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LAW REFORM OPTIONS FOR NEW ZEALAND

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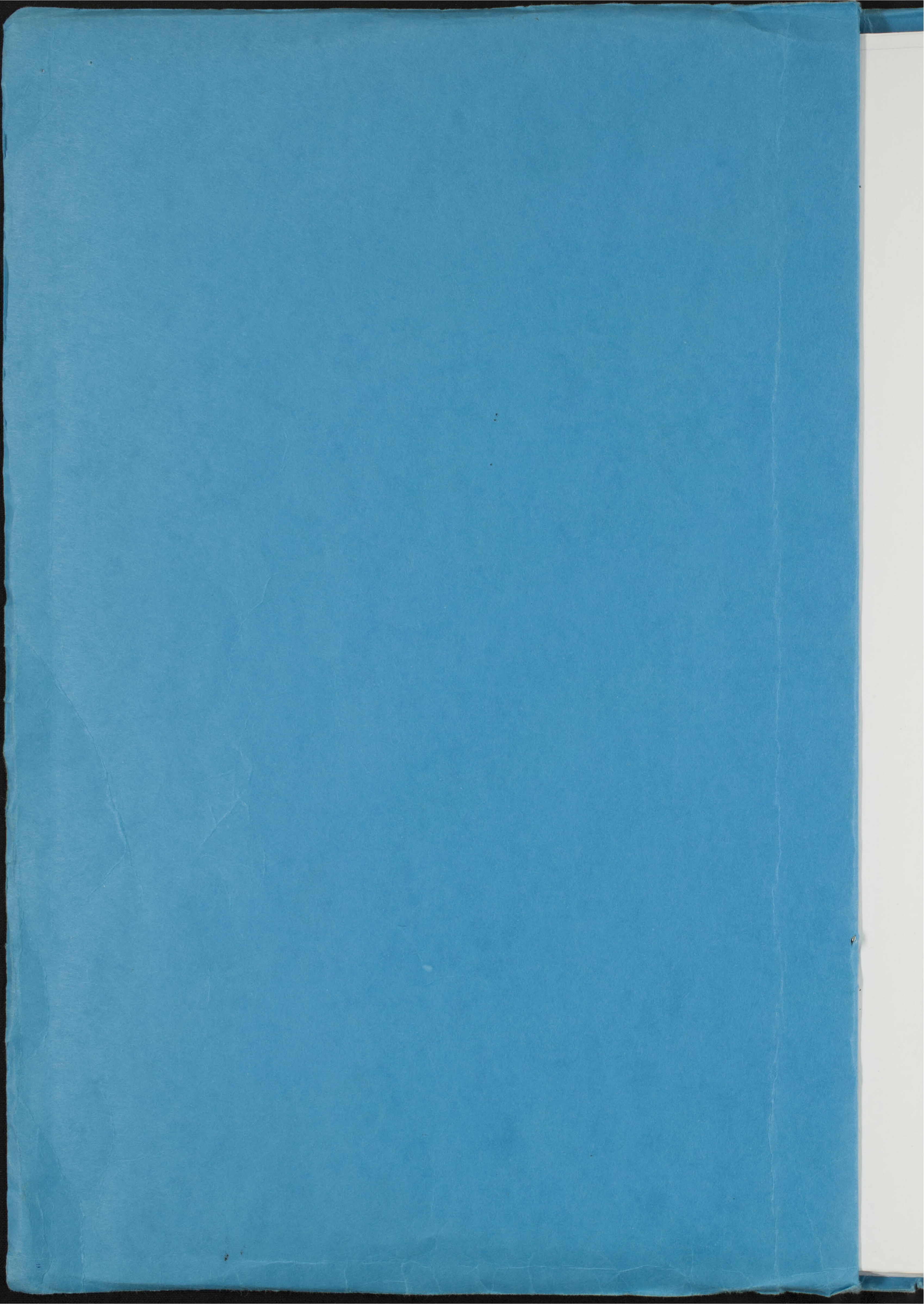

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ABSTRACT

The Principal purpose of this paper is to analyse, the mechanics of the legal reforms that would be required to enable New Zealand to become a republic.

The central theme of the paper is that New Zealand has matured as a nation to such an extent, that it is a natural progression for it to sever its links with the Monarchy. The primary focus of the paper will be on the legal requirements for establishing a republic here and the form that republic should take.

As part of the analysis the writer will examine the present system of Constitutional Monarchy in New Zealand. That system appoints by statute, a foreign Queen as Sovereign in right of New Zealand and establishes her as the Head of State. The paper will also analyse in some detail the role of the Governor-General as the representative of the absentee Head of State and the appropriateness of that role.

The writer will seek to establish the rationales for reform before making a proposal for the structure of the new republic and its head of state. In addition, the specific legal reforms that would be involved in establishing the structure will be discussed.

In embarking on the above analysis, it is the writer's intention and objective, to develop a practical and workable model for a "Republic of New Zealand". The model will seek to preserve the best features of the present system, under which the Governor-General performs a vital constitutional role, whilst relinquishing antiquated historical links and traditions.

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STATEMENT OF WORD LENGTH

The text of this paper (excluding contents page, footnotes and bibliography) comprises approximately 16,500 words.

I INTRODUCTION

New Zealand is on the verge of embarking on a new chapter in its constitutional history. The decision made by electors in 1993, in favour of MMP, has already seen the formation of numerous new political parties.[1] It has also seen splinter groups of Members of Parliament, leaving their existing parties to form their own parties, in the hope of becoming a minority coalition partner in the next government.[2]

In the face of such major change, from the Westminster tradition of electing governments by First-Past-the-Post, it is, in the writer's opinion, appropriate that other historical or inherited links with the United Kingdom be reassessed. That includes the issue of the ties New Zealand has with the British Monarchy and the issue of New Zealand becoming a republic.

The republican issue has recently been promoted by the Prime Minister in a number of public and parliamentary speeches.[3] Whilst the issue has yet to gain momentum, the fact that it has been propelled into the public arena by the Chief Executive is significant. Whether we, the public, like it or not, politicians generate change and the republican issue is now on the political agenda.

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1 For Example the United Party, Right of Centre and the Christian Democrats within Parliament and Act and the Green Party among others outside of the Parliament.

2 For Example the resignations of Peter Dunne to form the United Party and Graeme Lee to form the Christian Democrats. Both parties could be potential coalition partners for the majority party following the first MMP election if they are able to achieve the 5% vote threshold required under MMP to get seats in the House.

3 The issue has been raised by Mr Bolger in an Address in Reply Speech (see NZPD 8 March 1994) and in an adjournment debate (see NZPD 8 December 1994). In addition, it was the topic of an address he gave to the Newspaper Publishers Association annual meeting on 16 March 1994, made available by the New Zealand National Party, 14-19.

To illustrate how the Prime Minister is thinking, the following is an excerpt from a speech made to last years parliament:[4]

> The move to MMP is a very big constitutional change and marks a clear break with the British System of Government that we have followed thus far. I believe that constitutional change is likely to continue as New Zealand moves to stake out its own particular identity. ..... It is my view ... it is a personal view not the government's view ... that the momentum for change will gather as we identify more with our Asia-Pacific region of the world as our direct links to Britain decline. But the big reason will be that we want to be independent New Zealanders. This will not happen because of any lack of affection or love for our Queen in London, but because the tide of history is moving in another direction. MMP could prove to be the catalyst, given the possible greater role for the head of state as we form Governments under MMP.

The above statement contains a number of ideas and identifies several issues relevant to the topic at hand. Perhaps of particular interest, is the apparent suggestion that, a republic may be a natural progression for New Zealand now that MMP is at hand. It is submitted that a republic is also a natural progression as New Zealand continues to mature as an independent state on the international political, economic and cultural stage.[5]

The republican debate has featured prominently in Australian politics at times over the last couple of years, principally initiated by Prime Minister Paul Keating. However, an indication of the serious intent of the Australian Government is demonstrated by the establishment in 1993 of a Republic Advisory Committee. The Committee

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4 NZPD Address in reply Speech, 8 March 1994.

5 An example of New Zealand's enhanced international status on the political stage is our recent appointment and tenure as head of the United Nations Security Council.

has already reported in detail on the options available for constitutional reform, to achieve a viable Federal Republic of Australia.[6]

Our own Prime Minister has been accused of borrowing the issue to raise his profile. Indeed, an interjection during the speech quoted above, by Trevor Mallard, was to the following effect:[7] "The Prime Minister has been reading Paul Keating Speeches" to which the Right Honourable JB Bolger replied: "I do not read Labour Party Speeches."

Political point scoring aside, the writer is of the view that properly promoted, the issue may well become one with popular appeal. Accordingly, it is not too soon to examine the mechanics of the legal reforms required, to achieve a viable democratic Republic of New Zealand.

Prior to embarking on an analysis of such legal reforms in Part II of this paper, it is proposed, in Part I, to provide a brief overview of the present position and role of the British Monarchy and the Governor-General, in the government of New Zealand. In addition, the writer will in Part I, discuss some rationales for embarking on what is, in reality, major constitutional reform.

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6 The Report of the Republic Advisory Committee: *"An Australian Republic The Options - The Report"* (Australian Government Printing Service 1993).

7 See Text at n4.

PART I: THE NEW ZEALAND CONSTITUTIONAL MONARCHY AND RATIONALES FOR CHANGE

II THE INHERITANCE OF CONSTITUTIONAL MONARCHY

A. *Declaration of Sovereignty*

Although Captain Cook formerly laid British claim to New Zealand in 1769, the British Government of the day did not take steps to legally acquire the Islands as a colony. It was not until 21 May 1840 that Captain Hobson formerly declared British Sovereignty over New Zealand.[8] Thus New Zealand inherited the monarchy of its European Colonisers.

The new colony was administered by Hobson. He governed the colony in the name of Queen Victoria and few, other than perhaps the indigenous people could have disputed this as appropriate at the time.

However, it will be argued in this paper, that it is entirely inappropriate as we approach the 21st Century, for the Queen of England to continue to be the Sovereign in right of New Zealand. Furthermore, it will be argued that it is inappropriate for her to be the Head of State and to have power to appoint a Governor-General, to exercise her royal powers on her behalf in New Zealand.

B. *Parliamentary Democracy*

Notwithstanding the arguments that the writer will advance

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[8] The declaration of sovereignty over the North Island was able to be made with some confidence by Lieutenant-Governor William Hobson following session by northern Maori Chiefs under the Treaty of Waitangi, on 6 February 1840. Pursuant to the treaty, sovereignty was vested in the British Crown. The South Island was claimed by virtue of its discovery by Captain Cook. See JB Ringer, *"An Introduction to the New Zealand Government"*, Hazard Press, Christchurch (1991), 18-20.

as to the continued relevance and appropriateness of the Monarch's present position, the historical position remains that, by inheritance through colonisation, New Zealand is a monarchy. However, little more than a decade after the declaration of sovereignty, the Parliament of the United Kingdom passed the New Zealand Constitution Act 1852, establishing a "General Assembly" or Parliament to govern the colony.[9] That act established New Zealand as a constitutional Monarchy.

From that time New Zealand has developed as a Parliamentary Democracy and in reality is a monarchy in name only. Although the British Monarch is Head of State and the Governor-General is the personal representative of the Monarch, they have very limited powers of independent action.[10]

By binding convention both the Queen and the Governor-General act on the advice given to them by Ministers of the Crown.[11] Therefore, except in certain limited circumstances (which are discussed below) they do not have political powers of governance.

Accordingly, the power to govern in New Zealand's parliamentary democracy lies with the elected representatives of the people. More specifically, it lies with the Prime Minister and his cabinet Ministers whom,

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9 The New Zealand Constitution Act 1852 (UK) was intended to grant a representative constitution to the colony of New Zealand. It ceased to have effect as part of the law of New Zealand with the passing of the Constitution Act 1986.

10 Historically the Monarch had an almost unfettered prerogative power to govern. That prerogative power has progressively been eroded over the centuries by the development of Parliamentary democracy. See for example the discussion of the Royal Prerogative in ECS Wade and EW Bradley *"Constitutional and Administrative Law"* (10 ed Longman, London, 1985) 245-246.

11 For a more detailed discussion of the conventions surrounding the exercise by the Governor-General of her executive functions see text below, pp 22-24.

together with the Governor-General, make up the executive arm of Government.[12]

C. *The Constitution*

New Zealand does not, as yet, have a single constitutional document enshrined in an entrenched and readily accessible statute. An all-inclusive document setting out the rules and foundation principles determining the way in which a state is governed, is a feature of many established world republics. A single constitution is not, however, an essential ingredient in the republican mix, as will be discussed in Part II of this paper.

It is submitted that the present New Zealand constitution can be defined quite readily. The task of putting it in a single statute, if desired, would nonetheless be considerable. Presently the Constitution of New Zealand consists of a number of statutes, formal legal documents and well established conventions.[13] In addition, it is augmented by a number of common law decisions.[14] The following is a discussion and analysis of the most important, current constitutional instruments, of relevance to this paper.

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[12] During the early years of New Zealand's existence as a crown colony, governmental and policy making functions were exercised directly by the Governor of the day. He might consult the elected officials of the government. However, there was no convention and certainly no law requiring that he follow any of the advice he received which the Governor-General is now bound to do. For a discussion of the increasing power of the Prime Minister and Cabinet see: R Alley *The Powers of the Prime Minister, New Zealand Politics in Perspective* (2nd ed, Paul Longman, 1989) pp 103-122.

[13] For example, The New Zealand Bill of Rights Act 1990, The Electoral Act 1993, The Judicative Act 1908, The Legislature Act 1908 and the Official Information Act 1982 each contain provisions of constitutional importance.

[14] For example, *Fitzgerald* v *Muldoon* [1976] 2NZLR 615 clearly reinforced parliamentary sovereignty as a constitutional principle and re-emphasised the limits of prime-ministerial powers.

1 *The Constitution Act 1986 and the Role of the Governor-General*

In basic terms, the Constitution Act 1986, is now the foundation document of the New Zealand Constitution. It is the principal formal statement of what is now in place in terms of the Sovereign, Executive, Legislature, Parliament and the Judiciary.

The preamble to the Act states that it is:

> An Act to reform the constitutional law of New Zealand, to bring together into one enactment certain provisions of constitutional significance, and to provide that the New Zealand Constitution Act 1852 of the Parliament of the United Kingdom shall cease to have effect as part of the law of New Zealand.

It is clear from the preamble, that it was the intention of the legislators to restate the most basic and important constitutional principles or rules.[15] Those rules of most relevance to this paper include the following:

(a) *Head of State*

Part I of the Constitution Act deals with the rules relating to the Sovereign. Section 2 establishes that the

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[15] The Act was partly a response to the need to bring together fragmented statutory provisions of a constitutional nature, but was principally motivated by a desire to ensure a smooth transfer of power after the 1984 constitutional crisis where, to quote the then Minister of Justice Geoffrey Palmer, there was: "an unwillingness of the outgoing Prime Minister to recommend to the Governor-General urgent financial measures that those who would form the incoming government saw as essential. Surprisingly there appeared to be no means by which the successful party could immediately form a government to take responsibility for these measures." From: Foreword to Department of Justice, Reports of an officials Committee on Constitutional Reform (1986). Section 6 of the Constitution Act 1986 attempts to ensure a smooth transition by providing that a candidate at a general election can be appointed as a Minister of the Crown, even though not a member of parliament. If on return of the writ in the electorate in which the candidate stood, the candidate is not successful ss (b) of S.6 provides for the appointment to terminate within 28 days.

Sovereign in Right of New Zealand is the Head of State of New Zealand.

The Queen, as the present British Monarch, is Sovereign in right of New Zealand by virtue of the actions taken by Hobson in claiming sovereignty back in 1840.

Subsection (2) of S.2 establishes that: "The Governor-General appointed by the sovereign is the sovereign's representative in New Zealand."

Other provisions in Part I of the Act, further emphasise that the Governor-General is the representative of the Sovereign. When the present Queen visits New Zealand, she assumes the functions of the Governor-General and the Governor-General stands aside.[16]

(b) The Executive Council

The Executive Council is dealt with under Part II of the Constitution Act. The Governor-General is a member and usually chair of the Executive Council. The Council carries out statutory functions such as the making of official appointments and approval of subsidiary legislation.

Other members of the Council must be members of Parliament. Although S.6 of the Constitution Act provides for continuity of appointment, for up to 28 days, where a member loses his or her seat at an election.[17]

Perhaps the most important function of the Council is to ensure that the Governor-General has access to ongoing ministerial advice.

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16 Section 3 of the Constitution Act 1986 provides that powers conferred on the Governor-General under any act are royal powers exercisable by the sovereign in person.

17 See n.15 above.

(c) The Legislature and Parliament

Further duties or roles for the Governor-General are defined in Part III of the Constitution Act. The provisions of this part of the Act establish the continued existence of the House of Representatives, notwithstanding the dissolution of parliament.[18]

Pursuant to S.11 a Member of Parliament must take an oath of allegiance to the Queen. Section 12 provides for the Governor-General to confirm the appointment of the speaker of the House.

Most important in the context of this paper, are the provisions of Sections 14 through to 22. Among other things, these provide that the New Zealand parliament shall consist of the Sovereign in right of New Zealand and the House of Representatives.[19]

They also provide for Royal Assent to a Bill passed by the House,[20] for the Governor-General to summon, prorogue and dissolve parliament[21] and that the Crown may not, except by act of parliament, levy tax.[22]

The summoning, proroguing and dissolving of parliament and Royal Assent to Bills, are among the more important constitutional functions exercisable by the Governor-General, as representative of the Head of State. In circumstances of constitutional crisis, these functions might have to be exercised without ministerial advice. When exercised in such circumstances, in a discretionary

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18 Constitution Act 1986 S.10(3).

19 Ibid S.14(1).

20 Ibid S.16.

21 Ibid S.18.

22 Ibid S.22.

manner, these functions become what are termed reserve powers. The reserve powers are discussed in more detail below.[23]

(d) The Judiciary

Under Part IV of the Constitution Act, the Governor-General is given a further function with regard to judicial appointment and removal. In this instance the provisions of S.23 require that the Sovereign or the Governor-General: "act upon an address of the House of Representatives". This proviso underlines that the position of the Governor-General is, in the majority of instances, subject to direct control from elected representatives.

The Constitution Act 1986 therefore, allocates a number of well defined and important functions to the Governor-General. The Constitution Act would need to be amended, or repealed, for New Zealand to make the transition to a republic. The matter of this and amendments and or repeals of other "Constitutional" Legislation will be discussed in more detail in Part II of this paper.[24]

2 The Governor-General's Reserve Powers and The Letters Patent

The Governor-General as the Sovereign's representative in New Zealand, has at her disposal constitutional powers of considerable magnitude. These powers have been collectively termed the reserve powers and have been the

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23 See text below, 13-21.

24 By way of example, other legislation that may require repeal or amendment include The Judicature Act 1908, The Electoral Act 1993, The Royal Titles Act 1974 and the Flags Emblems and Names Protection Act 1981. The latter statute enshrines in law a New Zealand flag incorporating the Union Jack, a symbol that reflects our colonial heritage but which is unlikely to have continued relevance in a New Zealand Republic.

subject of quite rigorous academic scrutiny.[25]

The role of the Governor-General is in the main one that is titular and ceremonial in nature, with functions and powers carried out in accordance with ministerial advice. However, the reserve powers are most certainly not of a ceremonial or titular nature. The Powers are perhaps best defined as what remain of the Monarch's prerogative or discretionary power to govern.[26] This royal prerogative power was succinctly defined by A Quentin-Baxter in the following terms:[27]

> The royal prerogative comprises the inherent governmental powers of the Sovereign recognised by the common law, to the extent that they have not been taken away by legislation.

Historically, the English Monarchy was all powerful and able to govern in an unfettered way. Over the centuries that unfettered power to govern has been rapidly eroded, by the rise of the Westminster democratic style of government and consequent legislative reform.[28]

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25 See for example: FM Brookfield *"No Nodding Automation : A Study of the Governor-General's Powers and Functions"* [1978] NZLJ 491. RQ Quentin-Baxter *"The Governor-General's constitutional discretions : an essay towards a re-definition"* (1980) 10 VUWLR 289 and also A Quentin-Baxter *"Review of the letters Patent 1917 Constituting the Office of Governor-General of New Zealand"* (Cabinet Office, Wellington, 1980) 116.

26 AV Dicey *An Introduction to the Study of the Law of the Constitution* (10 ed, The MacMillan Press Ltd, London, 1975) at page 424. The often quoted definition is as follows: "the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown".

27 In the Review referred to in n25 above at page 116 para 3.

28 For example the Bill of Rights 1688 (Eng) was a fetter placed by the people of England on the arbitrary use by the Crown, of its prerogative powers. S.1 of that Act as printed in 6 Halsbury Statutes of England (3rd ed) 490 and quoted by Wild CJ in the celebrated case of *Fitzgerald* v *Muldoon* [1976] 2N2LR 615 at p619 states that "the pretended power of suspending of Laws or the execution of laws by regall authority without consent of Parliament is illegal".

The reserve powers are rarely exercised but can be exercised independently of parliament. Indeed, they are exercised over the Parliament of the day by the Sovereign's representative and when in New Zealand, could be exercised by the Queen herself.

It is the reserve powers available to the Governor-General relating to the legislature that are the particular focus of this paper. It should be noted however, that they are only one part of the Royal Prerogative, which consists of a range of powers, rights, immunities and privileges of varying importance.[29]

Some potential reserve powers are derived from statute. For example, and as discussed above,[30] The Constitution Act 1986. Other reserve powers derive from Statutory Regulations known as the Letters Patent and in addition, some of the powers have their legal source in the common law.

The Letters Patent is subordinate legislation, pursuant to which, the office of the Governor-General is constituted. There are two regulations currently in force.[31] The regulations, among other things, authorise the Governor-General to exercise the Monarch's "executive

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29 The Royal prerogative of Mercy is one example of a prerogative exercisable by the Governor-General that does not relate to the legislature. With limited exceptions all the prerogatives are vested in the executive of the Government for exercise. Otherwise they are almost always exercised on advice.

30 Above at pages 9 to 13.

31 Letters Patent Constituting the Office of the Governor-General of New Zealand SR 1983/225 and SR 1987/8. The latter regulation was promulgated as an amendment to the former, to address an anomaly that arose in respect of the appointment of members of the Executive Council, when the Constitution Act 1986 came into force.

authority of "Our Realm of New Zealand."[32]

That authorisation is prefaced by an injunction that such authority is subject to the provisions of the Law of New Zealand. Accordingly, therefore, it is statute and in particular the Constitution Act 1986, which sets out those potential reserve powers of particular relevance to this paper.

It should again be noted that the powers contained in the Constitution Act, only take on the nature of reserve powers when they are exercised by the Sovereign or her representative, using personal discretion. This would only occur in exceptional circumstances where, the Governor-General was unable to find a minister with the confidence of the House of Representatives able to advise her.[33]

Some of the more significant powers set out in the Constitution Act 1986 and mentioned above, require further analysis for the purpose of this paper. These are as follows:

(a) Royal Assent to Bills

Section 16 of the Constitution Act 1986 provides that the signed assent of the Governor-General is required, for a Bill passed by the House of Representatives to become law.

Historically, New Zealand Colonial Governors had a duty not

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32 SR 1983/225 Clause III(a). The Letters patent also provide for the constitution and membership of the Executive Council. It is the Executive Councils' function to formally advise the Governor-General on behalf of the elected government of the day.

33 Professor Brookfield cites as a commonly discussed example, the reserve power to dismiss a government that is acting illegally or unconstitutionally. Quite clearly the Governor-General could not seek advice from that ministry as to its own demise. FM Brookfield *"The Monarchy and the Constitution Today: A New Zealand perspective"* (1992) NZLJ 438, 439.

to disobey the law of the United Kingdom or to disobey the instructions of the Crown. Where these duties conflicted with the legislative agenda of colonial administrators, assenting to a bill might conceivably have become an issue.

In addition, colonial governors had the power to reserve assent and refer the matter to the United Kingdom for the Sovereign's assent.[34] Notwithstanding the lack of autonomy of the early New Zealand legislature, no bill presented for assent has ever had that assent refused, then or since. There are two examples of Bills passed that were later disallowed in 1855 and 1867, but the discretion to refuse assent has never been exercised.[35]

Today, Royal Assent to a Bill remains a formality. Section 16 of the Constitution Act 1986 further emphasises the formality of the procedure, in that it does not use the word "discretion", which had appeared in the equivalent provisions of the New Zealand Constitution Act 1852.[36] By Convention, the Governor-General is in the words of RQ Quentin-Baxter assured by the Attorney General in his certificate accompanying the Bill that the "Bill contains nothing which requires that his excellency should withhold his assent therefrom."[37] The assent power is therefore the least likely to be used on a reserve, discretionary basis.

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[34] The process has been described by Dicey, where he observed however, that: "these assents are constantly given as a matter of course" above n26, 104.

[35] See: McGee D *Parliamentary Practice in New Zealand* (2nd ed GP Publications Wellington 1994) 328-329.

[36] See: Palmer G *"New Zealand Constitution in Crisis Reforming Our Political System 1992"*, J McIndoe Limited 48-49. Palmer expresses the view that were the Governor-General to exercise the assent power as a discretion and refuse to follow advice and withheld assent "there would be a first rate constitutional crisis" at p 49.

[37] See n25 above, 298.

(b) Summoning, proroguing and dissolution of Parliament
Section 18 of the Constitution Act 1986 contains three further powers exercisable by the Governor-General. By proclamation, she may summon, prorogue or dissolve Parliament.[38] These powers were formerly contained in clause X of the Letters Patent of 1917. They do not appear in the 1983 regulations that replaced the 1917 Letters, as the powers have for many years and now continue to vest in the Governor-General by statute.[39]

The vesting of those powers by statute, rather than by subordinate legislation, is a recognition of their constitutional importance. Parliament cannot be dissolved, or summoned, without the Governor-General's intervention pursuant to these powers.

Both historically and in practice in New Zealand, the powers contained in S.18 have been exercised strictly in accordance with the requirements of the Electoral Act 1993 and ministerial advice. In particular, S.189 of the Electoral Act entrenches S.17(1) of the Constitution Act 1986, which provides for a three year parliamentary term.[40]

The powers to dissolve or prorogue have never been used in New Zealand contrary to the wishes of the government of the day. However, Dissolutions prior to the end of the statutory term are common, but they are done at the request

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38 Constitution Act 1986 S18(2). Prorogation differs from dissolution in that the former involves discontinuance or suspension of the meetings of the legislative body without dissolving the same. Parliament is not terminated by prorogation as it is when dissolved most commonly as a precursor to a general election.

39 Ibid SS (1), and see the comments of A Quentin-Baxter above n25, 13, para 42.

40 The Electoral Act 1956 also contains provisions relating to the Governor-Generals roles in directing the Clark of the writs to issue writs for a general election (s.125) following expiration or earlier dissolution of parliament. Dissolution is by convention done on the advice of the Prime Minister.

of the Prime Minister, for the purposes of an early general election.

Independent or discretionary application of those powers by the Queen's representative, may occur at times of constitutional crisis or deadlock. Examples commonly cited by writers on constitutional law, include a government refusing to resign after losing a general election, or after losing a vote of confidence in the house.[41] Similarly, a government with majority support that took advantage of that position and embarked on unconstitutional legislative changes, might expect the sanction of early dissolution.

Complimenting the powers to summon and dissolve, is the power to refuse a request for dissolution. This discretion might be exercised, where the Governor-General is able to ascertain, that there is an alternative power grouping in the House capable of forming a government. It is submitted that the Governor-General would have to be satisfied that, the alternative ministry would be able to command the confidence of a majority of the members.

(c) Appointment and dismissal of the Prime Minister

There is no statutory provision establishing the office of Prime Minister.[42] However, by virtue of clause X of the Letters Patent 1983, the Governor-General is empowered to appoint all Ministers of the Crown. These Ministers, including the Prime Minister, are appointed under the Seal of New Zealand "to hold office during pleasure".

Accordingly the Governor-General has the power to terminate

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41 See for example HV Evatt and EA Forsey, Evatt and Forsey on the Reserve Powers (Legal Books, Sydney, 1990) and the discussion by RQ Quentin-Baxter in the article referred to in n25 above, 290-297

42 By convention the Prime Minister is head of the government.

the appointment of the Prime Minister at her pleasure, theoretically at any time. In actuality, the use of the power might only be considered to break a constitutional deadlock. This reserve power has never been used in New Zealand. However, termination by a Governor-General has occurred in exceptional circumstances in Australia, as a result of a constitutional deadlock that arose between the lower house and the Australian senate.[43]

A more likely use of the powers in clause X is in respect of appointment. Under MMP, as the present Prime Minister has observed, there would seem to be an increased likelihood of a hung parliament.[44] If no one party has a majority, then the Governor-General's discretion to appoint should be exercised in favour of the person most able to form a workable coalition. The person that can satisfy the Governor-General, that he or she will be able to command the confidence of the House.[45]

It is clear from the above analysis that the reserve powers are an important constitutional protection against abuse of power by elected representatives. It is comforting to realise that the powers will rarely, if ever, be required. It is even more comforting to know that they are there, if and when required.

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43 The well documented and controversial dismissal by Sir John Kerr in 1975 of the then Australian Prime Minister Mr Whitlam arose from a constitutional deadlock. The Whitlam government was unable to secure passage of its supply bills through the senate. The decision by the Governor-General to act was made all the more controversial by the fact that the government he dismissed still had a majority in the lower house and had not been acting unconstitutionally or illegally. For an analysis of this dismissal see the article by RQ Quentin-Baxter n25 above.

44 See quote in text above, 4.

45 M Chen writes that "MMP may require reserve powers to be used more often. This will give the Governor-General more opportunities to exercise control over the government. See M Chem *"Remedying New Zealand's Constitution in crisis: Is MMP part of the answer?"* [1993] NZLJ22, 33.

It is submitted that the safeguard of having reserve powers in the hands of the head of state must be maintained in a New Zealand Republic. In Part II the writer will discuss in more detail how this may be achieved, so that this final constitutional safeguard can be preserved.

III CONSTITUTIONAL CONVENTION

The Reserve Powers are underpinned by a number of Constitutional Conventions. These conventions limit the opportunity for the Governor-General to exercise independent discretion in the application of the powers.

Dicey defined "conventions of the Constitution" as:[46]

> Customs, practices, maxims, or precepts which are not enforced or recognised by the Courts that make up a body, not of laws, but of constitutional or political ethics.

Whilst this definition has been the subject of criticism by legal writers,[47] it is submitted that it nonetheless identifies the fundamental basis for convention, that is, customary practice.

The fundamental convention underpinning the constitutional conduct of the Governor-General is that of ministerial advice. That is, that the Governor-General will (almost without exception) act in accordance with advice given to her by the ministers of the crown. The Convention is concisely set out in paragraph A5 of Chapter 1 of the

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46 *An Introduction to the Study of the Law of the Constitution.* AV Dicey (1975) The MacMillan Press Ltd, 417.

47 See for example: Marshall G, *Constitutional Convention - The Rules and Forms of Political Accountability (1986).* Marshall points out that conventions have indeed been the subject of judicial discussion and recognition.

Cabinet Office Manual, where it states that:[48]

> The Governor-General, like the Sovereign, acts on the advice received from Ministers. This advice is tendered either within the forum of the Executive Council, or directly to the Governor-General by the Prime Minister or another Minister of the Crown. Only in a very few cases may the Governor-General exercise a degree of personal discretion (and even then convention usually dictates what decision should be taken).

The last sentence of the above paragraph, is a clear reference to the discretionary aspects of the Governor-General's reserve powers in the event of constitutional crisis. It is notable that the manual recognises that, even in times of crisis, convention will likely dictate the decision that will be taken by the Governor-General.[49]

The Executive Council is the formal organ of government responsible for ensuring that the Governor-General is never without ministerial advisers. Clause VII of the Letters Patent 1983 constitutes the Council. Clause XVIII refers to the appointees to the Council as "our responsible advisors."

Those "responsible advisers" must be members of Parliament, except in accordance with the limited statutory proviso mentioned previously.[50] In practice, they will be

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48 Cabinet Secretary, Cabinet Office Manual (Wellington 1991) 3.

49 For example if a Prime Minister, having lost a vote of confidence before the House, refused to resign, there are a number of options available to the Governor-General that, by customary practice or convention, the Governor-General would almost certainly follow. These options include dismissal and the calling of an election after dissolution of Parliament. Alternatively, the Governor-General might see if there was another grouping, able to form a government from within the House of Representatives.

50 See n15 above.

ministers of the Government of the day. Acting on the advice of those ministers (in the form of recommendations to make Orders-in-Council) the Governor-General merely carries out the instructions of her Government.

The office of Governor-General is therefore not one where the incumbent exercises independent governmental powers. The holder of the office should be and usually is a non-partisan figurehead representing Queen and country.[51] The writer does not, however, underestimate the importance of the constitutional role of the office in maintaining legitimacy and continuity of Government.

The supremacy of the elected House of Representatives cannot (except in the exceptional circumstances referred to earlier in this paper, where the reserve powers might be called upon) be challenged or usurped by the Governor-General. The role of the Governor-General in facilitating the continued legitimacy of Parliament and its elected House, is fundamental to the maintenance of the rule of law.[52]

IV GOVERNOR-GENERAL'S CEREMONIAL ROLE

In keeping with the non-partisan role of our present Head of State, the Governor-General undertakes a considerable

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[51] However, there have been some controversial appointments. For example, Sir Keith Holyoakes' appointment in 1977 by the Queen on the recommendation of the then National Government. This was seen as politically motivated in some quarters and a departure from tradition by virtue of the appointees' previous role of Prime Minister and leader of the National Government during the late 1960's and early 1970's.

[52] For example: In dissolving parliament preparatory to a General Election the Governor-General takes an active participatory role in ensuring the continuance of what Professor Quentin-Baxter refers to as "... the virtue of the triennial Parliament, with its frequent and regular appeals to the electorate. This system allows minimal opportunities for the development of parliamentary situations that were not contemplated by the electorate." Above n25, 307.

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number of ceremonial duties. Such duties include opening new sessions of the Parliament and delivering the speech from the Throne.[53] In addition, the holding of investitures, attending Waitangi Day Commemorations, welcoming Heads of State and receiving the credentials of foreign diplomats, number among some the more important ceremonial duties.

The Governor-General, it is submitted, should be seen by the people of New Zealand as a symbol of Nationhood and unity. The position does not and should not, involve the incumbent in party politics. Therefore, the holder of the office can, through force of his or her own personality, be a popular figurehead to the public, regardless of their political affiliations or preferences.

The ceremonial nature of the job also involves the Governor-General in a patronage role for many community organisations. Such activities should further enhance the symbolic nature of the office, as a focus of national unity and identity. The Head of State needs to be able to represent the nation at home and internationally. It is the writer's view and one that will be argued in Part II of this paper, that the Head of State does not need to maintain links with the British Monarchy, to be able to successfully fulfil all of the existing constitutional and ceremonial roles of the office.

V THE NEED FOR REFORM

The Prime Ministers' call for debate on a New Zealand

[53] The speech from the Throne is prepared for the Governor-General by the Government and is used to outline the Governments proposed legislative programme for the comming session. It is also used as a "State of the Nation" statement or review, by and on behalf of the Government. See D McGee in above n35, 97-99. This act of communication to the House, on behalf of the government, further emphasises the titular nature of the office of Governor-General.

Republic is unlikely to gather sufficient momentum to initiate the reform on its own. There is some validity to the argument that the present system of constitutional monarchy, coupled with our parliamentary democracy, has served New Zealand well. The history of New Zealand is largely one of political stability and relative economic prosperity. Both are functions, in part, of a system of government that works.

There is, therefore, an issue as to whether such a radical reform to our constitutional framework can be justified. Is it necessary? Can rationale be established to support the proposed reform?

It is the writer's submission that there are a number of indicators that point to a New Zealand Republic being a natural progression. Rather than being urgent reasons for reform, these indicators highlight the emergence of New Zealand as an independent pacific rim nation.

The first of these indicators is the rapidly changing demographics of New Zealand. As each generation passes, more and more New Zealanders born on these South Pacific Islands, will find it difficult to see the relevance of colonial links with the United Kingdom.

New Zealand has a rapidly growing pacific island population in addition to the influx of Asian and other ethnic groups.[54] Few of these people have strong historical or cultural links to the United Kingdom.

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54 *The New Zealand Official Year Book 1995* (98 ed, Statistics New Zealand, Wellington) records that people of Pacific Island, Asian and non-European origin now make up over 10% of the population and states that: "While the cultural diversity of New Zealand is - for the greater part - Eurocentric, the range of cultural norms present in New Zealand that have come from non-European sources, along with existing Maori culture suggest that New Zealand will proceed into the next century possessing a wide range of different ethnic and cultural values.", 129.

The second indicator is our geographic situation. New Zealand is physically closer to the nations of the Pacific rim than the United Kingdom and Europe. Consequently, it looks to this region as an integral part of its future and is influenced by its near neighbours in both its political and cultural outlook.

A third indicator can be found in the area of trade and economic development. In 1960, the United Kingdom took 53% of our total exports. By 1992 the figure was as low as 6.5%, a function, partly of Britain joining the EEC and our consequent quest for other markets, closer to home.[55]

This trend is highlighted by both the Closer Economic Relations (CER) arrangement with Australia and increasing involvement in the Asia Pacific Economic Community (APEC). The importance of Asia in particular, is emphasised by the following statement from the Ministry of Foreign Affairs and trade:[56]

> there is now a strong consensus in political, business, official and research circles [that] New Zealand's best economic prospects are in Asia.

As our nearest neighbour and major trading partner, the moves by Australia to consider Republican reform will influence the New Zealand body politic. This can already be seen in the excerpts quoted above, from a recent prime-ministerial speech.[57] It is submitted that as trade and economic links with the United Kingdom continue to diminish, the relevance of the constitutional links to New Zealander's will also diminish.

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55 See Ministry of Foreign Affairs and Trade Publication (1992): New Zealand Trade Policy Implementation and Directions : A Multi Track Approach, 15.

56 Ibid 80.

57 See text at n4.

A further indicator can be found in the continued troubles of the Royal Family as aired in the world media. This adverse publicity can only increase the calls for change and weaken pro-royalist sentiment. Some of the antics portrayed, make it plainly embarrassing for New Zealand to be associated with the monarchy, no matter how minor its role in our government.[58]

Public opinion, fueled by the media is a powerful persuader of politicians. New Zealanders are increasingly secure of their place in the world and of their identity as a pacific rim nation. Change to total sovereignty for New Zealanders is inevitable. It is merely the timing and the method that needs to be formulated.

Another and perhaps the most important indicator which the writer argues will be a precursor to change, is the recent changes to the political environment with the introduction of a mixed member proportional representative ("MMP") electoral system. Ever since New Zealand relinquished its status as a dominion of Great Britain in 1947, political change has moved us slowly but, it is submitted, inexorably toward severing all constitutional links with the United Kingdom.

The introduction of MMP, is a major departure from the traditional First Past-the-Post system we inherited from the British based, Westminster style of government.

The Prime Minister is clearly of the view that there is an increased likelihood of a hung parliament following an MMP

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58 As FM Brookfield commented in above n33, 443: "If republican sentiment is probably not, or not yet, strong among New Zealanders, royalist sentiment has certainly declined greatly over the last forty years since the present Queen's first visit. Whatever happens elsewhere, that factor may in the end be enough to bring about or at least facilitate the demise of the New Zealand monarchy - perhaps after the present Queen, who in very many ways has staunchly and successfully upheld the institution, has gone."

election.[59] Correspondingly he is of the view that there will be an increased likelihood that the Governor-General might have to exercise reserve powers, as she may be unable to determine who are her responsible advisors.[60]

Therefore, the Governor-General is likely to have to use her discretions more often.[61] The office will assume much greater importance and potential political influence than hitherto has been the case. This leads to the central issue, it is submitted, as to whether that kind of power should continue to reside in the office of a person that represents the Monarch of another country? It is the writer's view that it should not and need not. This kind of power can and should be exercised by a Head of State that derives his or her efficacy directly from the people of New Zealand.

The rationales for change are those indicators discussed above. These indicate that the present constitutional monarchy is losing its relevance as New Zealand heads towards the end of the twentieth century. Relinquishing links with the British Monarchy does not necessitate the losing of the constitutional safeguards of the present system. Part II of this paper sets out how those safeguards can be maintained. In simple terms the change to a Republic would be a statement by New Zealand of its independence and maturity as a nation.

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59 See text at n4.

60 Ibid. The Prime Minister envisages a greater role for the Head of State "as we form Governments under MMP." The Governor-General's responsible advisors are those elected members of the House who are able to form a government capable of commanding the confidence of a majority of the House. In a hung parliament the Governor-General may have to exercise her inherent discretion (without advice) to appoint a Prime Minister or dissolve parliament and call another election.

61 For a detailed analysis of the role of the Governor-General and the reserve powers under MMP see C Morris *"The Governor-General, the Reserve Powers, Parliament and MMP, a New Era"* (1995) 25 VUWLR 1.

VI DEFINITION OF A REPUBLIC

A "REPUBLIC" DEFINED

Having "set the scene" in the analysis and commentary above, the reader will have a background knowledge of what is now in place in New Zealand in terms of the Constitutional role of the Governor-General. In addition, it is submitted that the writer has identified some valid rationales for embarking on the proposed reform process, toward the establishment of a republic.

Before embarking on an analysis of the reform process, it is necessary to first define what a republic is. The Oxford dictionary defines the meaning of the word Republic as:

> (a country with a) system of Government in which the elected representatives of the people are supreme and with an elected head (The President).

A further definition is provided by the Hutchinson Encyclopedia:[62]

> A country where the head of state is not a monarch, either hereditary or elected but usually a president whose role may or may not include political functions

Whilst simplistic, the above definitions identity two of the most important basic features of a republic. They are, firstly, that ultimate power in a republic (in theory at least) resides in the voters and secondly, the Head of State is elected or appointed and it is not an inherited or hereditary position.

The Australian Republic Advisory Committee used the

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62 The Hutchinson Encyclopedia (2 ed Helicon Publishing Limited, Oxford, 1992) 701.

following definition in its Options report:[63]

> A republic is a state in which sovereignty is derived from the people, and in which all public offices are filled by persons ultimately deriving their authority from the people.

It follows from the above definitions, that the present use by New Zealand of a hereditary monarch, as its head of state, must be abolished if republicanism is to be embraced. At present, all Members of Parliament are elected through a system of universal adult suffrage. Yet the sovereign and her representative the Governor-General, are not subject to the electoral process.

B FEATURES OF HISTORICAL REPUBLICANISM

Writers in the field of political science have commented that historically, where a nation embraced republicanism it was often a revolutionary repudiation of monarchy. Examples cited include the French and American revolutions and the Romans, who replaced the collapsed Etruscan monarchy with an empire founded on republican principles.[64]

History indicates that when the legitimacy of a hereditary monarch is challenged and usurped, there is a real risk of anarchy, if the power vacuum is left unfilled. Traditionally the proponents of the republican ideal would fill the vacuum with popular sovereignty.

The Sovereignty of the people would be backed by a written constitution. The constitution would be used to balance the rights of the people by placing checks on the powers

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63 Above n6, 39.

64 S Lawson and G Maddox in an *"Introduction to Australian Journal of Political Science"* (1993) Vol 28 Special Issue on Republic of Australia. See also G Maddox in the same publication in an article entitled "Republic or Democracy?" 9-26.

of those elected to govern them. These checks and balances contained in often extensive legal documents, have been identified as among the distinguishing historical features of a republic.[65]

Most constitutions seek to encapsulate basic freedoms to protect the rights of the "sovereign people" of a nation. As such they often contain enshrined or entrenched laws, which cannot be altered by simple majority vote of elected representatives, if at all.

It is submitted, that for the republic founded by revolution rather than by a stable process of reform, a written constitution is an essential element. For a country like New Zealand, that has basic freedoms in place and embarks on planned reform to republican status, the importance of a single and extensive constitution is not so clear. In the case of the former, the constitution represents a new approach to governance. In the latter, the changes may be of a more cosmetic nature (as in relinquishing historical ties to a foreign monarchy) and the pre-existence of basic freedoms mitigates against the need for a single foundation document.[66]

In summary then, the term republic denotes a system of government with a number of identifiable features. Some of these are indicated by the definitions mentioned above. They are the supremacy or sovereignty of the people. An elected rather than hereditary head of state and public

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[65] Pettit P 1992 *"Republican Themes"* Legislative Studies 6(2) 29-30.

[66] For example, The Constitution of the United States has in the first ten amendments to its constitution, laid down a range of rights designed to protect its people from abuse of power by the state and guarantee certain basis rights and freedoms against the state. The French constitution contains a Declaration of the Rights of Man and of the citizen, that dates back to the revolution and is intended to guarantee individual rights previously denied when the French were governed by its monarchy. Both of these countries established republics by revolutionary force.

officers deriving authority from the people. In addition, another important feature of a democratic republic is a well defined separation of powers between the state and the judiciary. Of utmost importance is the rule, of law backed up by the power of the courts to judicially review how the state enforces its laws.

Historically, republics have emphasised people power and personal rights. They are a repudiation of monarchical systems of rule by the successive generations of one family.

VII REPUBLIC OF IRELAND - A MODEL FOR NEW ZEALAND?

As a conclusion to Part I of this paper, it is proposed to briefly examine the constitutional framework of an existing republic. The purpose of such an examination is firstly, to use the example to illustrate the basic legal elements of a republic and secondly, to identify aspects of the model that might be adopted for use in New Zealand.

The model chosen is that of the Republic of Ireland. 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-executive president who fulfils a similar role to the New Zealand Governor-General. It also has a proportional representation electoral system, although using the single transferrable vote, rather than the Mixed Member Proportional representation system adopted by New Zealand.

Unlike New Zealand, however, the Republic of Ireland does have a single written Constitution.[67] Adopted in 1937, it

[67] Bunreacht na hEireann. For a full copy of the Constitution with commentary see JM Kelly *"The Irish Constitution"* (2 ed 1987 Jurist Publishing Co Ltd, University College, Dublin).

provides a legal framework within which the state government must operate. Additionally, it sets out the fundamental rights of the Irish citizen.[68] It also establishes a bicameral parliament.[69]

Many features of the Irish system of government would be instantly recognisable to students of the New Zealand constitution. Those features include an independent judiciary, a government which gains its efficacy through holding a majority of seats in parliament and a non-executive head of state, with certain residual discretionary powers.

The Irish Free State was established in 1922, following the War of Independence with Britain. The State had dominion status and the British Crown continued to be represented by a Governor-General until 1936. The 1937 Constitution vested executive power in the people "to be exercised by or on the authority of the Government" and created the office of President.[70] At this time, links with the English Monarchy were effectively severed.

The Irish President therefore, replaced the Governor-General, but not as a representative of the Monarch, rather, as a representative of the Irish people. In that representative role, the President of the Republic has two functions, those of head of state and guardian of the Constitution. It is at this point that the similarities with the office of Governor-General in New Zealand begin to emerge.

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68 Articles 40 to 44. These guarantee among other things, personal liberty and freedom of expression.

69 Article 15. The Irish legislature consists of the Dail or lower house, the Seanad (senate) or upper house and the president. It has the "sole and exclusive power of making laws for the State".

70 Articles 49 and 12 respectively.

In terms of the role of the Irish president as constitutional guardian there are, under the constitution, certain powers which the president may exercise independently of the government. Among these powers is a discretion to refuse a dissolution to a Prime Minister that has lost his or her majority in the Dail or Lower House of Parliament.[71] It is submitted that this and other discretions accorded to the president, are akin to the reserve powers available to the New Zealand Governor-General.[72]

Another major similarity with the New Zealand office is, that except for these seldom used discretionary functions, the Irish President must act on advice from his or her Ministers. Article 13.9 states that:

> The powers and functions conferred on the President by this constitution shall be exercisable and performable by him only on the advice of the Government, save where it is provided by this Constitution that he shall act in his absolute discretion or after consultation with or in relation to the Council of State, or on the advice or nomination of, or on receipt of any other communication from, any other person.

The Council of state referred to in the above quote performs a similar function to the New Zealand Executive

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[71] Article 13.2.2

[72] The other discretions include power to refer a bill to the Supreme Court to test its constitutionality (article 26), to convene a meeting of either or both houses of the Legislature (article 13.2.3), and where a bill is passed without senate consent, the president may on receipt of a petition from a majority of senators and at least one third of the members of the lower house, refuse to sign a Bill into law until the same has been approved by a national referendum (article 27). David Morgan comments that "It is a tribute to successive Irish Governments that Presidents have seldom found it necessary to use these powers and have never had to do so in what might reasonably be regarded as a crisis. Indeed it is notable that only two of these discretionary functions have ever been exercised by the President". DG Morgan, *Constitutional Law of Ireland: The Law of the Executive, Legislature and Judicature*. (The Roundhall Press, Dublin 1985) 48.

Council, in advising the Irish Head of State. Members of the Council include both the Prime Minister and his or her deputy. Although the President must consult with the Council, where the constitution confers a discretion, he or she is not bound to follow the recommendations of the Council.

Unlike the New Zealand Governor-General the Irish president is elected by direct vote of the people.[73] The term of office is seven years and a president may serve a maximum of two such terms.[74] A candidate for the presidency must either be nominated by a minimum of 20 members of the House of Representatives or by the Councils of not less than four administrative counties.[75] Under Article 12.10 of the Irish Constitution, the President can be impeached for "stated misbehaviour" and where he or she exercises a non-discretionary function, that function can be subjected to judicial review. This impeachment power should be contrasted with the position of the Governor-General in New Zealand. Brookfield observes that the sovereign has a reserve power to refuse to dismiss a Governor-General and "to reject a Prime Minister's advice that the Governor-General be dismissed."[76] It is submitted that there is much greater certainty in a system where the process for the removal of the Head of State, is contained in a written constitution.

To summarise, the Republic of Ireland provides a model for a republican system of government that could conceivably be adopted for use in New Zealand. It is not suggested that it is simple a matter of transporting the Irish system

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[73] Article 12.2.1.

[74] Articles 12.3.1 and 12.3.2.

[75] Articles 4.2 i and ii.

[76] In above n33, 443.

of government in its entirety to New Zealand. However, there are a number of aspects to the Irish system, which could be incorporated in republican reforms in this county.

In particular, if New Zealand were to sever its constitutional links with the monarchy, why not replace the Governor-General with an elected President? That President would be a non-executive officer with certain residual discretions, to safeguard the constitution in times of crisis.

A single written constitution would not be a necessity, nor would codification of the reserve powers. The terms of the New Zealand constitution are, as has been discussed, workable and capable of precise definition, even though not contained in a single document. The reserve powers, so seldom required, are nevertheless able to be described with enough specificity from customary practice and convention, to be workable without codification.

Without doubt, all the Governor-General's functions outlined earlier in this paper, could be exercised by a republican head of state. The only major difference in the constitutionality of the new office is, that the republican Head of State would no longer gain his or her efficacy from the sovereign monarch. It is submitted that the efficacy of the republican head of state would either be derived from a sovereign parliament, or directly from the people of New Zealand, or a combination of both.

PART II: THE MECHANICS OF REFORM

VIII THE MINIMALIST APPROACH TO REPUBLICAN REFORM

It is intended in Part II of this paper to focus on an analysis of the legal reforms that would be required to establish the Republic of New Zealand. The writer will look at the policy decisions and instrument choices that need to be made, to establish a viable legal framework for a republic to function effectively in the New Zealand context.

The writer proceeds from the assumption that the political decision to dispense with the Monarch as sovereign, will inevitably be made. It will, as discussed, come about as a natural function of progress and consequent change in the New Zealand pschye. The issue should properly be decided by the voters at a referendum, in a similar manner to that held for the recent electoral reform.

Assuming that a majority vote for constitutional change, what then are the minimum reforms that would be necessary to change to a workable republic? This question was part of the terms of reference of the Australian Republic Advisory Committee (ARAC) which concluded in its options report that:[77]

> ... all that is required to convert Australia into a republic is to remove the Monarch and implement consequential amendments to its governmental system. ... Such a republic would substitute an Australian Head of State for the Monarch and the Governor-General, with consequential provision being made for the new Head of State's appointment, removal and powers. However, the present relationship between the executive government and the Governor-General would be maintained essentially unaltered. All other institutions of Australian

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77 See above n6, 40.

> government, the States, Parliament, including the Senate, the High Court - and our fundamental constitutional principles - federalism, responsible parliamentary government, the separation of powers, judicial review - would remain completely unaltered. Those institutions and principles need not be altered by the advent of a republic, and the model prescribed by the Committee's terms of reference would leave them intact and unaffected.

This statement of minimum requirements can be readily applied to New Zealand. Notwithstanding that Australian has both federal and state governance, an extensive written constitution and a bicameral House of Representatives, its constitutional similarities to New Zealand are clear. It is therefore reasonable to conclude that similar minimalist reforms could work in New Zealand. Brookfield has likened New Zealand to a "defacto republic" with the Governor-General in almost all respects a defacto President.[78] A statement of this nature by a leading constitutional expert, tends to confirm that only minor adjustments would be needed to turn New Zealand from defacto republic, to a republic in fact and at law.

The minimalist approach has its critics across the Tasman. Australians for Constitutional Monarchy (ACM) subscribe to the view that you cannot replace the Governor-General with an Australian Head of State, without changing the fundamental nature of the office.[79] The chief concern of ACM in its submissions to ARAC, was the effect of a republican system on the balance of power between the executive and the Head of State. ARAC rejected this concern citing the example of a number of existing parliamentary republics and stating that:[80]

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78 Above n33, 443.

79 Above n6, 41.

80 Above n6, 42. The Report concludes that "the choice to become a republic has no particular implications for the system of government by a newly independent nation".

> Any of the options outlined in this report, if adopted, would result in the government of Australia continuing to be administered by a ministry responsible to the Parliament and commanding a majority in the House of Representatives with a largely ceremonial Head of State who performs almost all of his or her functions on the advice of that Ministry.

It is the view of the writer that the minimalist approach to change is one that should be adopted by New Zealand. Firstly, the minimal changes required (which shall be discussed in more detail below) can be accommodated within the present constitutional structure. Secondly, adopting the minimalist approach is likely to be more acceptable to an electorate which has a limited understanding of the constitutional issues. Thirdly, having put the initial changes in place (by severing links with the hereditary monarch and introducing our own Head of State) further and perhaps more radical change could be introduced as New Zealand society develops. For example, by the introduction of a single written constitution and or codification of the reserve powers. By opting for the necessary minimal reforms, an initial statement can be made about New Zealand's maturity and status as an independent nation. The fundamental concept of responsible government will remain largely unaffected.

However, even the minimal change of substituting a New Zealand Head of State for the Monarch and Governor-General would be major constitutional reform. Accordingly, it would be appropriate for a referendum to be held on the issue before a decision to proceed is made. As with the MMP referendum, the people of New Zealand will need educating as to what remains of our legal ties with the Monarchy, to be able to make an informed decision.

It is the writer's view that notwithstanding the legal position, the real appeal of a New Zealand republic is emotive. For a generation of New Zealanders the links with the Queen of the United Kingdom must surely be an anachronism. A Majority of countries have their own head of state representing the people of their nation. Yet, New Zealand has an absentee Head of State in the Queen. The Queen is by circumstance, unable to perform the normal functions of Head of State within her realm of New Zealand. Accordingly, she has a representative to perform those functions on her behalf.

The anomaly is, that her representative is appointed on advice by the Prime Minister. Furthermore, the Governor-General exercises all of the functions of a Head of State, but cannot claim the status of head of state. Where in that equation, is there a justification for having to refer the nominee to the Queen, for approval and appointment?

It is submitted that the people of New Zealand will come to understand that there is no constitutional necessity to retain the Queen as an absentee head of state. The link with the British Monarch is merely a symbolic relic of an old world order. More than that, there is for New Zealand, the emotive issue of what amounts to a continuing aberration on its status as an independent nation.

IX IMPLEMENTATION OF MINIMAL REFORMS

The writer contends that a majority of New Zealanders could be convinced as to the merits of establishing a republic. If, at a national referendum (assuming that this would most likely be the method used) a major ity voted for change, what are the legal reforms that would need to be implemented?

The minimalist approach outlined above principally involves bringing an end to the constitutional monarchy of New Zealand. In addition, it involves establishing a new office for the New Zealand head of state and putting in place rules and procedures for the governance of that office.[81]

A. *The New Head of State*

Before analysing the specific law changes that would be required to relinquish existing ties to the British Monarchy, it is proposed to look at the options for a new head of state. Clearly, the position of head of state is central to any discussion of republican reform. Removal of the monarch as Head of State, without having a viable replacement, would be a dangerous and foolhardy constitutional experiment. That is particularly so as we approach the first MMP general election, a system that is expected to place greater emphasis and importance on the office of the Governor-General.

The importance of the office of head of state as a constitutional guardian, is sufficiently well established historically and legally, not to require further discussion here. It is notable that ARAC received over four hundred submissions and of these, only 26 advocated abolition of the office of head of State, a proposal rejected by the Committee.[82]

Therefore, before a decision is taken to abandon the constitutional monarchy, a proposal for a functional

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[81] The Report of the Australian Republic Advisory Committee briefly examined and rejected the option of dispensing with both the Monarchy and with the Head of State. The basis for the rejection was the significance placed by the committee on the importance of the role a Head of State takes in maintaining checks and balances on the power of the executive. Above n6, 50-51.

[82] Above n6, 47 and see also above n81.

alternative head of state needs to be developed. It is the writer's view that there are three major elements to the new office which require consideration. They are, a general position description, appointment and removal and the powers to be allocated to the office.

1 A position description for the new Head of State

A strictly minimalist approach to reform might dictate that the new head of state would simply fulfil the same role as the existing Governor-General. That approach does not take into account the fundamental change in the role that will occur with removal of the monarch. The Head of State will no longer be a representative of the monarch, but Head of State in his or her own right.

It is therefore possible that the Head of State in a New Zealand Republic could seek to exert political influence, by virtue of this fundamental change. The implications of the higher profile of the new office in terms of the powers to be allocated to the Head of State will be discussed below.

Notwithstanding the likely higher profile of the office, if New Zealand does follow a minimalist approach to the reform process, many of the present elements of the office of Governor-General will be duplicated in the new office. However, this should not apply to the title of the office. In keeping with the move away from the constitutional monarchy, to a republic, it is submitted that the most appropriate title for the new position is that of "president". Just as the term Governor-General is synonymous with monarchy, conversely, "President" is the commonly used title for a republican head of state.

The position description for the President of the Republic of New Zealand should contain a number of general

requirements, as base indicators of the type of role to be performed. The first of these requirements is that the President is a non-executive head of state. That is, like the Irish President and the present Governor-General, the New Zealand President must act on the advice of the Ministers of his or her government and will not have actual political power.

Secondly, the president will carry out a variety of ceremonial and representational functions, at national and international level, on behalf of the New Zealand government and New Zealanders. Again, this is a range of functions similar to those carried out by the Governor-General. However, the increased profile of the office may lead to a greater representational role for the President internationally, for example in promoting New Zealand's economic interests overseas.

Thirdly, the position of President must be non-partisan, in order for the incumbent to be able to effectively exercise constitutional guardianship functions. This requirement would not be intended to exclude persons with a political background from assuming office. More importantly, the method of appointment would need to be carefully formulated, to reduce the opportunity for politicisation of the position.

2 Appointment and removal of the President

The method of appointment and removal of the President requires careful consideration if politicisation is not to occur. The present method of appointment of the Governor-General by the Queen, on advice of the Prime Minister, is open to the criticism that such appointments are indeed political. With the removal of the monarch, that method will of course be redundant. However, the minimal change option of leaving the decision of both

appointment and removal with the Prime Minister and his government alone, has little appeal. Such a method would not sit easily with either the non-partisan nature of the position, or the likely greater emphasis on consensus decision making with the advent of MMP.

The Prime Minister, in his address to the 1994 annual conference of the Newspaper Publishers Association, stated that "the options would seem to be either a general vote of all electors or election by an electoral college."[83] Similarly, submissions to ARAC favoured parliamentary appointment, popular election or appointment by an electoral college.

It is submitted that there is no right answer as to the best method of appointment or removal. However, in the model of the Republic of Ireland discussed above, popular election has been successfully employed for over half a century to choose its head of state.

There are problems inherent in both parliamentary appointment and the electoral college option. For example, both exclude direct voter involvement and the former may lead to conflict between the government and opposition parties as to the best candidate, especially if a special majority (for example two-thirds of the House) was required. Furthermore, the latter option of an electoral college would inevitably lead to concerns and controversy over its membership, that is, the issue of who should or should not be represented on the college.

The primary criticism of the electoral option is the concern that a President, with the popular mandate of a majority of votes, may become too powerful. He or she might be encouraged to attempt to enter the political arena

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[83] See above n3, 17

in competition with the government, especially if backed by a greater majority in voter support than that government.[84] It is the writer's view that the President of New Zealand will rightly have a greater national and international status than the Governor-General presently enjoys. However, politicisation of the new office can be avoided by adequately defining (as in Ireland) and limiting the powers of the office.[85]

The scope of this paper does not allow for a detailed assessment of each of these options. Rather, it is the writer's intention to formulate a basic framework for a workable New Zealand Republic. Accordingly, having reviewed the ARAC report in the light of the political and legal circumstances pertaining to New Zealand, it is the writer's view that appointment by popular election, would be an acceptable option for New Zealand. Furthermore, it is clearly within the contemplation of the Prime Minister.

In keeping with the Irish model, it is submitted that nomination of a suitable candidate or candidates, should require the backing of at least 20 members of parliament. If the post MMP political parties are able to agree to the nomination of a single candidate, then the need for an election can be avoided, with consequent cost savings. In Ireland the non-partisan nature of the office has lead to five single candidate appointments, without a poll, since 1937.[86]

The term of appointment should be six years to ensure

84 See for example the comments of the ARAC n6 chapter 5, 64-74.

85 The ARAC report took the view that if popular election is the method chosen for selection the powers of the head of state would have to be clearly defined and limited in the constitution "so that the Australian people know precisely the powers and duties of the heads of state they are being called upon to elect." Above n6, 72-73

86 See DG Morgan above n72, 52.

continuity of office and to allow for the presidential election to coincide with every second general election. The incumbent President should be able to stand for re-election for a second term, with a two term maximum tenure of office.

As far as qualifications for the office are concerned, there appears to be no good reason to depart from the Irish practise. Therefore the qualifications for President of the New Zealand Republic would be a New Zealand citizen aged 35 years or over. The President should not be allowed to hold any other office during his or her tenure and if a Member of Parliament when elected, must vacate that position. The selection process should ensure that only suitable candidates are nominated, presumably with the necessary eminence and acumen to be able to carry out the constitutional and ceremonial functions attaching to the office.

Provision for removal of the President outside of the electoral process will be an essential part of the reforms. At present the power to remove the Governor-General may only be exercised by the Queen. The power would be exercised upon recommendation of the Prime Minister.

In order to preserve the impartiality of the office, the President should not be subject to removal at the arbitrary discretion of the Prime Minister and his government. The writer supports the view taken by ARAC where the committee stated that there is "a good case ... for parliamentary removal of a popularly elected head of state, provided there was a special majority requirement which ensured a bipartisan result."[87] In the Irish Republic the President can be impeached for "stated misbehaviour" and ARAC submissions refer to grounds of "misbehaviour or incapacity

[87] ARAC Report above n6, 81.

or acting contrary to the constitution."[88] Whatever the specific grounds decided upon, it is submitted that before parliament (by two-thirds majority) is permitted to remove the President, there should be a constitutional requirement for the matter to be referred (also by vote of a majority of the House) to an independent judicial body. That body would decide whether the grounds for removal have been established beyond a reasonable doubt.

3 Powers and Functions of the New Zealand President

The office of President will, like that of the Governor-General, be a non-executive one. In accordance with the minimalist approach advocated by the writer it can be concluded that only those powers and functions presently exercised by the Governor-General should be given to the non-executive President. All such powers to be exercised on advice, with limited exceptions as discussed below.

Therefore, using the Constitution Act 1986 as a staring point, the President would continue to have the power to: confirm the appointment of the speaker of the House; sign a Bill passed by the House into law; summon, prorogue and dissolve Parliament and remove a judge of the High Court from office.

The Letters Patent will need to be revoked as discussed below. However, certain powers and functions allocated to the Governor-General under these regulations should be retained for execution by the President. The Executive Council should be retained to ensure the President has continued access to ministerial advice. In addition, the power to appoint the members of the Council, Ministers of the Crown (including the Prime Minister) and to exercise the prerogative of mercy should be placed in the hands of

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[88] CF: The Irish Constitution Article 12.10.1. and above n6, 75-76.

the President.

In terms of the Electoral Act 1993, the President should also continue to execute the power to direct the Clerk of the Writs, to issue writs for the general election, as required under S129 of that Act.

All of the above powers could be transferred to the President without effecting the present balance of power between the executive, parliament and the judiciary. The powers are, after all, only those powers already exercised by the representative of the Head of State. These are powers which have for many years assisted in the maintenance of stable government. There is no reason to anticipate that this will change just because they are vested in the new office of President.

The President would continue to fulfil all the ceremonial and representative roles now performed by the Governor-General. The notable exception being of course, that he or she will no longer represent the Queen as Sovereign and absentee Head of State.

X CODIFICATION OF THE RESERVE POWERS

The President should still retain the power to exercise the role of guardian of the constitution in times of crisis. To facilitate this, the reserve powers available to the Governor-General should be transferred to the new head of state.

The concept of an impartial final arbiter, to resolve a constitutional deadlock where the parliamentary government has malfunctioned, sits well with the concept of democracy. This statement has validity whether the democracy concerned is a constitutional monarchy or an autonomous republic.

The power to take positive action against constitutional abuse by an elected government, must be available to the President as a last resort. No other official, or body, is better placed to protect the normal functioning of parliamentary democracy in times of crisis than the head of state. This point has been illustrated by the conduct of a number of heads of state at such times throughout the commonwealth.[89]

The New Zealand President would, as an elected head, have a clear mandate from voters to underpin his authority as a constitutional guardian. This mandate, together with the non-partisan nature of the office, means the President (like the Governor-General) is best placed to intervene where there is an issue of constitutionality requiring resolution.

If the President is to retain reserve powers, the issue then raised is how these may be vested in the new office and in what form. Do the powers require partial or complete codification, or should the conventions governing exercise of these discretions remain unwritten?

In respect of the issue of codification the writer again submits that the best option is the minimalist approach to reform. That approach dictates that the minimum change would be to leave the reserve powers underpinned by conventions, but without statutory codification.

As previously stated, there is a substantial body of writing on this issue by scholars of constitutional law.[90] Some favour codification of the reserve powers for reason of certainty, enforceability and the benefit of judicial

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[89] See the examples discussed in the ARAC report above n6 and the analysis of the Kerr dismissal of the Whitlam Government by RQ Quentin-Baxter in n25 above, 298-391.

[90] See above n25.

review and interpretation.[91] Others oppose codification because of the need for flexibility in the development and application of the powers, to a dynamic political and constitutional landscape.[92]

Having evaluated the opposing views and reasoning behind them, the writer is of the opinion that statutory codification would not assist with the better functioning of a New Zealand Republic. The fundamental reason for reaching this conclusion is clear from the writing of those commentators that oppose codification. That is the need for flexible powers.

In the unlikely event (even with the advent of MMP) that the President of the new republic would be called upon to exercise a reserve power, it is submitted that it would be preferable that the scope and flexibility of the discretion was sufficient to be able to adequately resolve the crisis, in whatever form it may take. The following statement by Dr Forsey clearly identifies the central problem with codification:[93]

> To prevent disputes, a more general statement would be worse than useless. Almost the whole field of argument would be left wide open. Precision, detail, comprehensiveness are indispensable. A law covering, with precision, all the possible circumstances which might call for the exercise of even a single reserve power, let alone the lot, is surely beyond the wit of even the most learned and imaginative draftsman. There are bound to be loose ends. Many of the new constitutions, as we have seen, leave the Governor-General with considerable discretion. Also any formula the draftsman may produce will risk giving the Crown or its representative either too much power or too little.

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91 The best known proponent being HV Evatt see above n41.

92 See Dr Forsey in his introduction in above n41.

93 Above n41, xxxiii.

Statutory codification of the reserve powers would run the real risk of giving the President too little power to resolve a constitutional deadlock. Instead, it is submitted that the existing powers be vested in the President and augmented by a restatement and redefinition of the conventions underpinning their exercise.

This restatement and redefinition could, as suggested by Professor Quentin-Baxter be agreed to by a resolution of the House of Representatives.[94] The content of the restatement could reflect (with amendment by deletion of the references to the Governor-General and the Queen and substitution of "President" therefor) the conventions as set out by the professor, in the conclusion to his paper. In addition, new conventions could be included that would better meet the possible constitutional dilemmas that may require resolution under an MMP parliament.[95] Alternatively, or in addition, the resolution of the House could be set out in the Cabinet Manual which, as discussed earlier, already sets out the convention of ministerial advice.

It is notable that the ARAC options report favoured some form of codification, probably within the existing Australian constitution. This approach appears to be based on the concern that leaving the discretionary powers undefined would leave the head of state with potentially autocratic powers. It is the writer's view that extra-statutory codification of the conventions as proposed above would mitigate against abuse of the reserve powers by a New Zealand President. Were the President to attempt to

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94 See above n25, 314-315.

95 For a discussion of these new "MMP" dilemmas see the discussion by Caroline Morris in above n61. On page 22 of the article Morris proposes three new conventions to underpin exercise by the Governor-General of her powers to refuse a request for a dissolution of Parliament and to appoint a Prime Minister in the MMP environment.

exercise his discretion in a manner that clearly breached any one of the conventions adopted by resolution of the House, the sanction of impeachment would be available.[96]

XI ABOLITION OF THE CONSTITUTIONAL MONARCHY

In Part I of this paper, the writer identified the principal elements of the New Zealand constitution, particularly in relation to the Head of State and Governor-General. It is now proposed to analyse the minimum changes that would be required to New Zealand constitutional law, to facilitate republican reform.

The scope and length of this paper does not allow for a detailed examination of all the legislative changes that would have to be made. There are numerous statutes on the books which contain provisions referring to the sovereign monarch, her Governor-General and the Crown. A general review of all statutory provisions would be necessary, to establish the amendments required to remove references to the old order and substitute by amendment or revocation the new republican structure.

The task of abolishing the monarchy would be achieved by an Act of Parliament. As professor Brookfield has observed:[97]

> ... Parliament in exercise of its plenary powers could readily abolish the monarchy; though the Governor-General could properly query ministerial advice to assent to the measure for abolition, unless it had general parliamentary support, or had been endorsed by a referendum of the electors.

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96 See text above 48-49.

97 Above n33, 444.

The Governor-General would have no reason to query advice to assent if, as proposed in this paper, the abolition has been voted for in a national referendum.

A Revocation of the Letters Patent

The Letters Patent Constituting the Office of Governor-General would need to be revoked simultaneously with the passing of the legislation removing the monarch as head of state. Clause XVIII of the Letters of 1983 and Clause II of the Letters of 1987, reserve the power of revocation to Her Majesty the Queen, personally.

Accordingly, a new letter would need to be issued in the form of a statutory regulation. The new letter or regulation would by Her Majesty's command, revoke the existing regulations pursuant to Clauses XVIII and II respectively of the 1983 and 1987 regulations. This would have the effect of terminating the office of Governor-General and the right of that officer to exercise the monarch's executive authority in New Zealand. Such revocation would also abolish the Executive Council.

B Amendment to the Constitution Act 1986 or a new Constitution?

In keeping with the minimalist approach to reform as proposed by the writer, it would not be necessary for a lengthy formal constitution to be adopted for New Zealand to make the transition to a republic. In fact, because there is no entrenched constitutional document the process would be simpler for New Zealand than Australia. The ARAC Report confirmed this by noting that a Constitutional Amendment Bill would have to be passed by an absolute majority of both Houses of Parliament. Furthermore it would then be referred to a referendum of the people of

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Australia.[98]

That is not to say that New Zealand would not benefit from a single written constitution. Such further reform is not within the scope of this paper. However, it is not inconceivable that having adopted the minimal reforms proposed by the writer and become a Republic, that New Zealand would take the further step of fully documenting its constitutional laws. Such a document would incorporate the basic tenants of our system of government.

It is possible that such a document, like the Irish Constitution discussed above, could be used as a means of codifying some of the discretionary powers of the New Zealand President.[99] The decision to embark on this more radical reform, would be dependant on the evolutionary success, or otherwise, of the initial republic.

It is not necessary for the New Zealand Republic to embrace such immediate and radical change. The difference between the Irish reforms and those proposed for New Zealand is that the former embraced republicanism at a time of political upheaval and conflict. The impetus for radical change came from the oppressive colonial rule of the British. New Zealand has no such impetus for radical reform. Instead, it has a long tradition of stable democracy. Accordingly, the approach of initial minimal reform, although conservative, is appropriate. If subsequently it is decided the functioning of the new republic would be assisted by an entrenched constitution, such legislation can be introduced.

The drafters of such a constitution will have the advantage of having been able to observe the workings of the republic

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98 Above n6, 117.

99 See the discussion in the Text above, n34 and n72.

in the New Zealand political and constitutional environment. They will therefore be able to make adjustments to "fine tune" the system, before such matters become entrenched in the provisions of the new constitutional document.

In the absence of a New Zealand constitution therefore, the minimalist approach will require amendment to the Constitution Act 1986. A Constitution Amendment Act would need to be passed by the House and by way of example, the following are some of the likely amendments:

1 The Head of State

Part I of the existing Act would need to be revoked in its entirety. The effect would be to remove the reigning British Monarch as the sovereign in right and Head of State of New Zealand. It would also remove reference to the Governor-General as the sovereign's representative, the appointment of the Governor-General having been revoked with the revocation of the Letters Patent.

The amending legislation would then establish the President as head of state. It would also have provisions dealing with the method of appointment (by election) and removal in the terms discussed above.[100]

Because the act of abolition is of such constitutional significance, it would be appropriate for the amending legislation to have a suitable new preamble, setting out the nature of the reform. It is suggested that such a preamble may be in the following form:

> An Act to reform the constitutional law of New Zealand and in recognition of the development of New Zealand as an independent nation devoted to the principles a

[100] See text above 48-49.

> parliamentary democracy to abolish the monarchy and establish New Zealand as an independent republic.

Any other formula of wording that conveys the above intention would be acceptable. The important point is, that the statement be clearly made to the nation and internationally. Part I of the amending legislation should be equally unequivocal as to its purpose. That is, in amending the sections in Part I of the Constitution Act 1986, there should be a provision that clearly states that the Constitutional monarchy is abolished.

2 The Executive and the Legislature

Part II of the Amendment Act would need to deal with the establishment of an Executive Council to advise the President, in the manner that the present Council advises the Governor-General.[101] Section 6 of the existing Act, allowing for continuity of appointment after a general election and that Councillors must be members of parliament, need not be amended.

Similarly sections 8 and 9 would remain without amendment save for substitution of "President" for references to the Governor-General in respect of the appointment of parliamentary under-secretaries. Also, Part III relating to the legislature would not require amendment except that, the President would confirm the appointment of the speaker.

3 Parliament

Section 14 of the Act would require amendment to state that the parliament of New Zealand will consist of the President of New Zealand and the House of Representatives. Section 16 would have the President inserted, as the officer to

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101 The Executive Council having been abolished with the revocation of the Letters Patent.

exercise the function of assenting to Bills passed by the House.

In terms of the summoning, proroguing and dissolution of parliament, these functions would be exercised by the President, with S18 being amended accordingly.

As part of the overall package of reforms, there would need to be a provision inserted in the Constitution Amendment Act preserving the prerogative (common law) powers and immunities of the Crown. The intention would be to ensure that the executive government of the new republic would continue to have the same powers and immunities that extend to the present executive government.

The ARAC Report at page 147, contains a draft provision preserving these immunities and powers following abolition of the monarchy. It is submitted that it could be adapted for use in the Constitution Amendment Act as follows:[102]

> Subject to this Act, abolition of the Monarchy in itself shall not affect any power, function, right, privilege, immunity or prerogative derived from the royal prerogative and exercisable by the government of New Zealand.

The above analysis is intended only to be an example of the specific statutory reforms that would be required to bring about the proposed minimum changes to the constitution of New Zealand. Although the proposal is for a minimalist approach, the scope of the reforms required is still considerable if a viable republic is to be achieved. Undoubtedly, before any government could make a decision to call for a referendum, a committee similar to that established in Australia would be required to report in

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[102] This is an adaption by the writer of a draft amendment to the Australian Constitution proposed by G Winterton; "*A constitution for an Australian Republic*" Independent Monthly, March 1992, 10 and quoted in the ARAC report.

detail on the options.

XII CONCLUSION

More than five years after its sesqui-centenary and rapidly approaching the 21st century, New Zealand still retains antiquated links with the British Monarchy. The time has come for a peaceful and positive revolution, by moving to the absolute autonomy of a democratic republic.

The Prime Minister has suggested that the beginning of the new century would be an appropriate starting date for the New Zealand Republic.[103] If that is the intention, then planning should start without delay, as there is much work to be undertaken to ensure that the reform process is fully worked through.

In the course of this paper the writer has analysed the primary reforms required to establish a viable republic in New Zealand. In particular, the discussion has focused on the minimum changes that would need to be undertaken to make the transition from constitutional Monarchy to democratic republic. Although the minimalist approach to reform has been proposed, the scope of the law changes involved remains considerable.

The first stage of the process must be, as observed by the Prime Minister, to bring together a group of constitutional law experts to explore the options for reform.[104] If it is then decided to proceed, the matter would be put to the vote by referendum, to find out the level of support for a move to a republic.

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[103] In his speech to the Newspaper Publishers Association see above n3, 18.

[104] Ibid.

In the event that New Zealanders vote in the affirmative, the writer has proposed a reform process involving an elected, non-executive President. The new Head of State would serve for a six year term and be eligible for re-election, for one further term, unless removed by a special majority vote of the House of Representatives.

The powers of the President should be exercised on advice of the executive members of the elected government. Those powers would be equivalent to those presently exercised by the Governor-General, with the same reserve powers necessary to enable the President to act as a guardian of the constitution.

The reserve powers would not be subject to statutory codification. However, the constitutional conventions relating to their application would be identified and or redefined by resolution of the House. In addition, they could be set out in the Cabinet Office Manual, to provide some greater certainty of application, without diminishing the flexibility of the discretions to adapt to a range of constitutional crises.

The initial reform would not require the drafting of a New Zealand Constitution, although this further reform option would always remain available. Instead, existing constitutional legislation (in particular the Constitution Act 1986) would need to be amended and the Letters Patent Constituting the Office of the Governor-General, revoked.

If a decision is taken to become a republic, it should be for the positive reason that it is a natural progression toward complete autonomy. The people of New Zealand should remain justifiably proud of their heritage and the stable system of government it has given them.

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