 1982) 200.
[56] Neil Collins and Terry Cradden *Irish Politics Today* (3 ed, Manchester University Press, Manchester, 1997) 99.

beyond politics is something of a myth".[57] In 1977, a seemingly political appointment was made, when the National Party Prime Minister, Sir Robert Muldoon, appointed Sir Keith Holyoake to the office. Sir Keith was a long-serving National MP and had been Prime Minister in a National Government from 1960 until 1972. However, as nothing arose during his term to test his impartiality, nothing turned on this point.

D Why Election Rather Than Selection?

As has been noted above, the public appear to prefer to be able to vote for their President rather than leaving the appointment up to politicians. This has been shown in Ireland, and in Australia. The office is important ceremonially, symbolically, and constitutionally. Therefore it is necessary that the office is held by a person who has the appropriate background, knowledge and skills to perform these roles adequately. The danger that a frivolous candidate will be put up and will win can be obviated by the nomination process. The fact that often a single candidate is nominated and therefore no election is held may have helped to keep the office free from politics. However, it seems preferable that, where there is only one candidate, a plebiscite takes place on the election of the single candidate as provided for in Article 60(1) of the Austrian Federal Constitution.[58] Presumably, if the candidate is not approved, another candidate must be nominated and the process repeated. This could potentially be very expensive and time-consuming, and it would be therefore be advisable that a candidate who is unlikely to be acceptable to the public is not put up at all.

The President is not answerable to the Courts or the Oireachtas for the exercise of the functions and powers of the office.[59] Therefore, direct election is also important for accountability. The prohibition on serving for more than two terms causes some difficulty here as, in the second term, the President is

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[57] Andrew P Stockley "Becoming a Republic? Matters of Symbolism" in Luke Trainor (ed) *Republicanism in New Zealand* (The Dunmore Press Ltd, Palmerston North, 1996).
[58] Duffy, above n 38, 137.
[59] Article 8.1.

arguably less accountable as they cannot seek re-election. It may be that this restriction should be removed.

In the New Zealand context, election seems preferable. Nomination should be by members of Parliament. The popular nomination suggested for Ireland is probably unadvisable in the New Zealand context as there seems a real possibility that inappropriate and under-qualified candidates could be put forward. The office ought to be a dignified and responsible one and not everyone who might be nominated by the public would be suitable. It seems likely that great sporting personalities or other well-known persons could easily attain the support necessary for nomination but, in fact, would be unsuitable for the role. Nomination by 20 members of Parliament would enable a number of candidates to be nominated. It seems preferable to encourage multiple candidates and therefore elections. It could be that a convention would be enough to encourage this, or alternatively, some more formal requirement could be put in place to ensure that at least two candidates are nominated in every case. A constitutional convention seems preferable, however, as it may be that situations arise where there is general popular consensus that only one candidate need be nominated.

It is acknowledged that elections may be costly, however, because of the symbolic nature of the office, the lack of judicial accountability, and the constitutional power of the role, elections are preferable to the all-too common situation in Ireland where candidates are declared President without going to the public for a mandate.

V THE POWERS OF THE PRESIDENT

A Formal Powers

The President's powers are largely formal in function. The President summons and dissolves the Dáil on the advice of the Taoiseach (Article 13.2.1). The President appoints the Taoiseach on the nomination of the Dáil (Article 13.1.1) and the other Ministers on the nomination of the Taoiseach

(Article 13.1.2). The President accepts the resignation of any Minister or terminates the appointment of a Minister who refuses to resign, on the advice of the Taoiseach.[60] These are all formal roles, in which no discretion can be exercised. The Constitution Review Group considered whether the President should be given more discretionary powers but concluded "the President should not be given further discretionary powers. The symbolic value of the office derives from the detachment of the holder from partisan politics".[61]

In New Zealand, the great majority of the Governor-General's powers are formal. The Governor-General, by convention, acts on the advice of the executive council. It is only in reserve powers that the Governor-General has any discretion. The reserve powers are generally accepted to be the power to appoint a Prime Minister and the power to refuse to dissolve Parliament.

B Dissolution of the Dáil

Article 13.2.2 allows the President to "in his absolute discretion refuse to dissolve Dáil Éireann on the advice of a Taoiseach who has ceased to retain the support of a majority in Dáil Éireann". This power could have been used on four occasions but in each case dissolution was granted despite the fact the elections had only recently taken place.[62] In fact, on two of the four occasions the Government had not been defeated but wanted to increase its majority.[63]

The test for ascertaining that the Taoiseach has "ceased to retain the support of a majority" is not clear. It may be that a formal vote of no confidence in the Dáil would be necessary. However, as Hogan points out, if this were the test, a Taoiseach who could not command a majority of the Dáil could pre-empt a confidence vote and ask the President to grant a dissolution under Article 13.1. This is because the discretion to refuse to dissolve can only be exercised under Article 13.2.2 if the test is satisfied. Gerald Hogan considered that the phrase does not simply mean a formal vote in the Dáil but

[60] Article 13.1.3.
[61] "Third Progress Report", above n 21, 10.
[62] Morgan, above n 50, 72.
[63] Morgan, above n 50, 72.

may also extend to other situations where "by reason of developments inside and outside the House, it is clear the Taoiseach has lost his majority".[64] Professor James Casey says "the view generally held is that a dissolution can be refused only if an alternative government is feasible, can be assured of a working majority and can be expected to carry on for a reasonable period of time".[65] It seems, however, that the President is not able to participate in the formation of a new Government, but must wait until the Dáil nominates a new Taoiseach. The President cannot "send for" another Deputy to form a Government even if it is clear that that Deputy would be able to command a majority of the Dáil.[66]

If a Taoiseach ceases to retain the support of a majority of the Dáil and requests a dissolution, which the President declines to give, the Taoiseach must resign.[67] Following the resignation, it is up to the parties in the Dáil to sort out who is to be the next Taoiseach. Once these negotiations are concluded, the Dáil will nominate a new Taoiseach and the President will then formally appoint that person.

1 Constitution Review Committees – reform options

The Constitution Review Group considered these issues in its 1996 report.[68] The Review Group looked at the options of introducing a fixed-term Dáil or a constructive vote of no confidence.

a Fixed-term Dáil

The introduction of a fixed-term Dáil could be done simply by deleting Articles 13.2.1, 13.2.2 and 16.3.1 of the Constitution, that is, all the provisions for dissolving the Dáil, and then replacing Article 16.5 with a new Article

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[64] Gerald Hogan "Issues Arising from the 1989 General Election" (1989) Irish Jurist 157, 167.
[65] James Casey *Constitutional Law in Ireland*, cited in "Third Progress Report", above n 21, and in Kelly, above n 40 (the writer was unable to obtain a copy of this book).
[66] Kelly, above n 40, 55.
[67] Article 28.10 "The Taoiseach shall resign from office upon his ceasing to retain the support of a majority in Dáil Éireann unless on his advice the President dissolves Dáil Éireann and on the reassembly of Dáil Éireann after the dissolution the Taoiseach secures the support of a majority in Dáil Éireann."
[68] Constitution Review Group, above n 42.

stating "[e]lections to Dáil Éireann will take place every four years, according to a schedule regulated by law". The Review Group believed that a fixed-term Dáil would remove the possibility of a Government calling a general election while still undefeated in the hope of strengthening its position, and would remove the uncertainty that seems to prevail in the final twelve to eighteenth months of a Dáil term because the Government is looking for the best time to go to an election. They noted, however, that a fixed-term Dáil would be less democratic as it involves less consultation with the electorate. The other difficulty would be if a political deadlock were to arise in which no Government could be formed from the existing Dáil. Therefore it would be necessary to provide for dissolution in this situation. The Review Group suggested a provision for dissolution, "after a Government resignation or defeat, if no Taoiseach had been elected after, say, sixty days".[69] They noted that fixed-term Parliaments are a rarity and that "the Norwegian experience is not persuasive as to the superior merits of a fixed-term system".[70]

b Constructive vote of no confidence

The constructive vote of no confidence was considered more favourably by the Review Group. "A constructive vote of no confidence ... forces the legislature to agree upon a viable alternative before it can defeat the Government".[71] This could be introduced by amending Article 28.10 to include the words "demonstrated by the loss of a motion of no confidence that, at the same time, nominates an alternative Taoiseach". The Review Group noted the possibility of the Taoiseach resigning in anticipation of losing a constructive vote of no confidence. They suggested that a provision could be inserted into the Constitution that prevented the Taoiseach resigning when a constructive vote of no confidence had been tabled. This option would address the issue of when the President could refuse to dissolve the Dáil, as it would only be when a vote of no confidence had not made clear a new Government could be formed that the President would dissolve the Dáil. It also addresses the issue of presidential interference in government formation. The Review

[69] Constitution Review Group, above n 42, Article 28 Issue 6 (b).
[70] Constitution Review Group, above n 42, Article 28 Issue 6 (b).
[71] Constitution Review Group, above n 42, Article 28 Issue 6 (a).

Group considered the option of giving the President a role such as a Governor-General has in the process of identifying a new Prime Minister. They considered the constructive vote of no confidence was a preferable option. This prevents the President becoming involved in politics.[72]

It seems that the constructive vote of no confidence may be a sensible requirement. It would provide greater certainty. If a Government has lost the support of the majority of the Dáil, a constructive vote of no confidence would signal that another Government could be formed. Whereas, following a confidence vote, if no Government could be formed, but the Taoiseach had lost the confidence of the Dáil, the Taoiseach would have to advise the President to dissolve the Dáil and the President would have to accept that advice.

c Clarification of President's discretion

The All-Party Oireachtas Committee on the Constitution 1996-1997 (the O'Keefe Committee) considered the constructive vote of no confidence. They concluded that there was a danger in the option:[73]

> A weak government formed following a general election may seek to avoid a constructive vote of no confidence by pandering to the interest of the opposition and a weak government which has come into power following the success of a vote of no confidence may seek to avoid all difficult issues in order not to provoke another constructive vote of no confidence.

With due respect, this seems to be a weak argument. There appears to be no more danger of this occurring than in the present situation where there is always the threat of a confidence vote. The Committee suggested instead that, where a Taoiseach who has lost the support of the Dáil, the President should only grant a dissolution if, within ten days from the vote of no confidence, the Dáil has not elected a new Taoiseach. They recommended that certain factors would be required to indicate that the Taoiseach had lost the support of the Dáil. They also suggested that the President should have the power to summon the Dáil

[72] Constitution Review Group, above n 42, Article 28 Issue 6 (a).
[73] In "Third Progress Report", above n 21.

within three days to vote on a motion of confidence where the President deems the Taoiseach may have ceased to retain the support of the Dáil.

d Arguments for retaining the status quo

The Third Progress Report of the All-Party Oireachtas Committee on the Constitution also considered these issues. The Committee was concerned that the definition of the circumstances in which the President might refuse dissolution would lead to a practice whereby Presidents refused dissolution as a matter of course. This could create an expectation that, in certain circumstances, there would be a refusal and failure to refuse could be viewed as a political act in itself. This would increase the political involvement of the President.[74] They did not endorse the idea of a constructive vote of no confidence or of giving the President power to intervene in Government formation. Their reasoning was that "the government formation process in Ireland has not, broadly speaking, been a perplexing one. The committee therefore recommends no change."[75] While this argument is perhaps a little short-sighted, part of the conclusion seems to be correct. The President should retain the discretion to decide when dissolution should be refused. The uncertainty surrounding when the Taoiseach has "ceased to retain the support of a majority of the Dáil" should not be resolved by definition. Increased definition detracts from the utility of the discretion. It does seem advisable, however, to follow the O'Keefe Committee's recommendation that the President should be given the power to summon the Dáil for a vote of confidence within three days of deeming that the Taoiseach may have lost the confidence of the Dáil. The President already has the power to convene a meeting of the Dáil after consultation with the Council of State,[76] and a provision could also be included to allow the President to require a vote of confidence.

[74] "Third Progress Report", above n 21.
[75] "Third Progress Report", above n 21.
[76] Article 13.2.3.

2 *The Governor-General's power to refuse to dissolve parliament*

In New Zealand, the Governor-General has, as one of the reserve powers, the power to refuse to dissolve Parliament. The Governor-General may call on the leader of the party or coalition that can command a majority in the House to invite them to form a Government. Although this power has never been used in New Zealand, it does seem possible. It has been said that there is no requirement that the Governor-General must consider whether another party could form a Government.[77] However, a former Governor-General, Sir Michael Hardie Boys suggested that, if the National-New Zealand First coalition had fallen apart in 1997 and Jenny Shipley had advised him to dissolve Parliament, "if it was very clear a different alignment in the existing parliament could govern, then the request is likely to be refused and that other alignment appointed to govern".[78] It is unclear exactly what the Governor-General must do in this situation. If the Prime Minister had lost confidence but refused to resign – an unlikely situation, but a possibility – it is not clear whether the Governor-General could dismiss him or her. Under the Irish model, the situation would have been more certain. If the Prime Minister requested a dissolution in these circumstances, the President could have refused to dissolve Parliament. The Prime Minister would therefore have had to resign,[79] which means that the entire Government is deemed to have resigned.[80] The President would then have waited until a new Prime Minister was nominated by Parliament. On the nomination of a new Prime Minister, the President would formally appoint them. Note that this situation would only occur where it was clear another Government could be formed. If this were not clear, the President would agree to the dissolution.

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[77] Angela Jane McDonald "Constraining a President: a Republican Challenge for Australia and New Zealand" LLM Research Paper, VUW, 2005, 36.
[78] Rt Hon Sir Michael Hardie Boys "'Nodding Automaton' Some Reflections on the Office of Governor-General" (2001-2002) 8 Canterbury L Rev 425, 431.
[79] Article 28.10.
[80] Article 28.11.1.

3 *The Cook Islands*

In July 2006, a constitutional crisis of sorts occurred in the Cook Islands. This "crisis" is pertinent to this paper for a number of reasons. The High Commissioner of the Cook Islands (the Queen's representative in the Cook Islands) has the powers set out in the Cook Islands Constitution. Article 37(3) of the Cook Islands Constitution states:

> The High Commissioner may at any time, by notice published in the *Cook Islands Gazette*, dissolve the Legislative Assembly if he is advised by the Premier to do so, but shall not be obliged to act in this respect in accordance with the advice of the Premier unless the High Commissioner is satisfied, acting in his discretion, that in tendering that advice the Premier commands the confidence of a majority of the members of the Assembly.

A by-election was held in which the Government lost one seat, meaning that they no longer had a majority in the House. The Premier advised the High Commissioner to dissolve Parliament. The High Commissioner accepted that advice and decided "with immediate effect" to dissolve Parliament. The High Commissioner said that his reason for accepting the advice was that he was satisfied that "under article 37(3) of the Constitution, I have a discretion as to whether or not I am obliged to act upon that advice".[81] The High Commissioner was widely criticised for this decision. In a letter to the editor, one critic said:[82]

> I did not see or read anyone disputing the right of the [High Commissioner] under Article 37(3) of the Constitution to dissolve Parliament and I for one would not do that either. But the fact of the matter is the [High Commissioner] did not take steps to ensure that the advice given to him by the PM was correct … It is obvious to everyone that the [High Commissioner] acted prejudiciously and was so politically biased towards the PM and his government ... He was so afraid to consult with the above leaders and too frightened to test his concern(s) in Parliament that he made a desperate decision to dissolve Parliament before Jim was ousted in a vote of no confidence.

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[81] Charles A Sweeney QC "The Constitutional crisis in the Cook Islands: An Introduction to the Issues" (Cook Islands Bar, 2006) <http://www.cookislandsbar.com/> (last accessed 28 August 2006).
[82] Tupou Faireka, MP Tupapa Marearenga "Letter to the Editor" (Cook Islands Herald, 5 August 2006) <http://www.ciherald.co.ck/articles/h314i.htm> (last accessed 28 August 2006).

After the High Commissioner announced that he was dissolving Parliament, the members of the Opposition and the Speaker gathered in the parliamentary chamber and the Speaker purported to open a session of Parliament during which a motion of no confidence was carried by all present. No members of the Government were present. The question therefore arose as to whether this was a valid parliamentary session or not. Members of the Opposition threatened to take the High Commissioner to court. It was discussed whether or not this was possible.[83] However, it appears that, with time, the issue has gone away. A new election was held in September 2006. At the time of this paper, it is not yet clear which party has won the most seats, with special votes still to be counted. It seems that Article 14(3) of the Cook Islands Constitution would address the issue in any case. That Article provides:

> (3) The appointment of the Premier shall also be terminated by the High Commissioner—
>
> (a) If the Premier ceases to be a member of the Legislative Assembly for any reason other than the dissolution of the Assembly; or
>
> (b) If the Legislative Assembly passes a motion in express words of no confidence in Cabinet or if Cabinet is defeated on any question or issue which the Premier has declared to be a question or issue of confidence:
>
> Provided that, if after the passing of such a motion or after that defeat the Premier so requests, the High Commissioner, acting in his discretion, may dissolve the Legislative Assembly instead of terminating the appointment of the Premier …

The proviso to Article 14(3)(b) suggests that the High Commissioner was acting within his discretion. Even if the confidence vote in the House was valid, the High Commissioner could have dissolved the Legislative Assembly, as it would be within his discretion to do so.

If this situation arose in New Zealand, the Governor-General would have discretion as to whether or not to dissolve Parliament. The Governor-General could have invited another member to form a Government. There is strictly no convention that he must consider this option, as the situation has not yet occurred in New Zealand, but it seems the Governor-General should look to invite the formation of a new Government if that is possible. However, if

[83] Sweeney, above n 81.

the Governor-General disregarded the Prime Minister's advice to dissolve Parliament, the Prime Minister would resign, leaving the Governor-General without a Government. The Governor-General must have a Government, and therefore, the Governor-General would have to be certain another Government could be formed.

Under the Irish model, what would happen in this situation would depend on the interpretation of the phrase "ceased to retain the support of a majority" of the House. This has never been considered, as the President has never exercised the discretion not to dissolve. If the phrase requires a formal vote in the Dáil, the President would have had no choice but to dissolve the House on the advice of the Premier. If it is more discretionary than that and allows the President to make a judgement on where the support of the majority lies, the President may refuse to dissolve the House, but is under no obligation to do so.

The Irish model provides some degree of certainty that is lacking in New Zealand's convention model. It does not provide all the answers in this situation, but is clearer to some extent. It does seem that the President retains some discretion in deciding where the support of the majority of the House lies, which is very important. The very nature of politics means that some discretion is required as no two "crises" will be exactly the same. The retention of discretion allows these situations to be dealt with as appropriate in the circumstances.

C Appointment of Prime Minister and Cabinet

As has been noted, while the President formally appoints the Taoiseach, there is no discretion attached to this function. Article 13.1.1 provides "[t]he President shall, on the nomination of Dáil Éireann, appoint the Taoiseach, that is, the head of the Government or Prime Minister". Article 13.1.2 then provides "[t]he President, shall, on the nomination of the Taoiseach with the previous approval of Dáil Éireann, appoint the other

members of the Government". It seems that, as there is no discretion attached to these roles, there have been no problems with them.

The Constitution Review Group considered whether the President should have a role in the formation of a new Government. They note that the lack of discretion in this area is "quite unusual in parliamentary government systems, and underscores a desire to maintain a position for the President impeccably remote from party politics".[84] They did, however, acknowledge that there may be difficulties where a new Dáil assembles and no party or group of parties has an overall majority, but they concluded that the intervention of the President would not secure a Government more quickly. The All Party Committee of the Oireachtas agreed with this conclusion in the Third Progress Report.

The Governor-General has the power to appoint the Ministers of the Crown (Letters Patent, clause X) including the Prime Minister, although this is not specifically provided anywhere. By convention, the Governor-General will appoint the leader of the party or coalition that has the support of a majority of the House. John McGrath QC suggests:[85]

> ... one area where it is well recognised that constitutional convention provides only limited guidance to the correct exercise of legal powers concerns the Governor-General's power to appoint the Prime Minister following a general election. Where it is unclear where the support of the new House of Representatives will lie, the Governor-General retains a discretion as to whom to appoint.

However, Governor-General, Hardie Boys stated:[86]

> in a parliamentary democracy such as ours, the exercise of the powers of my office must always be governed by the question of where the support of the House lies. If that is unclear, I am dependent on the political parties represented in the House to clarify that support, through political discussion and accommodation.

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[84] Constitution Review Group, above n 42.
[85] John McGrath, QC "The Crown, the Parliament and the Government" (1999) 7 Waikato Law Review <www.knowledge-basket.co.nz> (last accessed 25 August 2006).
[86] Hardie Boys, above n 78.

By convention, the Governor-General appoints as Prime Minister the person who can command a majority of the House. It has been suggested that under MMP, following an election, it will be more likely that it will not be clear who can command a majority of the House. Caroline Morris suggested that the Governor-General would need to use discretion in this situation to appoint a Prime Minister.[87] In reality, however, Sir Michael Hardie Boys made it clear that a Governor-General would wait for Parliament to sort it out. He referred to the Irish model, and said:[88]

> In all of the countries examined, it is very clear that the real responsibility for forming a government rests with the political parties. That political parties provide this vital link between the democratic election process and the formation of a government has long been the case in New Zealand. MMP has made their importance more apparent. It is political parties which, through negotiation, must find a viable government in the Parliament. No-one else can arrive at the solution for them, or impose an outcome on them.

Hence the question of how the Governor-General ascertains who to appoint as Prime Minister is not clear. The Irish Constitution removes any discretion from the President and places the issue in the hands of the Dáil. In effect, this is what happens in New Zealand, as the Governor-General will only appoint as Prime Minister the person who can command the majority of the House.

The Irish model would be suitable for New Zealand, as it is, by default, what happens anyway. There do not seem to be any problems associated with this model that could not arise under the current system.

Currently, Parliament must be summoned within six weeks of the return of the writs after an election.[89] It has been pointed out, however, that this is not a legal constraint on the time taken to form a Government. In theory, it is argued, Parliament could assemble, MPs could be sworn in, the Speaker appointed, "and then the House could adjourn with the issue of who

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[87] Caroline Morris "The Governor-General, the Reserve Powers, Parliament and MMP: A New Era" (1995) 25 VUWLR 345, 354.
[88] Rt Hon Sir Michael Hardie Boys "The Harkness Henry Lecture: Continuity and Change: The 1996 General Election and the Role of the Governor-General" (1997) 5 Waikato LR .
[89] Constitution Act 1986, s 19.

will form the next government being left until some other occasion".[90] However, this has never happened. The requirement to meet within a certain period of time provides a timeframe that political parties work towards in forming a Government. There is no such provision in the Irish Constitution. However, it would seem sensible to retain this requirement if the Irish model were to be followed in New Zealand. This requirement tends to prevent a defeated Government continuing in office in a caretaker role for any protracted period of time. Under the Irish model, the Government could not be formed until Parliament had been summoned but, if it was clear who would command a majority of the House, Parliament could be summoned immediately. In the Irish model, the outgoing Taoiseach must advise the President to summon the Dáil as the outgoing Taoiseach remains in office until the Dáil has nominated a new Taoiseach and the President has formally appointed them. The requirement that Parliament be summoned within six weeks of the return of the writs would also prevent the (unlikely) situation where a defeated Prime Minister did not advise the President to summon Parliament even though a new Government could be formed.

1 The 2005 election – New Zealand

Following the 2005 election, it was not immediately clear who would be able to form a Government. The provisional results indicated that Labour held 50 of the 122 seats, while National held 49. Based on these results it was possible that National could have formed a Government in a coalition or supply agreement with New Zealand First (seven seats), and a combination of the Maori Party (four seats), United Future (three seats) and ACT New Zealand (two seats). With only one seat less than Labour, it seemed possible that National could have formed a Government. However, the final results showed National only had 48 seats, and the total number of seats was 121. Labour held 50 seats, with Jim Anderton's Wigram seat bringing the total to 51. The final results were not available until 18 October 2005, although the election occurred on 17 September. The last day for the return of the writs was

[90] Jonathan Boston, Stephen Levine, Elizabeth McLeay, Nigel S Roberts and Hannah Schmidt "Caretaker Government and the Evolutions of Caretaker Conventions in New Zealand" (1998) 28 VUWLR 629, 639.

6 October, meaning there were six weeks from that date for Parliament to sit. Parliament was opened on 7 November. Even in this tight timeframe, with complex negotiations among a large number of parties, the parties managed to complete negotiations and reach agreement within a matter of weeks, allowing Parliament to open within the six-week timeframe and a Prime Minister to be appointed.

D Codification of the Reserve Powers

The Irish system is based entirely on a written Constitution. New Zealand's system is based on a hybrid of convention and law. Arguments have been made both for and against the possibility of codification of the Governor-General's reserve powers. Evatt argued that codification would provide certainty.[91] This view has been supported by George Winterton.[92] However, Quentin Baxter suggests that codification of the reserve powers is impossible. He suggested a Parliamentary resolution instead.[93]

One of the main arguments against codification seems to be that if the powers are set down in writing, they become justicible. Caroline Morris suggested that:[94]

> The effects of codification are … questionable. From a strict separation of powers viewpoint it does not seem desirable to have political questions of the highly sensitive nature which the Governor-General seeks to answer when she exercises the reserve powers to become the province of the judiciary.

The case most often cited in this context is *Adegbenro v Akintola*.[95] In that case, the Governor of Nigeria dismissed the Premier on the basis of a letter signed by a majority of the members of the House. The Constitution stated "the Governor shall not remove the Premier from office unless it appears to

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[91] H V Evatt *The King and His Dominion Governors* (2 ed, 1967) reprinted in *Evatt and Forsey on the Reserve Powers* (Legal Books, NSW, 1990).
[92] George Winterton *Parliament, the Executive and the Governor-General* (Melbourne University Press, Melbourne, 1983).
[93] R Q Quentin-Baxter "The Governor-General's Constitutional Discretions: An Essay Towards Redefinition" (1980) 10 VUWLR 289.
[94] Morris, above n 87, 369.
[95] *Adegbenro v Akintola* [1963] AC 614 (PC).

him that the Premier no longer commands the support of the majority of the members of the house of Assembly". It was argued that the Constitution intended to embody the convention followed in the United Kingdom that support should be judged on the basis of a vote in the House. The Privy Council, however, interpreted the meaning of the words in the Constitution, and held that those words overrode any convention. On the basis of the words of the Constitution, the Governor had not acted unconstitutionally. This case is held up as a demonstration of the danger of codifying the powers, as they then become subject to principles of statutory interpretation, which are not suited to discussions of these important reserve powers. Professor Quentin Baxter argues "there is a high risk that the convention will suffer a deformity in the course of transcription, or lose its ambience when judicially interpreted".[96]

However, it is not true to say that codification leads automatically to the judicial examination of the powers. In Ireland:[97]

> the President shall not be answerable to either House of the Oireachtas or to any court for the exercise and performance of the powers and functions of his office or for any act done or purporting to be done by him in the exercise and performance of these powers and function.

Therefore, the Courts will not examine the meaning of the words of the Constitution in relation to the President's powers. The President is not accountable to the Courts or to the Legislature, but is accountable to the electorate (at least, if the President intends to stand for a second term). If the Irish presidential model were followed in New Zealand, it seems that it would be wise to keep the exercise of the President's powers out of the realms of the Courts.

The other argument against codification is that as "convention implies a true consensus, it is seen to be changeable only by another consensus".[98] This argument is also addressed to some extent by the Irish model. The President's powers are set out in the Constitution. The Constitution can only

[96] Baxter, above n 93, 305.
[97] Article 13.8.1.
[98] Baxter, above n 93, 305.

be amended by referendum of the people at which one-third of the registered voters vote.[99] Therefore, if the powers of the President were to be changed, that could only be achieved by a majority of the registered voters voting for it. Although this does not produce absolute consensus, it is closer to a consensus than if these powers could be amended by Act of Parliament.

Therefore, if the Irish model were to be followed in New Zealand, it may be advisable to have a written Constitution that is not an Act of Parliament and that can only be amended by referendum, as they have in Ireland. It is not clear that this is legally possible. The Republic of Ireland was able to pass the Constitution in the way that it did because, as a newly independent state, there was a "clean slate" that allowed the framers of the Constitution to enact the Constitution as they wished. It is unlikely that New Zealand could find an opportunity to simply follow this example.

However, the enactment of the Constitution of the Republic of South Africa may provide a model for New Zealand. That Constitution was developed by the National Assembly and the Senate, sitting jointly for the purpose, and called the Constitutional Assembly.[100] The Constitution was sent to the Constitutional Court for consideration against constitutional principles and then referred back the Constitutional Assembly for reconsideration. A two-thirds majority of the Assembly was required to pass the Constitution. New Zealand could follow this example, with the Legislature sitting as a Constitutional Assembly, therefore avoiding the Constitution being an Act of Parliament. It seems advisable, however, that a New Zealand Constitution should be approved by the people in a referendum. This would require an extensive information campaign and would be an expensive process. However, it seems justifiable to expend considerable amounts of money to ensure such an important issue is understood and agreed to by the people.

[99] Articles 46, 47.
[100] Constitution of the Republic of South Africa (Act 200 of 1993).

E President's Power to Refer Bills to the Supreme Court

Article 26 states that the President, after consultation with the Council of State, may refer a Bill to the Supreme Court for review before he or she signs the Bill into law. If a Bill is referred to the Supreme Court for review, and the Supreme Court finds that any provision in it is repugnant to the Constitution, the President must decline to sign the Bill. This means that, if any provision is found repugnant, the whole Bill fails and the President may not sign it. The constitutionality of any Bill signed following a referral may not be subsequently challenged in the Courts (Article 34.3.3).

The Supreme Court may not review financial Bills, as these are considered the exclusive domain of the Government.

This power has been used 15 times, and on seven occasions the Bills have been found repugnant to the Constitution. This is obviously a significant power, and the only power of the President to be used with any regularity.[101] The most recent example of the use of this power was in relation to the Health Amendment (No 2) Amendment Bill 2004. This Bill was an amendment to the Health Act 1970 concerning the payment of certain charges. One of the objects of the Bill was to declare lawful certain charges for out-patient services imposed in the past, for which there had been no lawful authority, and for charges imposed for certain in-patient services that the legislature had declared should be free. The Supreme Court made it clear that, in line with the presumption of constitutionality principle, the Court should interpret the Bill so as to bring it into harmony with the Constitution. However, the right to recover money that had been unlawfully charged was a property right under

[101] Bills referred to the Supreme Court: In re Offences Against the State (Amendment) Bill, 1940, upheld; In re School Attendance Bill, 1942, found to be unconstitutional; In re Electoral (Amendment) Bill 1961, upheld; In re Criminal Law (Jurisdiction) Bill, 1975, upheld; In re Emergency Powers Bill, 1976, upheld; In re Housing (Private Rented Dwellings) Bill, 1982, found to be unconstitutional; In re Electoral (Amendment) Bill, 1983, found to be unconstitutional; In re Adoption (No 2) Bill, 1987, upheld; In re Matrimonial Home Bill, 1993, found to be unconstitutional; In re Regulation of Information (Services Outside the State for the Termination of Pregnancies) Bill, 1995, upheld; In re Employment Equality Bill, 1996, found to be unconstitutional; In re Equal Status Bill, 1997, found to be unconstitutional; In re Part V of the Planning and Development Bill, 1999, upheld; In re Illegal Immigrants (Trafficking) Bill, 1999, upheld; In re Health Amendment (No 2) Amendment Bill, 2004, found to be unconstitutional.

the constitution and is protected by Articles 43 and 40.3.2. Therefore, the retrospective provisions of the Bill were found to be repugnant to the Constitution.[102]

1 Judicial appointments

The Judges of the Supreme Court, the High Court and all other Courts are appointed by the President.[103] However, in exercising this function, the President must act only on the advice of the Government.[104] The independence of the Judiciary is aided by protection of remuneration.[105] Supreme Court Judges can only be removed for stated misbehaviour or incapacity, and then only upon resolutions being passed by the Dáil and the Seanad calling for their removal.[106] The independence of the Judiciary is especially important where they are given the power to review legislation. However, it is arguable that the Government appointing the Judges who are to consider government legislation is not an ideal situation. Again, however, no specific issues seem to have arisen to call into question the independence of the Judiciary.

2 Supremacy of the Constitution v supremacy of Parliament

In New Zealand, Parliament is generally considered to be supreme. Section 3(2) of the Supreme Court Act 2003 provides that "[n]othing in this Act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament". The notion of parliamentary sovereignty was described by Dicey:[107]

> The principle of Parliamentary sovereignty means nothing more nor less than this, namely, that parliament thus defined has, under the English constitution the right to make or unmake any law whatever; and further, that no person or body is recognised by the law as having a right to override or set aside the legislation of Parliament.

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[102] *In re Health Amendment (No 2) Amendment Bill 2004* [2005] IESC 7.
[103] Article 35.1.
[104] Article 13.9.
[105] Article 35.5.
[106] Article 35.4.1.
[107] A V Dicey *Introduction to the Study of the Law of the Constitution* quoted in Rt Hon Dame Sian Elias GNZM "Sovereignty in the 21st Century: Another Spin on the Merry-Go-Round" (2003) 14 PLR 148, 150.

In recent years, a number of commentators have questioned this doctrine. Joseph argued:[108]

> Parliamentary sovereignty is a latter-day myth perpetrated by our habits of lazy thinking. Parliament has never been *sovereign*.

Lord Cooke of Thorndon observed "[t]he legislative and judicial functions are complementary; the supremacism of either has no place".[109] The Chief Justice, Dame Sian Elias, put it thus "Parliament is supreme as legislator. But it legislates under the law of the constitution".[110]

In all discussions about the constitutional arrangements of New Zealand, parliamentary sovereignty is held up as one of the vital tenants of our system. Any discussion of giving the Courts the power to invalidate legislation gives rise to the argument that parliamentary sovereignty would prevent such an arrangement. However, if one takes a step back, the question must be asked whether Parliamentary sovereignty is really fundamental to the New Zealand system. Even if the Supreme Court Act 2003 makes it so, does that mean it should be? In *Moonen v Film and Literature Board of Review*,[111] the Court of Appeal indicated that, in an appropriate case, it might make a declaration that a statutory limitation upon rights cannot be demonstrably justified in a free and democratic society and is in breach of the New Zealand Bill of Rights Act 1990.[112] Sir Geoffrey Palmer points out that the New Zealand Bill of Rights Act 1990, coupled with the common law powers that Courts have always exercised in New Zealand, grants the Courts a "weak form of judicial review" of legislative action.[113] This weak form of judicial review is discussed by Mark Tushnet. He concludes:[114]

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[108] Philip A Joseph "Parliament, the Courts, and the Collaborative Enterprise" (2004) 15 KCLJ 321, 321 (emphasis in original).
[109] Lord Cooke of Thorndon "The Road Ahead for the Common Law" (2004) 53 Int & Comp LQ 273, 278.
[110] Elias, above n 107, 162.
[111] *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9.
[112] In Elias, above n 107, 158.
[113] Rt Hon Sir Geoffrey Palmer "The New Zealand Constitution and the Power of the Courts" [2006] 15:XXX Transnational Law & Contemporary Problems 1, 16.
[114] Mark Tushnet "Weak-form Judicial Review: Its Implications for Legislatures" (2004) 2 NZJPIL 7, 23.

> Weak-form systems with legislators not committed to constitutional values might override judicial interventions too readily, re-establishing a system of parliamentary supremacy. Weak-form systems whose legislators believe that courts have a large advantage over them will defer to the courts' interpretation too often, transforming the system into one of strong-form review.

The "weak form of judicial review" of legislative action is weak indeed. Where Parliament is considered sovereign, legislation can be made that may be considered to breach certain standards. However, the most the Courts can do is interpret the legislation consistently with the Bill of Rights. Parliament can then simply pass new legislation that makes it clear that the intention of the legislation was to breach that right, and therefore there is nothing the Court can do. It seems that there is no real safeguard against "unconstitutional" legislation.

In Ireland, it is the Constitution itself that is supreme. In the course of his judgment in *Byrne v Ireland*, Budd J stated that:[115]

> It is the people who are paramount … The State is not internally Sovereign but, in internal affairs, subject to the constitution, which limits, confines and restricts its powers.

In *re Article 26 and the Regulation of Information (Services outside the State for the Termination of Pregnancies) Bill 1995*, Hamilton J stated "[t]he Constitution limits, confines and restricts the powers of the State and the organs of State established by the Constitution."[116]

The Irish Constitution was not enacted as an Act of the Oireachtas. It was enacted in the same way as a Bill, but a motion was put to the House that the Constitution was "approved by the Dáil". This draft Constitution was put to the plebiscite. The response was not overwhelmingly supportive. Only 38.6 percent voted in favour, 29.6 percent voted against, and 31.8 percent abstained or spoiled their vote.[117] David Gwynn Morgan argues that any danger that this process, and therefore the Constitution, would be found to be invalid was

[115] *Byrne v Ireland* [1972] IR 241.
[116] *In re Article 26 and the Regulation of Information (Services Outside the State for the Termination of Pregnancies) Bill 1995* [1995] 1 IR 1.
[117] Morgan, above n 50, 29.

countered by Article 58, which provided that all Judges in office when the Constitution came into force could only remain in office if they took an oath to uphold the Constitution.[118] This process removes the power from the legislature to amend the Constitution, while legislation can be struck down by the Courts if found unconstitutional.

3 *The New Zealand Position*

In New Zealand, the Governor-General theoretically has the power to refuse to give assent to Bills.[119] Dame Silvia Cartwright stated: "I have the reserve power to refuse to assent to legislation, but that would be a major step to take".[120] However, this power has never been used and it seems unlikely it ever would be.[121] John McGrath suggested "If a Governor-General declined to assent to legislation, removal from office would generally be an available remedy".[122]

In the absence of a written Constitution, judicial review of legislation would require a standard against which the legislation could be measured. Paragraph 5.36 of the Cabinet Manual states:

> When a Bill is ... submitted to the Cabinet Legislation Committee for approval for introduction, the Minister is required to confirm in the covering submission that the draft Bill complies with the legal principles and obligations identified in paragraph 5.35.

The legal principles and obligations in paragraph 5.35 are:

- the principles of the Treaty of Waitangi;
- the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 or in the Human Rights Act 1993;
- the principles in the Privacy Act 1993;
- international obligations;

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[118] Morgan, above n 50, 27.
[119] Philip Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington 2001) 677.
[120] Dame Silvia Cartwright "Dialogue: New Zealand's Constitutional Monarchy" (2002) 6 Green Bag 2d 57, 58.
[121] Geoffrey Palmer and Matthew Palmer *Bridled Power* (4 ed, Oxford University Press, Melbourne, 2004) 57.
[122] McGrath, above n 85.

- the guidelines contained in the LAC Guidelines: Guidelines on Process and Content of Legislation, a publication of the Legislation Advisory Committee.

Further, the Attorney-General is required to draw the attention of the House to any Bill that appears to be inconsistent with the New Zealand Bill of Rights Act 1990. The Minister of Justice is responsible for examining all legislation for compliance with the New Zealand Bill of Rights Act 1990 and advising the Attorney-General. The Crown Law Office examines Bills developed by the Ministry of Justice.[123]

Therefore, there are standards that are supposed to be met for New Zealand legislation. However, there a number of factors that prevent these standards being a fully effective guard. First, Cabinet can approve legislation that does not conform to the standards. It may be politically unwise, but there is nothing to prevent them from doing so. Second, the Attorney-General need only "bring to the attention" of the House any inconsistency with the New Zealand Bill of Rights Act 1990. Parliament may still pass the inconsistent legislation. In *Mangawhero Enterprises v Attorney-General*, it was found that if the Attorney-General fails to do this, nothing can be done.[124] Third, late amendments to Bills may not go through either of these vetting processes and inconsistencies with standards and the Bill of Rights may be introduced. After the legislation has been passed, there is little that can be done. The Courts must interpret legislation with Parliament's intention in mind. For example, if it is clear that Parliament intended to enact legislation that was inconsistent with the Bill of Rights, the Court must interpret it as so. Section 4 of the New Zealand Bill of Rights Act 1990 makes the position clear:

> No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—
> (a) hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
> (b) decline to apply any provision of the enactment—
> by reason only that the provision is inconsistent with any provision of this Bill of Rights.

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[123] Cabinet Manual (Cabinet Office, Department of Prime Minster and Cabinet, 2001) paragraph 5.39; New Zealand Bill of Rights Act 1990, s 7.
[124] *Mangawaro Enterprises Ltd v Attorney-General* [1994] 2 NZLR 451, 456 (HC) Gallen J.

Where there is ambiguity, however, the Courts must interpret legislation consistently with the New Zealand Bill of Rights Act 1990. Section 6 of that Act provides: "Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning".

4 *A New Zealand model?*

The Irish model may be a step too far for New Zealand. Politicians are very unlikely to agree to giving the Courts a power to invalidate legislation duly passed by Parliament. However, it is clear that there are few real safeguards in the current process of enacting legislation.

Without giving a New Zealand President the power to refer Bills to the Supreme Court, a constitutional protection could be granted by allowing the President to refer back to Parliament Bills that do not, in the President's opinion, conform to stated standards. This would not involve the Courts but would be a final chance to bring to Parliament's attention provisions that may conflict with stated standards of constitutionality.

If the President were to have this power, it would be important that he or she were elected, rather than appointed. It would be advisable that nomination were structured to ensure the Presidents had the requisite background to make such decisions. It would also be prudent that they had Counsel to advise on such issues.

If New Zealand wishes to continue with the principle that Parliament's intention should be upheld by the Courts, this model would presumably be more acceptable. The President would not have a veto as such, as once a Bill was referred back, Parliament could still enact it. However, it would provide a constitutional protection that is not currently afforded by our current system. In many ways, this model would provide the advantages of the Irish President's power, without the danger of politicising the Judiciary. This model would presumably be more acceptable to politicians than the Irish model.

F Other Powers of the President

1 Article 13.2.3

Article 13.2.3 allows the President, after consultation with the Council of State, to convene either the Dáil or the Seanad or both Houses of the Oireachtas. This has occurred once, in 1969, when President de Valera convened a meeting of both Houses to address them on the fiftieth anniversary of the inaugural meeting of the first Dáil. This power could be used to convene the Dáil to ascertain where the support of the House lay where the Taoiseach had requested a dissolution.

2 Articles 22.2 and 24.1

Article 22.2 allows the President to appoint a committee of privileges to decide whether a Bill is a money Bill or not.[125] This can only happen where the Seanad refers a question to the President. This provision seems not to have been used. Article 24.1 allows the Government to restrict the amount of time the Seanad has to consider a Bill, with the agreement of the President. Again this seems never to have been used.

3 Article 27

Article 27 only comes into effect on the operation of Article 23. Article 23 allows a Bill passed by the Dáil that the Seanad rejects or that the Seanad passes with amendments to which the Dáil does not agree, or a Bill that is neither rejected nor passed within ninety days by the Seanad, to be enacted into law by resolution in the Dáil. If this occurs, Article 27.1 provides that a majority of the Senators and one-third of the Deputies may petition the President to decline to sign the Bill.[126] Article 27.4 provides that the President can decide, at his or her own discretion, after consultation with the Council of

[125] Money Bills are treated differently to other Bills in their passage through the legislature. Money Bills cannot be initiated in the Seanad.
[126] Deputies (or TDs) are the members of the Dáil.

State,[127] whether the Bill "contains a proposal of such national importance that the will of the people ought to be ascertained". If the President considers this to be so, the Bill must not be signed unless it is approved by a majority in a referendum in which one-third of the registered voters cast a vote or there is a general election and the new Dáil passes a resolution approving the proposal. Whichever of these events result, they must occur within 18 months of the President's decision. This could be a fairly significant power, but its use depends on Article 23 being used, and a petition being brought to the President – neither of which appear to have occurred.

The reference of Bills to the people where the subject matter is considered "of national importance" could be a useful model for New Zealand. As discussed above, the President could be given a power to refer Bills back to the House for consideration where certain standards were not met.[128] It may be that the President should also have a power to refer Bills to the people for consideration in appropriate circumstances. Article 27 only applies in very particular circumstances, which would not be relevant in the New Zealand context (as this paper does not advocate the return to a bicameral legislature). However, the principle that some Acts of Parliament are of such national importance that they should be referred to the people may be incorporated into a New Zealand model. For example, if the President were to be given a power to refer Bills back to Parliament, and Parliament was able to simply pass the legislation again, it may be that the President could then refer the Bill to the people in appropriate circumstances. Another option would be to require Parliament to pass the Bill a second time with a special majority, as in the United States. However, this paper does not propose to discuss that model.

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[127] The Council of State consists of: i) As ex-officio members: the Taoiseach, the Tánaiste (Deputy Prime Minister), the Chief Justice, the President of the High Court, the Chairman of Dáil Éireann, the Chairman of Seanad Éireann, and the Attorney General.
ii) Every person able and willing to act as a member of the Council of State who shall have held the office of President, or the office of Taoiseach, or the office of Chief Justice, or the office of President of the Executive Council of Saorstát Éireann (the Irish Free State 1922-1937).
iii) Such other persons, if any, as may be appointed by the President under this Article to be members of the Council of State. (Article 31.2)

[128] Above Part V E 4.

VI RESTRICTIONS ON THE PRESIDENT

A Travel

Article 12.9 provides "[t]he President shall not leave the State during his term of office save with the consent of the Government". This prohibition appears to include personal travel as well as official visits. When President Hillery was advised by doctors to take his dying daughter to a warmer climate, he needed the Government's permission. President Hillery also needed the Government's permission to sail his yacht outside Irish territorial waters.[129] In 1991, Mary Robinson visited Belfast in Northern Ireland. This caused some difficulty – it was unclear whether visiting Northern Ireland constituted leaving the State. If it did, that implied that Northern Ireland was a foreign country and, if not, the President could be seen as presenting herself as representing all the island's people.[130] The Government did not advise her not to go but the Tánaiste did inform her of the Government's concerns.[131] The visit went ahead and, in the course of the visit, the President shook hands with Gerry Adams, the leader of Sinn Féin, the political wing of the IRA. This action went against the Government's official policy towards Sinn Féin at that time, which included censorship in State broadcasting. There was a huge outcry. Former Minister of Justice, Patrick Cooney, said that the handshake had set back the day of reconciliation in the North and prejudiced her office and moral authority.[132] He suggested that the next time such a visit was proposed "the Government should have 'more bottle' and stop her from going".[133] In the end, this event blew over relatively quickly and may, in fact, have aided reconciliation. Three months later the Taoiseach, Albert Reynolds, shook Adams' hand, as did United States President Clinton. The following year, the IRA declared a ceasefire. After the declaration of the ceasefire, Mary Robinson was asked about shaking Adams' hand. She said:[134]

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[129] Duffy, above n 38, 132.
[130] Siggins, above n 13, 166.
[131] Siggins, above n 13, 166.
[132] Siggins, above n 13, 167.
[133] Siggins, above n 13, 167.
[134] "The Sunday Tribune" in Siggins, above n 13, 168-169.

> It was a very difficult decision ... In the difficulty, in the weighing it up, I underestimated what the media response would be afterwards ... that creates a lot of pressure when you hold an office like mine because it's important that you don't get drawn into political controversy.

It seems that such a provision would need to be clarified for the New Zealand context. It seems advisable that State and Official visits should require the consent of the Government. However, it seems unnecessary that private travel should be approved by the Government. If a President wished to travel to a State with which, for example, New Zealand did not currently have diplomatic relations, it would be very unwise for the President to travel there. However, it seems preferable to rely on the President's discretion in these matters than to put such strong formal restrictions on their personal activities.

B Right to Speak

Article 13.7 states:

> 1 The President may, after consultation with the Council of State, communicate with the Houses of the Oireachtas by message or address on any matter of national or public importance.
> 2 The President may, after consultation with the Council of State, address a message to the Nation at any time on any such matter.
> 3 Every such message or address must, however, have received the approval of the Government.

It is unclear whether restrictions apply to all speeches given by Presidents. It has been suggested that, technically, only two addresses to the Oireachtas and a handful of speeches to the nation have been made and that every other speech by a President does not require prior approval.[135] However, it is clear that Governments have not shared that view. There were tensions between President Robinson and Taoiseach Charles Haughey throughout the time that they were both in office. When President Robinson recorded a message for Irish-Americans at Saint Patrick's Day dinners in the United States, Haughey responded by sending a letter, accompanied by constitutional opinions of two former Attorneys General, referring to Article 13.7. The opinions suggested that the President required approval from the Government for every address to the nation, including interviews. Robinson had given many interviews without

[135] Duffy, above n 38, 133.

consultation.[136] Jim Duffy argues that the idea that all speeches of the President are subject to Government approval is based on the erroneous belief that the President's constitutional position is in some way akin to the position of the British Queen, whose every utterance is presumed to have been delivered with the approval of the Government.[137]

It seems that only speeches to Parliament, or official addresses to the nation should be subject to Government approval. As noted above, New Zealand Governors-General have made speeches on many issues in their role as symbolic head of the nation. If the President is elected on the basis of their "theme", it seems preferable that a President should be allowed to make speeches on issues that they consider important.

VII CONCLUSION

New Zealand will, almost inevitably, become a republic at some point in the future. At that time, it will be necessary to put in place a constitution in which the Governor-General is replaced by another form of Head of State. The Irish Presidential model seems to be a suitable model on which New Zealand could base its constitutional development. However, some modifications should be made to the Irish model, based on lessons learnt in Ireland and some fundamental differences in New Zealand's political culture and society.

The role of Head of State is important as the "ceremonial personification of the State". In New Zealand, some Governors-General have been strong symbolic figures. This has been less true in Ireland until recently, but the experience of the last 20 years shows that the Presidential model can produce equally strong symbolic Presidents. Election of the Head of State would add to this role by giving the people the opportunity to elect the person they believe most represents their vision of New Zealand. Election also encourages the people to feel more connected to the symbol they have chosen.

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[136] Siggins, above n 13, 159.
[137] Duffy, above n 38.

The Irish model of presidential election has some flaws. By providing that there shall be no election where only one candidate is nominated, there have been relatively few presidential elections. This seems to defeat the purpose of directly electing the President. It is possible that in New Zealand there could, perhaps, be provision for a plebiscite on the single candidate as in Austria. However, the preferred solution would be a convention whereby Parliament is always required to nominate more than one candidate.

There is a danger in that this convention may lead to the politicisation of the presidential election, as it is likely that the two major political parties would each put forward a candidate. However, Ireland's experience has shown that even a highly politicised election campaign may not lead to the politicisation of the office, as the importance of impartiality is well understood by all. The last two Irish Presidents have received extremely high approval ratings, despite the political affiliations that enabled their nominations.

Ireland has considered the difficulty of nomination, with Review Groups suggesting provision should be made for popular nomination. This does not seem appropriate in New Zealand. It is very possible that great New Zealand "icons" could receive the required nominations and be elected, but would be likely to be unsuitable for the role. There is a certain amount of knowledge and experience required for the role, and it is important that the role remains a dignified one. Therefore, nomination by 20 members of Parliament is suggested, with a constitutional convention that more than one candidate will always be nominated.

The Irish President has less discretionary power than the Governor-General in regards to the appointment of Prime Ministers and the dissolution of Parliament. However, as has been shown, the reserve powers of the Governor-General are unclear and it may be that there is no more real power in the Governor-General's role. There is enough discretion left with the President to deal with political situations as they arise. The President can only refuse to dissolve the Dáil when the Taoiseach has ceased to retain the majority of the support of the Dáil. The Cook Islands example shows how

problematic this situation can be, and it is suggested that the New Zealand President should only refuse to dissolve Parliament when it is certain another Government could be formed. This is in reality the current New Zealand position.

It seems that codification of the reserve powers in a way similar to the President's powers in the Irish Constitution may not solve all the issues in regards to those powers, but they do provide more certainty and do not seem to cause any more problems than are inherent in the discretionary reserve powers. Codification has long been believed to be inherently problematic. However, the Irish model provides a basis for codification that could work adequately in New Zealand.

The President's ability to refer Bills to the Supreme Court provides a constitutional safeguard against abuse of parliamentary power. While accepting that it seems unlikely that a New Zealand Parliament would give up its supremacy in such a way, it does seem that giving a New Zealand President the power to refer Bills back to Parliament for reconsideration would be a positive step. There are currently no strong safeguards against abuse of power by the legislature. "Parliamentary supremacy" does not seem to provide an adequate argument against having these safeguards. The power of the President to refer Bills to the people in certain circumstances may also be a valuable model for New Zealand.

If the Irish model were to be followed in New Zealand, it would be advisable to have a written Constitution that is not an Act of Parliament and that can only be amended by referendum, as is the case in Ireland. It is not clear that this is currently legally possible. However, the enactment of the Constitution of the Republic of South Africa may provide a model for New Zealand, with Parliament sitting as a Constitutional Committee rather than as Parliament. It would be advisable that a New Zealand Constitution would also be approved by the people in a referendum.

Subject to the reservations outlined above, the Irish Presidential model could provide a basis on which a New Zealand model could be developed.

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