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**CONSTITUTION AOTEAROA – HOPELESS DREAM
OR POSSIBLE REALITY? AN ANALYSIS OF THE
HURDLES FACING MAJOR CONSTITUTIONAL LAW
REFORM IN THE NEW ZEALAND CONTEXT**

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Abstract:

Law reform is a complicated endeavor even at the best of times. Large scale constitutional reform then can seem a distant daydream. Sir Geoffrey Palmer and Dr Andrew Butler have undertaken to draft a codified constitution for Aotearoa New Zealand in an attempt to make that dream a possible reality. This paper looks at the core features of the draft constitution and highlights aspects of the proposal which may throw up hurdles in the reform process to be followed when attempting to pass the constitution into law. The key issues fall into two categories: those relating to legality and those relating to legitimacy. Ultimately issues of legality such as the propriety manner and form provisions, entrenchment and supreme law can be overcome. However, issues of legitimacy are at the crux of constitutional law reform. In order to produce a constitutional text which carries political legitimacy an extensive programme of public engagement must be undertaken, including educative elements as well as consultative elements which utilise new technologies as much as possible in order to engage as many communities across New Zealand as possible. While constitutional reform is possible, the actual reform process itself is instrumental in whether the vision will ultimately succeed or fail.

Key words: constitution, reform, process, public engagement

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I Introduction

Constitutional development is a slippery subject, hard to get by the tail.¹

With the exception of three nations, all independent countries have formal written, codified constitutions. While they may vary to some degree in their content, for the most part each sets out in an easily accessible way the constitutional structure of its respective country and the founding principles which underpin it. Most modern constitutions can be described as follows:²

A written—more properly, a codified—constitution provides a clear, accessible and coherent account of the body of fundamental rules and principles according to which the state and society are constituted and governed. In addition, it defines the powers of the institutions of government and sets out the rights of individuals and their responsibilities.

A constitution can be described as the rules and principles which together create a clear boundary fence marking out the limits of public power and penning in those who might wish to test its limits or abuse it. New Zealand is one of three countries in the world, along with Britain and Israel, which does not have a formal, codified constitution. Instead, we have an “unwritten constitution” made up of various elements contained within different statutes and constitutional conventions and practices. Our approach in the past to constitutional change has generally taken the typical kiwi “she’ll be right” or “if it ain’t broke, don’t fix it” approach, and what few changes we have made have generally been in the form of quick fixes with a bit of number eight wire to patch up problem areas.³ If you were to now step back and look at our constitution as a whole, however, it appears to be made of nothing but little bits of number eight, all twisted and knotted together, attempting to resemble a strong, cohesive whole. All that is needed is one loose bull to try the fence and the whole thing will collapse.

¹ RQ Quentin-Baxter “Themes of constitutional development: the need for a favourable climate of discussion” (1984) 15 VUWLR 12 at 13.

² Vernon Bogdanor, Tarunabh Khaitan and Stefan Vogenaver “Should Britain Have a Written Constitution?” (2007) 78(4) e Political Quarterly 499 at 499.

³ Matthew Palmer “New Zealand Constitutional Culture” (2007) 22 NZULR 565.

In an attempt to pre-empt that bull, Geoffrey Palmer and Andrew Butler have undertaken an ambitious project, resulting in the recently published book *A Constitution for Aotearoa New Zealand* (“the book”).⁴ As part of this project Palmer and Butler have come together to draft a codified constitution for New Zealand, known as Constitution Aotearoa. This draft Constitution comprises chapter two of the book, with the remaining 12 chapters devoted to an explanation of what it is Constitution Aotearoa proposes, and how this differs from our current constitutional arrangements. The book thus serves a dual purpose as an educative tool and as a vehicle for expressing their vision for change. The proposal is not merely a codification of our existing constitutional arrangements, though in most respects it attempts to reflect New Zealand’s constitutional heritage as closely as possible. There are some major changes being proposed. In its current form, the proposed Constitution would—amongst other things—make New Zealand a republic with its own home-grown Head of State;⁵ it would create an entrenched, supreme law structure which would grant the courts almost unprecedented constitutional power;⁶ it would formally recognise the constitutional position of te Tiriti o Waitangi / the Treaty of Waitangi (the Treaty)⁷ for the first time;⁸ as well as including the entirety of the current Bill of Rights Act 1990;⁹ and it would implement a fixed four-year election cycle rather than continuing our current three-year practice.¹⁰

This is a mammoth law reform project. If it becomes a reality, the Constitution will touch all areas of New Zealand law, fundamentally changing the existing constitutional structures and the way in which New Zealanders engage with government. This paper seeks to analyse the likelihood of such a proposal becoming a reality in New Zealand in the near future by identifying some of the key issues which arise in relation to this type of constitutional reform and how they might be overcome. This paper is not concerned with questions relating to whether constitutional reform is necessary or is desirable in the abstract, or what a codified constitution might or ought to include. Palmer and Butler have

⁴ Geoffrey Palmer and Andrew Butler *A Constitution for Aotearoa New Zealand* (Victoria University Press, Wellington, 2016).

⁵ Draft Constitution Aotearoa, pt 3 (published in Palmer and Andrew *A Constitution for Aotearoa New Zealand*, above n 4), [Constitution Aotearoa].

⁶ Constitution Aotearoa, arts 1, 68 and 116.

⁷ For the remainder of this paper the phrase ‘the Treaty’ will be used to refer collectively to both the Māori and the English versions of the text.

⁸ Constitution Aotearoa, art 72.

⁹ Constitution Aotearoa, pt 12.

¹⁰ Constitution Aotearoa, art 28.

considered these issues at some length in the context of the New Zealand situation in their book. The focus of this paper is on whether a particular reform procedure can be identified for any codified constitution which emerges from this endeavour, and failing that, whether potential hurdles can be identified for this type of reform and how they might be avoided or overcome.

Constitution Aotearoa is only intended to be a first draft, offered up in the hopes of using this period of relative calm to once again push the point and reignite the conversation by providing New Zealanders with something tangible to base their discussions on. Over the next year Palmer and Butler are engaging in a process of consultation with the public, through meetings, fortnightly blogs on their website, and through social media. They are seeking submissions on their proposals and intend to revise their draft after considering public input. The resulting “final” draft will then be published in a second book.¹¹ Thus, the current version of Constitution Aotearoa is only one example of what a new constitutional framework for New Zealand might look like. Even so, some assumptions must be made about what the final product might look like in order to focus this paper’s inquiries.¹² In proposing Constitution Aotearoa, Palmer and Butler have two main aims. Their principle aim is “to state the Constitution in one place so that it is certain and accessible for everyone”.¹³ On its own this would essentially be a collation exercise; the collection and codification of the existing fundamental principles which together form New Zealand’s constitutional fence into one document, which could be passed as an ordinary statute and referred to as our ‘Constitution’.

While a project confined solely to colouring the unfilled spaces in our constitution and bringing everything together under a single basic law would not be without difficulty—indeed, part of the problem of constitutional reform in New Zealand stems from the fact that no one can agree what is in fact constitutional—Palmer and Butler also aim to achieve change:¹⁴

Our proposal is not meant as a simple restatement of our constitutional framework as it is now. This is also an aspirational and reformist project. The changes we have put

¹¹ Palmer and Butler *A Constitution for Aotearoa New Zealand*, above n 4, at 226–227.

¹² It must be noted that the author has been heavily involved in the project almost from its inception and has worked closely with Geoffrey Palmer and Andrew Butler during its development as the principal research assistant engaged for the project. As such, much of what is discussed in this paper is influenced by participant observation, and the potential for bias must be recognised—although all attempts have been made to present an accurate and well-rounded perspective.

¹³ Palmer and Butler *A Constitution for Aotearoa New Zealand*, above n 4, at 11.

¹⁴ At 12.

forward in Constitution Aotearoa we believe are a necessary part of preserving democratic freedom in New Zealand and protecting the fundamental principles which anchor public power and strengthen government accountability.

It is this, ‘secondary’ aim which this paper will focus on—questioning whether the core reforms proposed are possible to achieve and what hurdles might rise up in the reform process.

The reformist aspects of Constitution Aotearoa are primarily aimed at strengthening accountability, transparency and the rule of law in order to provide a constitution “fully fit for purpose in the political and social realities of modern New Zealand”.¹⁵ Thus, some features of Palmer and Butler’s first draft of Constitution Aotearoa are integral to fully realise their vision as set out in the book, and any future version which does not include these elements will not be achieving all that is intended for this project.

The features essential to achieving this vision include any resulting codified constitution being supreme law to strengthen accountability;¹⁶ entrenchment, to prevent government from being able to repeal integral elements of our current constitutional arrangements in a single sitting day of the House under urgency, without any public input, and to protect transparency and the rule of law;¹⁷ the inclusion of the Treaty in recognition of it being “an integral part of New Zealand’s constitutional arrangements” and to clarify one of the most complex and confusing parts of the mess of written and unwritten rules which currently make up our constitution;¹⁸ and the inclusion of the New Zealand Bill of Rights Act 1990 (the NZBORA) to preserve democratic freedoms.¹⁹

While constitutional reform is certainly possible without one or all of these proposals, the resulting Constitution would be unlikely to achieve the core aims which motivated Palmer and Butler to propose Constitution Aotearoa in the first place. Thus this paper will focus on the possibility of reforming New Zealand law through the passage of a codified Constitution which is supreme and entrenched, and which includes the Treaty and the NZBORA. It will briefly canvass the general process for law reform in New Zealand and attempt to identify whether there is a particular process which must be followed for ‘special’ constitutional reform by considering previous reforms which touched on the

¹⁵ Palmer and Butler *A Constitution for Aotearoa New Zealand*, above n 4, at 13.

¹⁶ At 19–20.

¹⁷ At 13.

¹⁸ At 147.

¹⁹ A 162.

constitution and how they were conducted. The bulk of this paper however is devoted to a discussion of the key problems reform of this kind may face and how they may be overcome. The main hurdles which may hinder reform can be divided up roughly into two categories—discussed further below—which refer broadly to the distinction between issues of legality and issues of political legitimacy.

II General Law Reform Process

Law reform is a complicated and often difficult process. It can come about in a number of ways, whether triggered by crisis or through the gradual recognition that the law has moved on from what it once was. Whatever the case, “the awkward issue of politics” must be confronted.²⁰ Law reform is closely related to politics; “the making and passing of legislation is central to the law reform process”, and only the legislature, made up of our elected representatives, our politicians, can make legislation.²¹ Therefore one of the most important steps when attempting reform is grabbing the attention of lawmakers.

Once the issue has been raised and there is an idea for reform, there is a general, loose process to follow to change or add to the law in New Zealand. First and foremost, the proposal must come before the House of Representatives (that body of elected representatives responsible for passing laws, known as the legislature) in a bill, which will take effect as law if it passes through the entirety of the legislative process.²²

During this process bills are usually referred to a Select Committee for consideration and public consultation, where a number of other important considerations may arise: how much of the law are you reforming; what are you changing it to; how are you doing that and what effects might that have on the legal system further down the track?

Reforming the law by getting a statute onto the books “is much harder than anyone who has not tried it may believe”, and reforming it *successfully* (so that it addresses the mischief it was intended to solve and does not require constant reforms itself) is even harder.²³ The questions raised above are just some of the myriad questions which must be asked—and answered—when looking to successfully reform the law. To a large extent Palmer and

²⁰ Geoffrey Palmer “The Law Reform Enterprise: Evaluating the Past and Charting the Future” [2015] 131 LQR 402 at 404.

²¹ At 404.

²² For a detailed explanation of types of bills and the legislative process see David McGee *Parliamentary Practice in New Zealand* (3rd ed, Dunmore Publishing, Wellington, 2005), especially from 305.

²³ Geoffrey Palmer “The Law Reform Enterprise”, above n 20, at 411.

Butler have tackled these questions and how they relate to large-scale constitutional reform in their book. However, there is a gap which must be filled in—the book largely presupposes that reform of the kind proposed is even possible to begin with.

III Is Constitutional Reform any Different?

Reform of any area of the law is a tricky endeavour; reform of constitutional law even more so. Constitutional law touches on all aspects of public life and will by nature almost always be controversial. Constitutions are generally defined as “a body of rules determining or providing procedures for determining the organization, personnel, powers, and duties of the organs of government”.²⁴ In some jurisdictions a special class of legislation, “constitutional” legislation, has developed as distinct from “ordinary” legislation.²⁵ However this distinction between different “classes” of legislation is relevant only to the way in which the courts will interpret and apply the law. While it is possible to establish special procedures for legislation on certain topics,²⁶ New Zealand, for the most part,²⁷ has no such formal distinction or legal requirements around making, amending or repealing constitutional legislation and such legislation can be amended by Parliament by the ordinary legislative process.²⁸

However, constitutional law is a very broad category encompassing almost anything to do with public power: executive, legislative and judicial functions; individual rights; electoral systems; local government; the public service; official information; complaints bodies; and any number of other topics.²⁹ Attempts at reform in many of these areas is likely to draw a high degree of public attention. Because the public power wielded by the government affects all citizens to some degree, constitutional reform often stirs up more visible controversy than reports on, say, the liability of multiple defendants or investigations into new Land Transfer Acts.³⁰ That is not to say that those issues are not important or do not have their share of interested parties standing ready to voice opposition to any recommendations which come out of the process, but those issues are unlikely to be

²⁴ KJ Scott *The New Zealand Constitution* (Oxford University Press, Oxford, 1962) at 22.

²⁵ David Feldman “The Nature and Significance of ‘Constitutional’ Legislation” (2013) 129 LQR 343 at 344.

²⁶ At 348.

²⁷ With the exception of certain provisions in the Electoral Act 1993, discussed in more detail later.

²⁸ Scott *The New Zealand Constitution*, above n 24, at 17 and 20.

²⁹ Matthew Palmer “New Zealand Constitutional Culture”, above n 3, at 569.

³⁰ Law Commission *Liability of Multiple Defendants* (NZLC R132, 2014); Law Commission *A New Land Transfer Act* (NZLC R116, 2010).

regarded with the same “high stakes” mentality of constitutional reform which tends to touch on foundational principles such as democracy and the rule of law. This means that politically, constitutional reform can be distinct from other types of reform.³¹

This distinction between the legal process of reform and the political aspects of the process has been described as a divide between legality (or “legal sovereignty”) and legitimacy (sometimes described as “political sovereignty”).³² The key point has been described thusly:³³

The competing views of sovereignty led the influential Victorian jurist A. V. Dicey to distinguish ‘legal’ from ‘political’ sovereignty. ‘Legal sovereignty’ is vested exclusively in the Crown. It is the only lawful source of governmental authority in our legal system. All acts of government derive from some legal rule recognizing the Crown’s ultimate authority. The paramount expression of this, it has been seen, is the Crown-in-Parliament. ‘Political sovereignty’, however, describes the relation between the Crown and its subjects. It especially embraces the idea that the relation is consensual in a dynamic, ongoing sense. ‘Political sovereignty’ thus legitimates the Crown’s exercise of its ‘legal sovereignty’.

Thus, there is a separation between legal process (what the Crown, or those exercising rights and powers drawn from the Crown can legally do), and political process (even if the Crown is legally entitled to do something, in order to maintain legitimacy, it may refrain from certain actions because of politics). Constitutional issues are often not “purely legal”, and, as Cooke said in reference to the possible abolition of the monarchy, the answer to these legal questions, while important, may not be decisive when it comes to reform:³⁴

In truth, the issue is not purely or even mainly a legal one. It is indeed an issue that would fall to be decided by lawyers, namely the Judges, but perforce they would have to decide it, not by defined legal criteria, but on vaguer considerations - largely their own sense of reality and of the public will.

³¹ Geoffrey Palmer *New Zealand’s Constitution in Crisis: Reforming our Political System* (John McIndoe, Dunedin, 1992) at 57.

³² Carwyn Jones “Tāwhaki and Te Tiriti : a principled approach to the constitutional future of the Treaty of Waitangi” (2013) 25(4) NZULR 703 at 705.

³³ Paul McHugh *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 2001) at 16.

³⁴ Robin Cooke “The Suggested Revolution Against the Crown” in Philip A Joseph (ed) *Essays on the Constitution* (Brookers Ltd, Wellington, 1995) 28 at 36.

A New Zealand's General Approach to Constitutional Law Reform

New Zealanders have historically opted to take a meandering, somewhat unpredictable approach to law reform affecting the constitutional framework within which government is conducted. Our current constitution is a tangled mess of wires consisting of legislation, case law, conventions and historic documents. To get a full picture you would have to comb through 45 Acts of Parliament, including six passed in England, 12 international treaties, nine areas of common law, eight constitutional conventions, three-and-a-half executive instruments, one prerogative instrument, one legislative instrument and half a judicial instrument.³⁵

Developments tend to be either slow and steady, evolving incrementally over time (such as the development of constitutional conventions through the practice of politicians), or sudden shifts which fundamentally change the constitutional structure of the nation (examples include the abolition of the Legislative Council in 1950, the advent of the NZBORA in 1990 and the introduction of the Mixed-Member-Proportional system in 1993). No two of these developments has followed the exact same path. The issues motivating these changes have differed, as has their progress through the legislative process. The abolition of the Legislative Council was the result of a private members bill which gained bipartisan support;³⁶ the reforms implementing our Mixed-Member-Proportional system were a result of a Royal Commission inquiry tasked with looking into our electoral system more broadly;³⁷ and the NZBORA is what remains of a more ambitious proposal in a Government White Paper after it went through the legislative process in the House of Representatives.³⁸

Unfortunately, there is no scope in this paper to enter into an in-depth consideration of these reforms in an attempt to discern some reason or explanation for why these particular proposals got through in the forms which they did, while others fell by the wayside. It is enough to illustrate that New Zealand has no clear and recognisable procedure for dealing particularly with large-scale reform projects of a constitutional nature. The success or failure of a particular project is often dependent on what is being reformed, the people

³⁵ Matthew Palmer “What is New Zealand’s constitution and who interprets it? Constitutional realism and the importance of public office-holders” (2006) 17 PLR 133 at 142–145.

³⁶ Scott *The New Zealand Constitution*, above n 24, at 9.

³⁷ Royal Commission on the Electoral System “Towards a Better Democracy” [1986–1987] IX AJHR H3.

³⁸ Justice and Law Reform Committee “Final Report on a White Paper: A Bill of Rights for New Zealand” (1987-1990) AJHR I.8C.

involved, whether a political will exists to see the project through, and public perception and interest.

B New Zealand’s Previous Attempts at a Written Constitution

A number of government initiated attempts have been made to review New Zealand’s constitutional structure with the aim of identifying potential avenues to reform.³⁹ There have also been a number of private undertakings with similar objectives.⁴⁰ They have produced little discernible change of any kind, and all agree that on the whole New Zealanders don’t understand their constitution or their rights under it.⁴¹ It has been suggested the reason for the lack of public engagement in these previous attempts and their ultimate failure to produce any helpful results regarding education or constitutional change is the lack of content with which to engage in the first place;⁴² “The desultory nature of New Zealand’s constitutional dialogue on change is caused in part, we believe, by the lack of any specific proposal with which to engage”. New Zealanders tend to be much concerned with pragmatism than anything else and have often viewed departures from current constitutional arrangements with indifference.⁴³ When combined with the lack of knowledge and education relating to constitutional matters which has been identified in previous reform attempts, it is no wonder New Zealanders have on the whole shied away from the conversation—pragmatism has suggested that given there is no immediately visible issue to be rectified, it is not necessary, and lacking a deeper understanding of the inner workings of government, bar some major public crisis in the future, there will continue to be no immediately visible issue in need of rectification.

It is hoped that the provision of a model—something tangible which can guide the conversation by simultaneously educating the public about the current arrangements and serving as an example for what might be included in a written constitution—might

³⁹ GG Grieve “Report of the Public Petitions M to Z Committee” [1961] IV AJHR 12–12A; RE Jack “Report of the Constitutional Reform Committee” [1964] III AJHR 114; Constitutional Arrangements Committee *Inquiry to review New Zealand’s existing constitutional arrangements* (10 August 2005); and most recently the government commissioned a report from the Constitutional Advisory Panel *New Zealand’s Constitution: A Report on a Conversation, He Kotuinga Korero mo Te Kaupapa Ture o Aotearoa* (November 2013).

⁴⁰ Colin James (ed) *Building the Constitution* (Victoria University of Wellington Institute of Policy Studies, Wellington, 2000); and Caroline Morris, Jonathan Boston and Petra Butler (eds) *Reconstituting the Constitution* (Springer, London, 2011). See also He Whakaaro Here Whakaumu Mō Aotearoa *The Report of Matike Mai Aotearoa, The Independent Working Group on Constitutional Transformation* (2016).

⁴¹ Palmer and Butler *A Constitution for Aotearoa New Zealand*, above n 4, at 12.

⁴² At 12.

⁴³ Robin Cooke “The Suggested Revolution Against the Crown”, above n 34, at 30.

overcome the difficulties faced previously and finally succeed in generating the public engagement necessary for the advancement of such a proposal.

IV What About This Reform in Particular?

There is no established process or procedure for “constitutional” reform to separate it from “ordinary” reform. The exact path reform will take to become law will depend on the nature and content of the proposal. This section identifies the main aspects of a reform like that proposed by Constitution Aotearoa which may influence its journey into law, and discusses ways to overcome and avoid potential hurdles which may stand in its way. As noted earlier, these fall into two broad categories: issues relating to legality (or “legal sovereignty”), and those relating to legitimacy (“political sovereignty”). Some of the issues identified and discussed below have been attempted in various forms before, with varying levels of success. However, nothing on this scale has ever been proposed or implemented in New Zealand before now.

The first issue identified and discussed below—general process and adoption—straddles the divide between the legal issues and the legitimacy concerns which the main hurdles which need to be overcome for major constitutional reform to succeed.

A General Process and Adoption Through Referendum

Palmer and Butler state that “Constitution Aotearoa must be the people’s Constitution”.⁴⁴ As such, they are embarking on a process of public engagement, calling for submissions on their proposals from the public. Constitution Aotearoa will be revised in light of these proposals to better reflect the will of the people, and a second, ‘final’ proposal will be published.⁴⁵ In an attempt to create some distance between this early stage of the reform effort and party politics, they “do not seek to secure consideration of it from elected politicians until the process is complete”.⁴⁶

Once the second version is published, however, whatever proposal results from this process will need to go through the usual legislative process to become law. This means it will need to be introduced in the House of Representatives as a bill, go through a first cursory reading before the House, be referred to a Select Committee where the public can comment, go

⁴⁴ Palmer and Butler *A Constitution for Aotearoa New Zealand*, above n 4, at 8.

⁴⁵ Att 8, 221 and 226–227.

⁴⁶ Geoffrey Palmer “Launch of *A Constitution for Aotearoa New Zealand*” (Parliament, Wellington, 21 September 2016).

through a second reading and debate, go before the Committee of the Whole House where the bill will be debated part-by-part, go through a third cursory reading and, finally, get Royal Assent and be signed into law by the Governor-General.⁴⁷

In addition to passing over the usual hurdles, “if the Constitution is to be adopted, it must be done by a referendum of the people”.⁴⁸ There is a constitutional convention that issues of constitutional significance are put to a referendum,⁴⁹ and without one any resulting Constitution would lack democratic legitimacy, or “practical sanctity”.⁵⁰ It is common in the amendment or creation of constitutions that referendum be used,⁵¹ largely because as a form of direct democracy they are one of the clearest means of demonstrating the electorate’s approval (or disapproval) of an idea, but also, especially in the case of a constitutional referendum, they are seen as necessary to “confer moral legitimacy upon the new legal order” to shore up political sovereignty.⁵² Thus, if there is low voter turnout or the result is decided by a very low margin of the vote, irrespective of the turnout, the result of the referendum may be undermined as it may not be seen as resolving the issue.⁵³

⁴⁷ The basic legislative process is set out in the Standing Orders of the House of Representatives. For a more in-depth description of the legislative process in New Zealand see Geoffrey Palmer and Matthew Palmer *Bridled Power* (4th ed, Oxford University Press, Melbourne, 2004); and for a very detailed discussion see McGee *Parliamentary Practice in New Zealand*, above n 22.

⁴⁸ Palmer and Butler *A Constitution for Aotearoa New Zealand*, above n 4, at 229.

⁴⁹ Andrew Geddis *Electoral Law in New Zealand: Practice and Policy* (2nd ed, LexisNexis, Wellington, 2014) at 324.

⁵⁰ Robin Cooke “Practicalities of a Bill of Rights” (F S Dethridge Memorial Address to the Maritime Law Association of Australia and New Zealand, 1984) 11 Council Brief 4 published in WK Hastings (ed) *F.S. Dethridge Memorial Addresses 1977–1988* (Maritime Law Association of Australia and New Zealand, Palmerston North, 1989) 71 at 75.

⁵¹ Stephen Tierney *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press, Oxford, 2014) at 1.

⁵² Robert Blackburn “Enacting a Written Constitution for the United Kingdom” (2015) 36(1) *Stat L R* 1 at 26.

⁵³ Royal Commission on the Electoral System, above n 37, at [7.29]. For example, in the recent ‘Brexit’ referendum held in the United Kingdom on the issue of whether to leave the European Union, although the turnout was high (72.2%), the vote was extremely close, with 48.1% voting to remain and 51.9% voting to leave (statistics from the UK Electoral Commission website <www.electoralcommission.org.uk>). The immediate aftermath was a maelstrom of confusion. Amongst other things there were reports of over 1 million people regretting their ‘Leave’ vote (Lizzie Dearden “Brexit research suggests 1.2 million Leave voters regret their choice in reversal that could change result” *Independent* (online ed, 1 July 2016)), and there have been talks of Scotland and Northern Ireland leaving the United Kingdom (Max Fisher “After ‘Brexit,’ 3 Centuries of Unity in Britain Are in Danger” *New York Times* (online ed, Washington, 25 June 2016)) as the majority of their constituents voted ‘Remain’; and there is continuing confusion about what the vote actually means (Hans Kudnani “Rather than offer clarity, Brexit has sown confusion in Europe” (online ed, 21 August 2016).

Having a binding referendum as the means of adoption would not be difficult in a practical sense. The Bill would be introduced Parliament as ‘the Constitution of Aotearoa New Zealand’ or whatever variant was decided upon, setting out the process for a binding government initiated referendum and with the text of the proposed Constitution appended or set out in a schedule. The referendum would ideally be held concurrently with a general election to minimise disruption and maximise voter turnout.⁵⁴ The appended Constitution would then be triggered by achieving a majority affirmation from the valid votes cast by electors in the referendum, as declared by the Chief Electoral Officer. The Constitution would then come into force on a date specified in the Act instituting the referendum.

However, from a theoretical standpoint, referendums, especially those dealing with constitutional matters, can be difficult.⁵⁵ There will need to be fairly widespread political support to advance the project. While petitions presented by the public can be given to Select Committees for report or a citizens initiated referendum on the issue could be forced under the Citizens Initiated Referenda Act 1993,⁵⁶ ultimately it is political will which is required to get any reform like this through the House and into law, as without majority support it will not make it into statute. Because of this Constitution Aotearoa probably has the best chance of success if it is picked up early on as a Government Bill. Formally all bills are of equal status; however, along with less complicated internal procedures relating to how and when they can be introduced, “in practical terms Government bills are far more significant than the other types of bills because of the political and procedural advantages which attach to them”.⁵⁷ Just on a very basic level the prospects for success of a Government Bill are greater, as in our Westminster system the executive generally form a majority of Parliament and can thus command the House. While not impossible for this kind of reform to succeed as a Member’s Bill, it would be a much slower and more difficult process, with much less certainty around whether the whole issue would even get to a

⁵⁴ Royal Commission on the Electoral System, above n 37, at [7.29]; and Alice Chote “An Obligation to Ask: A Constitutional Convention for Constitutional Referendums in New Zealand” (LLB (Honours) Research Paper, Victoria University of Wellington, 2012) at 6.

⁵⁵ Royal Commission on the Electoral System, above n 37, at [7.28].

⁵⁶ Anthony H Angelo *Constitutional Law in New Zealand* (Kluwer Law International, UK, 2011) at 47–48 and 71.

⁵⁷ McGee *Parliamentary Practice in New Zealand*, above n 22, at 306.

referendum at all.⁵⁸ How to actually go about *getting* the necessary political support is a separate issue, discussed further below.

There are further issues around referendums. A lot can turn on how the proposal is put to the people in the referendum and how the question is framed.⁵⁹ Questions must be precise and easy to understand, which is extremely difficult when dealing with complex issues; and the problem is tenfold in such a wide reaching proposal as this would be.⁶⁰ The voters themselves also play a major part in the success or failure of a referendum; ignorance or a general lack of understanding of the proposals can be exacerbated during a referendum campaign and there is “a potential to be manipulated by the Yes or No cases and even an unwillingness to consider change on the basis that ‘don’t know, vote No’ is the best policy”.⁶¹ Thus it is vitally important in instituting the referendum that close attention is paid to the wording of the question to be put to the people, and that significant effort is put into educating the public about the proposals in a clear, principled manner to avoid misinformation and fearmongering.

V Legality – Issues of Legal Sovereignty

One of the primary hurdles in the way of constitutional reform is the legality of the reform being proposed. If the engagement process with public goes badly, the legal hurdles facing Constitution Aotearoa would likely be insuperable, however, in reality, whether the reform is technically legally possible or not, it will happen if there is enough public engagement and support.⁶²

For the sake of completeness, two key issues relating to the legality of the proposals set out in Constitution Aotearoa must be touched upon: entrenchment and supremacy.

⁵⁸ For a detailed discussion of the types of bills and the different procedures and practical advantages attaching to the different categorisations see McGee *Parliamentary Practice in New Zealand*, above n 22, at 305–348.

⁵⁹ Tony Blackshield and George Williams *Australian Constitutional Law and Theory* (6th ed, The Federation Press, NSW, 2014) at [30.6].

⁶⁰ Royal Commission on the Electoral System, above n 37, at [7.28].

⁶¹ George Williams and David Hume *People Power: The History and Future of the Referendum in Australia* (UNSW Press, NSW, 2010) at 207–208.

⁶² Robin Cooke “The Suggested Revolution Against the Crown”, above n 34, at 36.

A *Entrenchment*

It is important from the outset to distinguish between two concepts which are too often conflated in the literature: entrenchment, and supremacy. Entrenchment commonly refers to a procedural (‘manner and form’) restriction placed on Parliament’s law-making power—a formal or procedural requirement “that must be fulfilled before a purported statute concerned by such requirements can be recognised as a statute or be enforceable”.⁶³ It is a procedural requirement that certain statutory provisions which are “entrenched” can only be amended or repealed by achieving a “super majority” of votes in Parliament, often 75 per cent, or by achieving an affirmative vote in a referendum of the people. Supremacy, or supreme law, on the other hand, refers to the idea that certain law has been identified as being of fundamental importance and should be elevated to a special position so that no other law can contradict it. The underlying idea is that once something is made supreme law, the courts take on the role of enforcing that law by ensuring that other legislation does not contradict it, and are usually empowered to ‘strike down’ legislation if it is found to be inconsistent. The main distinction between the two concepts boils down to this: entrenchment is a procedural limit on Parliaments law-making powers, while supremacy is a substantive limit which in theory shifts the balance of sovereignty in favour of the courts rather than Parliament.

The New Zealand Westminster system of Parliament is primarily based on the constitutional doctrine of parliamentary sovereignty, or parliamentary supremacy. In theory, the legal power of Parliament is unlimited, there is no higher law-making authority, it can legislate without restrictions.⁶⁴ In other words “Parliamentary sovereignty means neither more nor less than Parliament has the right to make or unmake any law whatever; and, further, that no person or body has a right to override or set aside the legislation of Parliament”.⁶⁵ The strict, orthodox doctrine championed by Dicey argued that Parliament could not pass a law to bind or limit its future law-making ability in any way, whether by instituting procedural requirements for the passage of certain kinds of law or by prohibiting legislation on a certain issue. Any law which purported to do that would have no legal force. While there may be political repercussions for choosing to legislate against these previous statutes, it was thought “[a] bare majority of Parliament that wanted to amend or repeal an entrenched provision, and was prepared to risk the electoral disadvantages of

⁶³ Han-Ru Zhou “Revisiting the ‘Manner and Form’ Theory of Parliamentary Sovereignty” [2013] 129 LQR 610 at 610.

⁶⁴ Palmer and Palmer *Bridled Power*, above n 47, at 156.

⁶⁵ AV Dicey *Introduction to the Study of the Law of the Constitution* (10th ed, Macmillan, 1959).

enacting ‘unconstitutional’ legislation, would not be likely to be deterred by a statutory provision whose legal effectiveness is notoriously doubtful.”⁶⁶

However, in recent years, manner and form doctrine has tended to displace the more orthodox view of parliamentary sovereignty and what it means for entrenchment clauses. New Zealand has had a history with entrenchment; since the implementation of our Constitution Act 1852 up until the New Zealand Constitution (Amendment) Act 1947 there were at least 15 entrenched sections which could not be amended or repealed by the New Zealand Parliament, and in the Electoral Act 1956 we implemented a number of manner and form restrictions which limit Parliaments ability to legislate in certain areas unless they do so by a super majority or a referendum of the people, which have been carried through to the current 1993 Act.⁶⁷ As long as a proposal for entrenchment demonstrates that it has the same level of support in the Parliament that is to adopt it as it proposes to require of any future Parliament that may wish to repeal or amend it,⁶⁸ it would appear that such protection is judicially enforceable given “[t]here also have been obiter statements from New Zealand’s judiciary that they regard themselves as possessing the ability to enforce any procedural, or “manner and form”, requirements that Parliament may impose on its own lawmaking power.”⁶⁹ David McGee, at the time writing as the Clerk of the House of Representatives, declared “[i]f it is to make valid law, Parliament and the House *must* comply with any statutory condition of law-making that is addressed to them”,⁷⁰ and Justice Woodhouse speaking as a judge of the Court of Appeal said in reference to New Zealand “it can hardly be doubted that in the final analysis Parliament recognises, as a matter of instinctive commonsense, that there are ultimate limits upon its constitutional power to legislate”.⁷¹

Whatever the legal force of the entrenched provision (and it would seem legal opinion has now developed to a point where most now support the view that Parliament can place

⁶⁶ Scott *The New Zealand Constitution*, above n 24, at 11.

⁶⁷ There are currently six entrenched provisions in the Electoral Act 1993, set out in s 268 which relate to the essential aspects of our electoral system such as the method of voting, the definition of electoral districts and the term of Parliament.

⁶⁸ McGee *Parliamentary Practice in New Zealand*, above n 22, at 384; Standing Order 267(1).

⁶⁹ Geddis *Electoral Law in New Zealand*, above n 49, at 45.

⁷⁰ McGee *Parliamentary Practice in New Zealand*, above n 22, at 113 (emphasis added); see also *Attorney-General for New South Wales v Trethowan* [1932] AC 526 PC; and *R (Jackson) v Attorney-General (UK)* [2006] AC 262.

⁷¹ Owen Woodhouse “Government Under the Law” (JC Beaglehole Memorial Lecture, 1979) 57 Council Brief 5.

effective controls on the way it makes law),⁷² in New Zealand there is a clearly established constitutional convention around “entrenching” legislation—all entrenched provisions on our statute books have been complied with in that any and all changes amending or repealing these provisions have met the 75 per cent support requirement, while other proposed changes have been abandoned due to lack of bipartisan support.⁷³ The entrenched provisions of the Electoral Act 1993 have “a superior moral sanctity”,⁷⁴ and if any government were to pass legislation without following the manner and form requirements intended, the legality or otherwise of the action “would in all probability not be regarded by the electors as a sufficient defence to a charge by the opposition that the government had behaved unconstitutionally”.⁷⁵ Thus, even if current consensus were not that it is perfectly possible for Parliament to bind itself in relation to procedural matters relating to the passing of legislation, there is an expectation that entrenchment provisions be respected, and any government who attempted to subvert this would be at serious risk of public backlash in the electoral polls.

B Supreme

While it is generally accepted now that Parliament can introduce manner and form restrictions on future Parliaments, “substantive” restrictions (those purporting to prohibit Parliament from legislating on a particular area of law at all) are still considered unenforceable: “a provision purporting to deprive Parliament of power to legislate at all on a matter ... can be overridden or repealed by subsequent legislation passed following the legislature’s normal procedures”.⁷⁶

New Zealand has some historical experience with “supreme” law. In the early years of colonisation our courts had the power to strike down, or “disallow” rules and legislation which were deemed incompatible with imperial law.⁷⁷ This was possible, however, because our Parliament at the time was limited by its constituting document, the Constitution Act 1852, and could only legislate for the peace, order and good government of New Zealand, provided such legislation was not contrary to the laws of England. This is no longer the case in New Zealand, there is no law higher in the constitutional hierarchy than that of our

⁷² Royal Commission on the Electoral System, above n 37, at [9.182].

⁷³ At [9.175]. See also Quentin-Baxter “Themes of constitutional development”, above n 1, at 18.

⁷⁴ Scott *The New Zealand Constitution*, above n 24, at 8.

⁷⁵ At 8.

⁷⁶ McGee *Parliamentary Practice in New Zealand*, above n 22, at 113.

⁷⁷ Palmer and Butler *A Constitution for Aotearoa New Zealand*, above n 4, at 142.

own Parliament.

Currently, Parliament exists with full law making powers bar the manner and form exception (discussed above). Implementing a “supreme” constitution is in theory a *substantive* restriction on Parliament’s powers to pass any laws it wants, which, despite our history in this area is not legally binding or enforceable. There are two ways this can be rationalised from a theoretical standpoint.

Option one is where, when the Constitution comes into law, Parliament as it currently exists will cease to exist and a new Parliament will be constituted which is subject to the powers as set out in the Constitution. This is similar to what some commentators have suggested:⁷⁸

a way in which New Zealand could adopt a ‘written’ Constitution under which the power of constitutional amendment could not be exercised by Parliament [would be] if the New Zealand Parliament transferred its powers to a Constituent Assembly and at the same time abolished itself, and the Constituent Assembly thereafter chose to adopt a Constitution creating a Parliament with limited powers, then the new Parliament would only have such powers as the Constitution gave it.

Essentially, Parliament would be enacting legislation which would have the effect of permanently dissolving itself, which, as it has ultimate law-making power, it is entitled to do. Then, once triggered by an affirmative vote in a referendum of the people as discussed above, the new Parliament would come together, with only those powers which the Constitution grants it. This means that Parliament would arguably no longer be “sovereign” or “supreme” as ultimate power and authority will have shifted to the courts whose duty it is to ensure government operates within its bounds. This would constitute what Professor Brookfield has termed a “technical revolution”—that is one which is accepted by the courts.⁷⁹ It is widely believed that even if issues of lawfulness around this process of revolution arise, pragmatism will be decisive.⁸⁰ Any legislation passed which the courts considered inconsistent with the Constitution could be struck out, in that it would not be considered valid law or enforced by the courts. However, depending on how this is drafted in the end, some have argued this “would not ultimately affect the supremacy of Parliament ... which could respond to any judicial decision of which it disapproved by enacting a

⁷⁸ Scott *The New Zealand Constitution*, above n 24, at 16.

⁷⁹ FM Brookfield “Republican New Zealand: Legal Aspects and Consequences” (Australasian Law Teachers Association Conference, Hobart, September 1994).

⁸⁰ Robin Cooke “The Suggested Revolution Against the Crown”, above n 34, at 36.

constitutional amendment.”⁸¹ Given that Parliament still retain the ability to amend the Constitution (as long as they meet the manner and form requirements of entrenchment), an unfavourable decision of the court could be effectively ignored by amending the provision in the Constitution which led to the issues.

Option two is based on the specific proposals in the current Constitution Aotearoa. Article 68 which deals with the constitutional jurisdiction of the courts is framed in such a way as to leave the last say to Parliament, at least on paper. Article 68(4) reads:

Where an Act of Parliament has been held or confirmed to be inconsistent with this Constitution by the Supreme Court, within one year of the decision of the Supreme Court, Parliament may enact an Act of Parliament (“the validating Act”) that provides that, notwithstanding the decision of the Supreme Court, the Act of Parliament in question shall continue to have effect, subject to such modifications or limitations as are provided for in the validating Act.

In theory this preserves Parliament’s ability to override a court’s decision to strike out legislation (as long as it meets the threshold of 75 per cent of votes of members of the House) and ensures Parliamentary sovereignty is retained—it is merely a procedural restriction subject to judicial discretion. Parliament can pass laws which are inconsistent with the Constitution (without having to amend the text of the Constitution), but they redefine themselves for that purpose as 75 per cent of the House, rather than the usual 50 per cent plus one requirement (a manner and form restriction which is generally accepted as possible). There is no legal repudiation of Parliamentary sovereignty (though political controls may make it almost impossible for the legislature to exercise this option in practice). Similar arrangements have been implemented in jurisdictions overseas, including those based on the doctrine of Westminster democracy (see clause 33 of the Canadian Charter), but have been exercised very infrequently.⁸²

Either option works from a theoretical standpoint (and in reality, many are likely to argue that both occur). This is at its heart a “technical revolution”, it is a constitutional moment being manufactured through the use of a referendum with binding consequences, which acts as an expression of constituent will, a *new* political will; and the fact remains that wherever ultimate sovereignty or supremacy lies, it will be more difficult for Parliament to legislate and the courts will have the potential for a much greater degree of influence.

⁸¹ Robert Blackburn “Enacting a Written Constitution for the United Kingdom”, above n 52, at 12.

⁸² Constitution Act 1982 C, cl 33.

New Zealand has attempted to implement supreme law before; the original White Paper containing the proposals for a NZBORA advised that the Act be supreme law. This part of the proposal was not accepted and the final NZBORA was passed as ordinary law. Sir Geoffrey Palmer, who spearheaded the group which issued the White Paper wrote on why he felt that part had been dropped:⁸³

Many people felt that elected representatives were more sensitive to the democratic will and more accountable than judiciary. Judges should not be entrusted with powers of this character. ... It was clear from that report that the central idea that there would be judicial review of Acts of Parliament, and that courts could declare unconstitutional enactments of Parliament which did not comply with the provisions of the Bill of Rights Act, was unacceptable to many.

Whether this state of affairs has changed enough over the last 25 years will be a major turning point in this reform. Writing in 2007 Matthew Palmer said he believed “New Zealanders’ potential trust in judges to exercise public power may have risen slightly, but not significantly”.⁸⁴ He continued:⁸⁵

Parliamentary sovereignty seems to me still to be an ultimate principle of New Zealand’s constitution. Suspicion of judges’ ability to frustrate the will of a democratically elected government taps into a deep root in the New Zealand national constitutional culture. The egalitarian and apparently democratic ethic remains strong in New Zealand.

For this reason, the way in which the proposal is framed may be crucial to whether enough public support can be gathered to push for a supreme law Constitution. And public support is fundamental, after all.⁸⁶

The truth is that, in the end, whether guaranteed rights are really fundamental, able to be overridden by a special parliamentary majority or a referendum, does not depend on legal logic. It depends on a value judgment by the courts, based on their view of the will of the people.

⁸³ Geoffrey Palmer *New Zealand’s Constitution in Crisis*, above n 31, at 54.

⁸⁴ Matthew Palmer “New Zealand Constitutional Culture”, above n 3, at 586.

⁸⁵ At 586.

⁸⁶ Robin Cooke “Practicalities of a Bill of Rights”, above n 50, at 75.

VI Issues of legitimacy and political sovereignty

The other primary hurdle in the way of constitutional reform is legitimacy of the reform process itself, which lends political sovereignty to the resulting structures. Without the legitimacy which comes from a high degree of citizen engagement and participation, building a sense of ownership in the constitutional text, it is unlikely to be an effective restriction on government power, as there will be little accountability to the people for any breach of the provisions within.

Thus it is crucial in attempting such large-scale constitutional reform in particular that special attention is paid to the process of reform how this facilitates engagement and participation in the development of ideas. What is needed is the establishment of institutions which facilitate dialogue between New Zealanders and creates an environment in which different segments of society have the ability to participate and will be heard—a dialogical model of constitutional design and reform.⁸⁷

It must be acknowledged here that by putting forward a model for consideration, Palmer and Butler are by default shaping the nature of the discussion to be had through their choices regarding what to include, and how, and what to leave out altogether. It may be that the only way to move forward after the second book is to completely deconstruct their proposals and begin again so that widespread public engagement can be incorporated from the beginning. Whether that will be the case remains to be seen. Even if it were to pan out that way, the book still has immense value as an educative tool which can be used to assist the public when engaging in discussions of constitutional issues and ensure the best quality of discussion possible.

Given these limitations, this section focusses on the process of constitutional reform more generally and identifies some of the key junctions where legitimacy can be strengthened through proper engagement processes and transparency. It concludes with a discussion of the Treaty as an example of the potential for polarisation which accompanies many attempts at reform, particularly in highly heterogeneous societies such as New Zealand. Finally, it identifies a potential method for mediating these difficulties in the future through the use incompletely theorised agreements.

⁸⁷ Jones “Tāwhaki and Te Tiriti”, above n 32, at 715.

A The People’s Constitution—Consultation and Public Engagement

1 The importance of public engagement and the effect of a “Constitutional Moment”

New Zealand has historically been slow to gain momentum with notions of constitutional change. We tend towards a “background of hesitation and questioning”;⁸⁸ are compelled towards an “ad hoc pragmatism by our cultural inclinations, our constitutional history, and the English roots of our intellectual paradigms”.⁸⁹ Lord Cooke expressed the belief in his 1988 speech “Fundamentals” that the time was right to abolish the New Zealand appeal to the Privy Council.⁹⁰ That change did not occur for another 15 years, and was overall a much longer project even than that. In an earlier 1984 speech “Practicalities of a Bill of Rights”, he had first articulated his support for an entrenched bill of rights.⁹¹ While the delay in implementing the NZBORA was by comparison much shorter, the resulting product was an ordinary law ghost of what had been proposed. On the whole, New Zealand has a “distinctively ambivalent attitude to the use of public power”.⁹²

Most constitutions are “forged under the blowtorch of political emergency”,⁹³ there is some defining event or momentous development—a revolution, war, a regime change or the attainment of independence—which triggers a ‘constitutional moment’ in which the need to clarify the rules by which a country is governed through a strong, unifying constitution is highlighted and which serves to motivate public engagement.⁹⁴ Constitution Aotearoa has not been precipitated by such an event, nor is such an event likely in the foreseeable future. Arguably this is the best time then to engage in this discussion as people are not preoccupied by the cataclysm, desperately trying to rewire the fence however they can after the rogue bull finally made its move. There is more time for thorough consideration of proposals, and for engagement and consultation. Engagement is vital. Particularly in the case of constitutional reform, public engagement is necessary to ensure the democratic legitimacy of any ultimate solution, and it assists in the assessment of the weight of public

⁸⁸ Robin Cooke “Fundamentals” [1988] NZLJ 158.

⁸⁹ Matthew Palmer “New Zealand Constitutional Culture”, above n 3, at 571.

⁹⁰ Robin Cooke “Fundamentals”, above m 88. .

⁹¹ Robin Cooke “Practicalities of a Bill of Rights”, above n 50.

⁹² Matthew Palmer “New Zealand Constitutional Culture”, above n 3, at 575.

⁹³ Palmer and Butler *A Constitution for Aotearoa New Zealand*, above n 4, at 13.

⁹⁴ Bogdanor “Should Britain Have a Written Constitution?”, above n 2, at 500.

opinion on social issues and works to flush out opposition.⁹⁵ Consultation, too, is vital because it facilitates a necessary discussion of what it is that we actually want, and will hopefully assist in reaching a consensus. Constitutional change like this cannot get through just by having the favour of one main political party, particularly in New Zealand with MMP, and “unity cannot be imposed”.⁹⁶

It could be argued that if Constitution Aotearoa (or any other iteration of a codified constitution for New Zealand) were to pass into law, it would constitute a technical revolution as discussed above, as the expression and adoption of a new constituent will. However, this sort of artificial process may not stir the necessary engagement required to make this endeavor truly successful. If we can do it this way, in a relatively stable period in our history, we should—it would save everyone having to clean up the mess left by the rogue bull. But, can you get enough public engagement and support with an artificially induced constitutional moment?

One of the main hurdles facing this kind of reform is apathy:⁹⁷

The ordinary man is expected to take an active part in governmental affairs, to be aware of how decisions are made, and to make his views known.

The fact that the ordinary man does not live up to the ideal set by the normative theory of democracy has led to much criticism of his passivity and indifference.

This is often in large part attributable to the fact that many people feel excluded from the system in which government operates, they do not feel they have the means to actively participate, and, even if they could, some may feel the exercise is pointless as their contribution or opinion will not be heard or acknowledged.⁹⁸

That an individual believes he ought to participate in the political life of his community or nation does not mean that he will in fact do so. Before the norm that one ought to participate can be translated into the act itself, the individual will probably have to perceive that he is able to act. And though the two are related, they are by no means identical.

⁹⁵ Geoffrey Palmer “The Law Reform Enterprise”, above n 20, at 415.

⁹⁶ Quentin-Baxter “Themes of constitutional development”, above n 1, at 17.

⁹⁷ Gabriel A Almond and Sidney Verba *The Civic Culture: Political Attitudes and Democracy in Five Nations* (Princeton University Press, Princeton, 1963) at 162.

⁹⁸ At 178.

People are prone to apathy and political discontent when they believe that they cannot participate in the system, or they feel that their contribution would be worthless.⁹⁹ The trust New Zealanders have in government and the political system is decreasing.¹⁰⁰ This leaves people feeling disenfranchised, and thus disinclined to participate. To combat this, a vast programme of engagement will have to be undertaken, including educative elements as well as the collection of views through a wide range of consultation methods.

2 *Model structures for carrying out constitutional design*

There are a number of models which could be adopted to carry out this extensive exercise. A few of the options are discussed below.

One of the best options, and one which New Zealand has experience with, would be for the government to establish a Royal Commission on the Constitution Aotearoa project. Royal Commissions are *ad hoc*, short term independent Commissions established with a specific mandate and imbued with extensive inquisitorial powers. They can be established to conduct investigations into conduct or for inquiries into broader advisory matters, especially on matters of policy.¹⁰¹ In the past New Zealand has established Royal Commissions in order to undertake a review of particular areas of law more generally and make recommendations for change.¹⁰² A Commission would be set up under the Inquiries Act 2013 and the relevant Minister appoints a chair and sets the terms of reference for the Commission.¹⁰³ Such Commissions, if overseen correctly, are well placed to carry out extensive public consultation due to their specific mandate, far more so than any individual government department which is heavily restrained by time and resources. After a period of time the Commission would produce a report and present its recommendations to the Government. Ideally at this point the Government would adopt any draft Constitution as a Government Bill and the legislative process as discussed earlier will be underway. It is possible that a similar result could be achieved with an extended Select Committee process which allows more time for submissions to be received. However, the Commission is more

⁹⁹ Almond and Verba *The Civic Culture*, above n 97, at 143.

¹⁰⁰ Michael Macaulay *Who Do We Trust?* (Victoria University of Wellington Institute for Governance and Policy Studies, March 2016).

¹⁰¹ Kenneth Keith “Commissions of Inquiry: Some Thoughts from New Zealand” in Allan Manson and David Mullan (eds) *Commissions of Inquiry: Praise or Reappraise?* (Irwin Law, Toronto, 2003) 153 at 156.

¹⁰² For example, see the Royal Commission on the Electoral System, above n 37.

¹⁰³ Inquiries Act 2013, s 7.

flexible and able to travel easier to better bring the conversation directly to the people.

The drawback to this model is that it has limited ability for direct public engagement in the actual design and drafting process of indeed it is found the best or easiest way forward is to begin again. While there is flexibility in terms of the consultative methods which could be utilised, any draft constitution emerging from this process will have been written by members of the Commission appointed by a Minister. This has the potential to undermine the legitimacy of the draft as the process may not allow for the same sense of ownership by the public as other models discussed below.

A second model rests on the establishment of a—possibly temporary—Constitutional Commission with a mandate to prepare a draft based on popular agreement. This would likely work in a similar way to the Royal Commission but it could be established as a permanent body, charged with keeping the constitution under review and making recommendations on change at regular intervals, entrusted with drafting the constitution it will eventually review as its first task. While the appointment process could be carefully monitored to ensure a more representative group of people than is likely in a Royal Commission, it is likely this option will suffer from the same limitations with regards to public engagement and ownership of the process and outcome.

A third model is based closely on the suggestion of Robert Blackburn who took the lead in the recent report which looked at the possibility of adopting a codified constitution in the United Kingdom.¹⁰⁴ This is perhaps the most participatory of the three in that it places special emphasis on popular participation. The third model is the establishment of a Constitutional Congress or Assembly, which includes a proportion of members of the public. Membership could be determined through a process of direct election from persons nominated as candidates, or else through random selection from the electoral register (then agreeing to serve), or a combination.¹⁰⁵ This model of engagement would likely need to be established by an Act of Parliament, setting out its terms of reference to consult, consider and make recommendations on key questions and options in drawing up the codified constitution.¹⁰⁶ The draft proposal would then be presented to the House in the same way as a report of a Royal Commission and would either be pushed through to a referendum (ideally) or dropped.

¹⁰⁴ Robert Blackburn “Enacting a Written Constitution for the United Kingdom”, above n 52.

¹⁰⁵ At 20.

¹⁰⁶ At 20.

A version of this third model was used recently in Iceland as they attempted to rewrite their constitution.¹⁰⁷ While ultimately the process did not result in a new constitution, that was largely due to political failings rather than a lack of public engagement or support, or a lack of democratic legitimacy.¹⁰⁸ Further, there are some limitations relating to how much help New Zealand can gain from the Icelandic experience given their extremely small (0.3 million) and largely homogenous population. However, the Icelandic experiment still offers some important insights regarding the best processes for constitutional reform:

[It was] revolutionary in many respects, but especially because, for the first time in human history, a country's foundational text (or at least a draft proposal for it) was written with the more or less direct participation of its people.

...

inclusiveness was aimed at, and at least partially achieved, through three different and complementary methods: (i) direct popular participation at various stages of the process, (ii) elements of descriptive representativeness where direct participation wasn't possible, and (iii) transparency. All three aspects arguably combined to ensure not just procedural legitimacy, but also some degree of epistemic reliability.

Iceland began the process of redesigning their constitutional arrangements by holding a number of one or two-day National Assemblies which were attended by up to 950 people selected largely at random from the electoral roll. The Assemblies were asked to consider whether Iceland in fact needed a new constitution. After a declaration in the affirmative, a Constitutional Council was formed, with citizens electing 25 representatives to the Council from roster of 522 candidates. After only four months the Council produced a draft text which was unanimously agreed to by all Council members and subsequently approved by 2/3 of the voters in a public referendum.

What was remarkable about the process as a whole was the level of transparency and engagement which was fostered and maintained throughout almost the entire process. There was public input upstream in the form of National Assemblies of people selected from the electoral role who were tasked with identifying the value framework of the

¹⁰⁷ See Thorvaldur Gylfason "Chain of Legitimacy: Constitution Making in Iceland" (presented at the "Perspectives on Constituent Assemblies" conference, Columbia University, 1–2 April, published as CESifo Working Paper No. 6018, July 2016); Thorvaldur Gylfason and Anne Meuwese "Digital Tools and the Derailment of Iceland's New Constitution" (CESifo Working Paper No. 5997, July 2016); and H el ene Landemore "Inclusive Constitution-Making: The Icelandic Experiment" (2015) 23(2) *The Journal of Political Philosophy* 166. Unless otherwise indicated, the following facts and discussion regarding the process followed in the Icelandic example come from these sources.

¹⁰⁸ Thorvaldur Gylfason "Chain of Legitimacy", above n 107, at 20.

Icelandic people and the general principles which should inform a new constitution. There was public input downstream in the form of the referenda to approve or disapprove the resulting draft text.¹⁰⁹

The most open and directly participatory part of the Icelandic constitutional process, however, took place midstream of the process, during what has traditionally been the most secretive moment in the history of past constitutions: the writing of the draft itself. The twenty-five members of the Council, far from isolating themselves from popular input, regularly posted online, for the world to see and for the Icelandic people to read, the version of the draft they were working on. All in all, they posted twelve drafts, all at various stages of completion. Anyone interested in the process could post comments and send feedback using social media like Facebook and Twitter, or using regular email and mail. In fact, foreigners themselves were free to participate if they could find a way (e.g., Google Chrome) to overcome the language barrier.

As this quote illustrates, while it was likely partly a result of the fairly representative Council (achieved through direct voting rather than through Government appointment), one of the primary reasons behind the overwhelming popular support of the draft constitution was due to the ability of the model to allow for a wide variety of public engagement. Ultimately, whichever model is chosen, its ability to facilitate and respond to public engagement will be instrumental in whether widespread constitutional reform like that proposed by Constitution Aotearoa will be successful. While it may not be possible to have direct engagement at all stages of the process, the chosen model will need to be capable of a large degree of transparency at all times; the public must be able to witness, observe, and thus make up their minds about the activities of the actors engaged in the constitution-writing process. This is likely to increase the perceived legitimacy of the draft by creating a sense of ownership of the document in the larger population as it acts like a window “opened in the walls of the constitutional assembly and more generally onto the whole constitution-writing process.”¹¹⁰

3 Engagement and consultation

The way in which people engage with each other, and with their communities at large, is changing.¹¹¹ As technology develops so to do the means of engaging directly with different communities in different ways. In order to increase engagement, a range of methods will

¹⁰⁹ Landemore “Inclusive Constitution-Making: The Icelandic Experiment”, above n 107, at 174.

¹¹⁰ At 179.

¹¹¹ Manuel Castells *Networks of Outrage and Hope: Social Movements in the Internet Age* (Polity Press, Cambridge, 2012).

need to be deployed to reach as many people as possible, including the traditional formal submissions and physical meetings, but also utilising new forms of media such as Facebook and Twitter. The Icelandic experiment is an excellent example of how this can work. They had a Council Facebook page, as well as individual member pages; a Twitter account; an interactive website; the use of online translation software; live video-streaming of some Council sessions; a YouTube account with speeches and interviews with Council members; all culminating with “a total number of 3,600 comments received in addition to some 320 formal suggestions from citizens, which were all discussed and answered by the three committees of the Council”.¹¹² Compared to the formal submissions, there were significantly larger numbers engaged through new media.

In New Zealand there are already private groups attempting to foster this engagement in constitutional design. Groups like Design+Democracy have been formed in response to a growing recognition that our current system is inadequate when it comes to engagement, particularly with young people. Design+Democracy work in partnership with government and other organisations to develop apps which encourage participation in issues relating to government.¹¹³ Example include the ‘On the Fence’ app which provided a user-friendly, interactive method of discovering how the users values and beliefs measured up against those of candidates running for public office, and ‘Ask Away’ which is an online platform which allows users to ask questions directly to political parties or individual politicians, with popular questions capable of being ‘voted up’ by users.

Other more traditional means of engagement and consultation are, of course, still necessary when engaging in the reform process as there are always some ‘unconnected citizens’ who are excluded altogether if the process relies too heavily on internet-based digital tools.¹¹⁴ Social movements are, after all, made of individuals; “At the individual level, social movements are emotional movements ... the big bang of social movement starts with the transformation of emotion into action.”¹¹⁵ Creating an environment through numerous engagement efforts which fosters enthusiasm and which makes people feel they are able to participate, and that they will be heard is the key to successful constitutional reform.

¹¹² Gylfason and Meuwese “Digital Tools and the Derailment of Iceland’s New Constitution”, above n 107, at 14.

¹¹³ Design+Democracy is a research unit established within Massey University’s College of Creative Arts and are accessible through their website: <designdemocracy.ac.nz>.

¹¹⁴ Gylfason and Meuwese “Digital Tools and the Derailment of Iceland’s New Constitution”, above n 107, at 12.

¹¹⁵ Castells *Networks of Outrage and Hope: Social Movements in the Internet Age*, above n 111, at 12.

4 Cost

The issue of costs will have to be dealt with by any body put in place to fully investigate this. Cost is a factor which may limit change.¹¹⁶ Such a large scale change will be costly, and this may influence people against change if they think the cost is exorbitant or there are things the money could be better spent on. A provisional breakdowns of the cost of the recent flag referendum indicate a government spend of around \$21.8 million, for a fairly simple proposal which ultimately did not result in change.¹¹⁷

There is little basis at this point in the process on which to predict the initial administrative, publicity and education costs of proposing such a wide-ranging proposal for reform, let alone the introduction of any major changes which result from the process. But ultimately any increase in cost must be measured against the substantial advantages which could arise as a result of Constitution Aotearoa, and any engagement process will need to make this point very clear from the outset to avoid the usual New Zealand pragmatism from settling back in in the face of potentially very costly reform.

5 *Te Tiriti o Waitangi / The Treaty of Waitangi as an example of potential polarisation*

Constitutions are by their very nature political declarations outlining the rights and obligations of citizens, including the powers of the organized few versus the unorganized masses and, as such, are naturally conducive to deep disagreements about individual provisions. Rights protected in constitutions entail obligations that may understandably meet resistance.¹¹⁸

New Zealanders hold many varied opinions and beliefs about all kinds of things, and should be able to engage in constructive discussions about all the elements of any proposed constitution. However, one of the more controversial aspects of any proposed Constitution coming out of this process, and one which most New Zealanders will likely have strong opinions on, is the treatment to *Te Tiriti o Waitangi / the Treaty of Waitangi*. This makes it useful as an example of the very real risk of further polarisation between communities and the necessity of having a safe, dialogical model to engage in this process.

¹¹⁶ Royal Commission on the Electoral System, above n 37, at [9.170].

¹¹⁷ Claire Trevett “Cost of flag referendum \$4 million under budget” *New Zealand Herald* (online ed, 15 June 2016).

¹¹⁸ Thorvaldur Gylfason “Chain of Legitimacy”, above n 107, at 7.

The Treaty has had a turbulent history.¹¹⁹ Today, however, the Treaty is generally understood to be a fundamental element of our constitutional arrangements;¹²⁰ “simply the most important document in New Zealand’s history”.¹²¹ Its historical significance is well understood and well accepted. Its contemporary significance is more contestable. There are varying perspectives on the current and future role of the Treaty in our constitutional arrangements. These fall broadly into three categories:¹²² those who believe the Treaty is fundamental to how this country is governed; those who see a Treaty-based multicultural future where the Treaty will still have a role to play despite increasing immigration speeding up ethnic diversity; and those who believe the Treaty has no role in how the country is governed. Even within these groupings there is little consensus around how exactly the Treaty should be dealt with, especially in the context of much wider constitutional change such as that proposed in Constitution Aotearoa.

Among those who view the Treaty as fundamental there are some who advocate for a constitutional arrangement based on different spheres of influence, where the Crown and tangata whenua operate within separate spheres, while a third ‘relational’ sphere allows for cooperation on certain matters;¹²³ “Te Tiriti never intended us to be “one people” as Governor Hobson proclaimed in 1840 but it did envisage a constitutional relationship where everyone could have a place in this land.”¹²⁴ On the other extreme there are those who believe that while the Treaty may have had historical significance, it has no present day political currency, nor should it be ‘politicised’ to advance a particular agenda,¹²⁵ and even some who claim that formally acknowledging the constitutional status of the Treaty

¹¹⁹ For more detailed accounts of the early history of the Treaty and the circumstances of its signing see Waitangi Tribunal *He Whakaputanga me te Tiriti the Declaration of Independence and the Treaty: the Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (2014); Claudi Orange *The Treaty of Waitangi* (Allen and Unwin, Port Nicolson Press, Wellington, 1987); and Matthew Palmer *The Treaty of Waitangi in New Zealand’s Law and Constitution* (Victoria University Press, Wellington, 2008). Also see chapter 7 of Palmer and Butler *A Constitution for Aotearoa New Zealand*, above n 4.

¹²⁰ Constitutional Advisory Panel, above n 39, at 35.

¹²¹ Robin Cooke “Introduction” (1990) 14 NZULR 1 at 1.

¹²² Constitutional Advisory Panel, above n 39, at 31.

¹²³ He Whakaaro Here Whakaumu Mō Aotearoa, above n 40, at 104.

¹²⁴ At 112.

¹²⁵ G Chapman “The Treaty of Waitangi: Fertile Ground for Judicial (and Academic) Myth-Making” [1991] NZLJ 228 at 235–236.

would result in “those without the required droplet of so-called indigenous blood [being] second-class citizens”.¹²⁶ Unfortunately it seems to be the case that:¹²⁷

[d]isguised prejudice is never far from the surface in New Zealand, whenever there is a debate on Maori matters. There is a dark and unpleasant underside to the New Zealand psyche when questions of race are confronted.

In 2013 the National government set up the Constitutional Advisory Panel it had promised in confidence and supply negotiations with the Māori Party during the 2008 elections. The Panel was charged with undertaking a review of New Zealand’s current constitutional arrangements and seeking the views of the public on various aspects of it. Here again, that dark, unpleasant underside showed itself when one commentator went so far as to say the panel itself was:¹²⁸

a major threat to New Zealand’s democracy. A biased constitutional advisory panel and a consultation process that locks out non-Maori [which] threatens to permanently put power and privilege into the hands of the tribal elite.

In its report the Panel discussed the Treaty and acknowledged that many New Zealanders “remain sceptical that the Treaty can be a constructive element of our constitution and so may be reluctant to participate in a conversation about its future”.¹²⁹ However, they, and others before them, do not believe it is possible to wind back the clock and pare back the Treaty.¹³⁰ It is already a fundamental element of our constitutional arrangements.

The Treaty encapsulates the fundamentals in the relationship between the tangata whenua of New Zealand and the Crown. As an explicit written commitment to the rights of people who are now a minority, it is an unfortunate reality that it lies in deep and enduring tension with New Zealand’s majoritarian constitutional culture (epitomised in the highly valued norm of parliamentary sovereignty).¹³¹ The Crown cannot now turn back on their

¹²⁶ John Ansell “Geoffrey Palmer: A Racist, Pure and Simple” (September 2016) Kiwi Frontline <sites.google.com/site/kiwifrontline>. See also the recent return of Don Brash’s ‘One New Zealand’ rhetoric.

¹²⁷ Geoffrey Palmer *New Zealand’s Constitution in Crisis*, above n 31, at 74.

¹²⁸ Muriel Newman “Independent Constitutional Review” (2013) New Zealand Centre for Political Research <www.nzcpur.com>.

¹²⁹ Constitutional Advisory Panel, above n 39, at 35.

¹³⁰ Constitutional Advisory Panel, above n 39, at 35; and Geoffrey Palmer *New Zealand’s Constitution in Crisis*, above n 31, at 98.

¹³¹ Matthew Palmer *The Treaty of Waitangi in New Zealand’s Law and Constitution*, above n 119, at 26.

commitments under the Treaty without the risk of social and political tensions.¹³² However, any policy which could be interpreted as ‘pandering’ to such a small portion of the constituent whole can equally subject the Crown to backlash from the public. This has created a hesitancy in New Zealanders to bring up the topic of the Treaty in discussions, the issue has been left to stagnate and if not managed very carefully it could cause an outpouring of toxicity and vitriol which would only serve to divide New Zealand rather than bring it together. In order to properly engage in the process of constitutional reform though, we need national engagement with, and discussion of, the issues; all of the issues. The process of discussing and implementing any change which came out of the process will be as important as the nature of the changes themselves.¹³³

However, there is some hope. Some have suggested a new “mood of willingness” to discuss these issues and perspectives has pervaded the country as it tries to confront the mutual rights and obligations established in the Treaty.¹³⁴ There seems to be a “very real desire for a more open constitutionalism and what we describe as a conciliatory and consensual democracy rather than an adversarial and majoritarian one”.¹³⁵

The treatment of the Treaty in the first iteration of Constitution Aotearoa is broadly similar to that proposed by the original White Paper on the Bill of Rights. Initially, it was proposed that the Treaty should be included in any bill of rights adopted in New Zealand, and a suggestion on how it might be dealt with formed part of the proposal; it expressly recognised and affirmed the rights, duties and obligations of Māori under the Treaty, declared the Treaty as always speaking and included the text of the Treaty, in both Māori and English in an Appendix to the proposed Bill of Rights. Article 72 of Constitution Aotearoa does much the same, as well as expressly stating that the rights, duties and obligations under the Treaty and subsequent Treaty settlement agreements that had previously vested in the Crown will now vest in and be assumed by the State instead.¹³⁶

There are a number of reasons why the Treaty was not in the final version of the NZBORA. Historically, Māori have been wary of incorporating the Treaty into a positive law or being expressly recognised in a Constitution because it would mean that the text of the Treaty

¹³² Constitutional Advisory Panel, above n 39, at 35.

¹³³ Matthew Palmer *The Treaty of Waitangi in New Zealand’s Law and Constitution*, above n 119, at 365.

¹³⁴ Paul McHugh *The Māori Magna Carta*, above n 33, at 9.

¹³⁵ He Whakaaro Here Whakaumu Mō Aotearoa, above n 40, at 9.

¹³⁶ Constitution Aotearoa, art 72(2).

could potentially be amended.¹³⁷ The Treaty was seen as sacrosanct and thus some favoured the Treaty retaining its existing status as a historical document effectively sitting outside of the law, with its principles informing the development of the law and the nations constitutional values.¹³⁸ However, this unique status leaves the Treaty vulnerable, as through sitting outside the law the Treaty continues to rely on the will of Parliament for recognition.¹³⁹

In the wake of the Foreshore and Seabed incident in 2004, attitudes towards including the Treaty in legislation may have changed from what they were when NZBORA was being proposed: “although the Foreshore and Seabed legislation was in relation to customary rights and not Treaty rights, it should certainly have illustrated to Māori the power of Parliamentary sovereignty”.¹⁴⁰ This is just one of many issue in relation to the Treaty which will have to be thoroughly discussed during the consultation process.

The process of constitutional reform is in essence a nation-building exercise, a way of discovering, or re-discovering our identity as a nation. Thus:¹⁴¹

it is in the interests of all New Zealander’s to be up-front and open about what they think about these issues, willing to listen to each other’s views, and prepared to work out pragmatic and effective ways of resolving specific issues as they come up, in the context of a sound conceptual understanding of the issues.

Māori and non- Māori will both continue to exist in New Zealand in inter-related communities. The relationship between the Crown (or the State), Māori and other New Zealanders will still continue to exist whether or not the Treaty is formally incorporated into a codified Constitution or not, and “existing demands to resolve historical injustices or contemporary disadvantage, or opposition to measures seen to imperil Māori culture, would not disappear in a puff of smoke if there were no Treaty of Waitangi”.¹⁴² In order to avoid a possibly irreversible rift in the relationship, it is essential during the consultation process, particularly when discussing the treatment of the Treaty, to avoid the danger posed

¹³⁷ David van der Zouwe “Clarification of the Position of the Treaty of Waitangi in New Zealand’s Constitution” (LLM Research Paper, Victoria University of Wellington, 2005) at 30.

¹³⁸ At 34.

¹³⁹ At 30.

¹⁴⁰ At 32.

¹⁴¹ Matthew Palmer *The Treaty of Waitangi in New Zealand’s Law and Constitution*, above n 119, at 28.

¹⁴² At 22.

by group polarisation, where groups of like-minded people move one another away from a center position to increasingly extreme positions.¹⁴³

One way to avoid this may be to adopt an ‘incompletely theorized agreement’, that is, “a process by which people agree on practices, or outcomes, despite disagreements or uncertainty about fundamental issues”.¹⁴⁴ These kinds of agreements can have a central role in constitution building because they allow people from different backgrounds, who may hold different beliefs to bridge the gaps between them and come together by agreeing on a certain outcome; “people can often agree on constitutional *practices*, and even on constitutional rights, when they cannot agree on constitutional *theories*”.¹⁴⁵ This works by enlisting silence as a tool to produce overlap, despite uncertainty, limits on time and capacity, disagreement and heterogeneity.¹⁴⁶ This allows people to demonstrate mutual respect as they collaborate in order to produce a set of norms and principles upon which they can agree, even if they interpret the way they may work slightly differently. A Constitution resulting from this process then will likely focus on principles rather than set processes or lengthy descriptions, containing incompletely specified standards and avoiding rules, at least when it comes to the description of basic rights. In this way a compromise is made in the immediate future, and the details on how this will work over time are left to develop on their own in much the same way as our current constitution works.

In relation to the Treaty this may lead to a focus on healthy relationships as a common objective, “looking past the words of the Treaty, or the constitution, to the reality of the underlying human interactions”.¹⁴⁷ The internalisation of the Treaty into New Zealand’s constitutional framework may enhance the possibility of a sustainable pluralism operating within New Zealand’s constitutional framework.¹⁴⁸

¹⁴³ Cass R Sunstein *Designing Democracy: What Constitutions Do* (Oxford University Press, Auckland, 2001) at 8.

¹⁴⁴ At 9.

¹⁴⁵ At 50.

¹⁴⁶ At 51.

¹⁴⁷ Matthew Palmer *The Treaty of Waitangi in New Zealand’s Law and Constitution*, above n 119, at 301.

¹⁴⁸ David van der Zouwe “Clarification of the Position of the Treaty of Waitangi in New Zealand’s Constitution”, above n 137, at 45.

However, it must also be acknowledged that often it is not that simple:¹⁴⁹

When one examines the existing literature on this subject, one can identify a certain amount of “talking past each other”. The difficulty in advancing discussion about the constitutional role of the Treaty appears to lie less in the different perspectives that have been presented and more in the fact that contributors to the discussion often appear to be talking about quite different issues.

It will likely take a significant amount of work to be able to shift the focus from individual perspectives to common values. Furthermore, whether this is something which Māori want needs to be determined. Any discussions regarding the present and future role of the Treaty should allow for Māori tikanga and Māori law to speak to the design of our constitutional arrangements, not just their eventual application.¹⁵⁰ As part of the extensive public engagement exercise which needs to happen in order to make this kind of constitutional reform happen, and extensive programme of consultation, particularly with Māori as tangata whenua needs to take place. The recent Matike Mai report on constitutional transformation is an excellent example of the kind of wide-ranging efforts which would be required.¹⁵¹ The Working Group responsible for the report held 252 hui between 2012 and 2015, as well as inviting written submissions, organising focus groups, and conducting one-on-one interviews.¹⁵² Hui “were held on marae, in kura, in hauora and social service clinics, in wānanga and universities, in disability centres, in law offices, in Trust Board offices, in gang pads, and in private homes”.¹⁵³ This sort of extensive, detailed consultation exercise allows for all voices to be heard. This is of particular importance when dealing with constitutional reform.

B The issue of politics

Whether reform is necessary or desired, little can or will be done without the will of the government to enact the proposed reform. “[b]asic constitutional change really does need widespread political support if it is to succeed”.¹⁵⁴ As the Icelandic example demonstrates, even with widespread public support, reform may not be possible if there is a lack of political will. However, New Zealand does have a more robust democratic history than

¹⁴⁹ Carwyn Jones “Tāwhaki and Te Tiriti”, above n 32, at 705.

¹⁵⁰ Carwyn Jones “Tāwhaki and Te Tiriti”, above n 32, at 715.

¹⁵¹ He Whakaaro Here Whakaumu Mō Aotearoa, above n 40.

¹⁵² At 7.

¹⁵³ At 18.

¹⁵⁴ Geoffrey Palmer *New Zealand’s Constitution in Crisis*, above n 31, at 57.

Iceland and may therefore stand some chance of holding elected representatives to account through the ballot box for refusing to carry out the clear wishes of the public. Unfortunately there are many other ways in which the legislature may make it difficult to enact this kind of reform if they do not agree with it, or if they simply do not see the advantage in spending political capital on such a project.

Ultimately, Parliament (and those who hold the majority in Parliament and make up the Government of the day) still retains the ultimate right to choose what to legislate and if a particular report does not fit within the legislative agenda of the Government of the day it is likely to languish, sometimes for years, seemingly a waste of time and effort.¹⁵⁵ The central difficulty for any great reform lies in securing attention for the proposal and parliamentary time for its enactment.¹⁵⁶ This particular problem has been well canvassed by many eminent academics and will not be covered in depth in this paper.¹⁵⁷ However, it should be noted that without some degree of political support, it is unlikely the extensive consultation programme necessary for this kind of reform will be achievable, and even if it were, there would be no means of implementing a final product into law or at least putting it to a referendum without the support of the politicians.

To gain political support it is likely the creation of enough of a social movement to put pressure on our elected representatives to discuss the issue will be necessary. This will likely require the collaboration of a number of groups such as Design+Democracy, Constitution Aotearoa, Non-Government Organisations interested in reigning in public power and others in a similar position.

¹⁵⁵ The report mentioned above on A New Land Transfer Act, despite having been presented in 2010 and having a complete draft Bill appended to the report, is still waiting for Parliament's attention almost six years on. This is just one of many examples, and is by no means the worst. Law Commission, above n 4.

¹⁵⁶ See Geoffrey Palmer "The Law Reform Enterprise", above n 20, at 411.

¹⁵⁷ For more on this, and for some ways forward, see Geoffrey Palmer "The Law Reform Enterprise", above n 20; Geoffrey Palmer "Law Reform and the Law Commission in New Zealand after 20 Years – We Need to Try Harder" New Zealand Centre for Public Law (paper presented to the New Zealand Centre for Public Law, Wellington, 30 March 2006); and Kirby, above n 1.

VII Conclusions

Constitutions are as devoid of function as an empty seashell unless there is life within them.¹⁵⁸

Law reform is a difficult subject at the best of times. Navigating the difficult realms of politics in order to gather the support necessary to get a proposal through the House of Representatives as legislation is a temperamental pastime at the best of times, and attempting to rouse public interest in a proposal for reform is even trickier. When the reform project involves constitutional law, particularly when it involves a proposal on the scale of Constitution Aotearoa, all these hurdles and more spring up in the path to progress.

In order to achieve their core purposes, any constitution which emerges from the consultation project being undertaken by Geoffrey Palmer and Andrew Butler will need to be entrenched, supreme law, include the Treaty, and be passed by a referendum of the people to be adopted. These elements of the reform throw up a number of other hurdles which must be overcome to achieve reform. These can be grouped into two categories: legal issues and legitimacy issues. In theory, the legal issues facing this kind of reform in terms of the practicalities surrounding entrenchment and supremacy are surmountable, but this means little if there is no public engagement in the reform process or political will to take up the effort. The success of this reform will depend on political support, and on public engagement. Constitutions are meant to be of the people, for the people.¹⁵⁹

The citizen is the core unit of the constitutional order and of constitutional identity. Both the imagined community that defines the nation and the one that projects an identity on the constitutional order are anchored in the citizen. The citizen is the constituent unity of the constitutional subject in all its multiple identities, chief among them, the who that makes the constitutions, the for whom it is made, and the to whom it is addressed. The citizen is at the heart of modern constitutionalism and is the principal actor in its birth, deployment and continuing life.

¹⁵⁸ Quentin-Baxter “Themes of constitutional development”, above n 1, at 27.

¹⁵⁹ Michel Rosenfeld *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge, New York 2010) at 211.

Without an extensive consultation programme which engages with all the aspects of the proposal, and with as many communities as possible, there will be no success.

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VIII Bibliography:

A Legislation

1 New Zealand

Constitution Act 1856.

Constitution Act 1986.

Electoral Act 1993.

Inquiries Act 2013.

New Zealand Bill of Rights Act 1990.

2 Canada

Constitution Act 1982 C.

B Cases

Attorney-General for New South Wales v Trethowan [1932] AC 526 PC.

R (Jackson) v Attorney-General (UK) [2006] AC 262.

C Reports

Constitutional Advisory Panel “New Zealand’s Constitution: A Report on a Conversation, He Kotuinga Korero mo Te Kaupapa Ture o Aotearoa” (November 2013).

Constitutional Arrangements Committee *Inquiry to review New Zealand’s existing constitutional arrangements* (10 August 2005).

GG Grieve “Report of the Public Petitions M to Z Committee” [1961] IV AJHR 12–12A.

He Whakaaro Here Whakaumu Mō Aotearoa *The Report of Matike Mai Aotearoa, the Independent Working Group on Constitutional Transformation* (2016).

RE Jack “Report of the Constitutional Reform Committee” [1964] III AJHR I14.

Justice and Law Reform Committee “Interim Report of the Inquiry into the White Paper – A Bill of Rights for New Zealand” (1986-1987) X AJHR I.8A.

Justice and Law Reform Committee “Final Report on a White Paper: A Bill of Rights for New Zealand” (1987-1990) AJHR I.8C.

Law Commission *The Public's Right to Know: Review of the Official Information Legislation* (NZLC 125, 2012).

Law Commission *The Role of Public Inquiries* (NZLC IP1, 2007).

Law Commission *A New Land Transfer Act* (NZLC R116, 2010).

Michael Macaulay *Who Do We Trust?* (Victoria University of Wellington Institute for Governance and Policy Studies, March 2016).

Royal Commission on the Electoral System “Towards a Better Democracy” [1986–1987] IX AJHR H3.

Hugh Williams, Jane Huria and Robert Peden *Report of the Electoral Commission on the Review of the MMP Voting System* (Electoral Commission, 29 October 2012).

D Books and Chapters in Books

Gabriel A Almond and Sidney Verba *The Civic Culture: Political Attitudes and Democracy in Five Nations* (Princeton University Press, Princeton, 1963).

Anthony H Angelo *Constitutional Law in New Zealand* (Kluwer Law International, UK, 2011).

JC Beaglehole “The Statute and Constitutional Change” in JC Beaglehole (ed) *New Zealand and the Statute of Westminster* (Victoria University College, Wellington, 1944).

Tony Blackshield and George Williams *Australian Constitutional Law and Theory* (6th ed, The Federation Press, NSW, 2014).

Manuel Castells *Networks of Outrage and Hope: Social Movements in the Internet Age* (Polity Press, Cambridge, 2012).

Robin Cooke “Practicalities of a Bill of Rights” (FS Dethridge Memorial Address to the Maritime Law Association of Australia and New Zealand, 1984) 11 Council Brief 4 published in WK Hastings (ed) *F.S. Dethridge Memorial Addresses 1977–1988* (Maritime Law Association of Australia and New Zealand, Palmerston North, 1989) 71.

Robin Cooke “The Suggested Revolution Against the Crown” in Philip A Joseph (ed) *Essays on the Constitution* (Brookers Ltd, Wellington, 1995) 28.

AV Dicey *Introduction to the Study of the Law of the Constitution* (10th ed, Macmillan, 1959).

Jon Elster “The Optimal Design of a Constituent Assembly” in Jon Elster and Hélène Landemore (eds) *Collective Wisdom: Principles and Mechanisms* (Cambridge University Press, Cambridge, 2012) 148.

Andrew Geddis *Electoral Law in New Zealand: Practice and Policy* (2nd ed, LexisNexis, Wellington, 2014).

Colin James (ed) *Building the Constitution* (Victoria University of Wellington Institute of Policy Studies, Wellington, 2000).

Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomas Reuters, Wellington, 2014).

Kenneth Keith “Commissions of Inquiry: Some Thoughts from New Zealand” in Allan Manson and David Mullan (eds) *Commissions of Inquiry: Praise or Reappraise?* (Irwin Law, Toronto, 2003) 153.

Kenneth Keith “New Zealand’s Constitution: Is it Brilliant or Odd?” in Geoffrey Palmer (ed) *Reflections on the New Zealand Law Commission: Papers from the Twentieth Anniversary Seminar* (LexisNexis New Zealand, Wellington, 2007) 35.

Learned Hand *The Spirit of Liberty: The Papers and Addresses of Learned Hand* Irving Dillard (ed) (A Knopff Inc, New York, 1960).

David McGee *Parliamentary Practice in New Zealand* (3rd ed, Dunmore Publishing Ltd, Wellington, 2005).

Paul McHugh *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 2001).

Geoffrey Palmer *New Zealand’s Constitution in Crisis – Reforming our Political System* (John McIndoe, Dunedin, 1992).

Geoffrey Palmer *Reform: A Memoir* (Victoria University Press, Wellington, 2014).

Geoffrey Palmer and Andrew Butler *A Constitution for Aotearoa New Zealand* (Victoria University Press, Wellington, 2016).

Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008).

Michel Rosenfeld *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge, New York 2010).

KJ Scott *The New Zealand Constitution* (Oxford University Press, Oxford, 1962).

Cass R Sunstein *Designing Democracy: What Constitutions Do* (Oxford University Press, Auckland, 2001).

Stephen Tierney *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press, Oxford, 2014).

E Journal Articles

Robert Blackburn “Enacting a Written Constitution for the United Kingdom” (2015) 36(1) Stat L R 1.

Vernon Bogdanor, Tarunabh Khaitan and Stefan Vogenaver “Should Britain Have a Written Constitution?” (2007) 78(4) e Political Quarterly 499.

Joel Colón-Ríos “Five Conceptions of Constituent Power” [2014] 130 LQR 306.

G Chapman “The Treaty of Waitangi: Fertile Ground for Judicial (and Academic) Myth-Making” [1991] NZLJ 228.

Robin Cooke “Book Review: Waitangi and Indigenous Rights: Revolution, Law and Legitimation by FM Brookfield” (2003) 119 Law Quarterly Review 326.

David Feldman “The Nature and Significance of “Constitutional” Legislation” (2013) 129 LQR 343.

Carwyn Jones “Tāwhaki and Te Tiriti: a principled approach to the constitutional future of the Treaty of Waitangi” (2013) 25(4) NZULR 703.

Carwyn Jones “A Māori Constitutional Tradition” (2014) 12 NZJPIL 187.

Tarunabh Khaitan “‘Constitution’ as a Statutory Term” [2013] 129 LQR 589.

Hélène Landemore “Inclusive Constitution-Making: The Icelandic Experiment” (2015) 23(2) *The Journal of Political Philosophy* 166.

PM North “Law Reform: Processes and Problems” [1985] 101 *LQR* 338.

Geoffrey Palmer “The Cabinet, the Prime Minister and the Constitution” (2006) 4 *NZJPIL* 1.

Geoffrey Palmer “The Law Reform Enterprise: Evaluating the Past and Charting the Future” [2015] 131 *LQR* 402.

Matthew Palmer “What is New Zealand’s constitution and who interprets it? Constitutional realism and the importance of public officeholders” (2006) 17 *PLR* 133.

Matthew Palmer “New Zealand Constitutional Culture” (2007) 22 *NZULR* 565.

RQ Quentin-Baxter “The Governor-General’s Constitutional Discretions: an essay towards a re-definition” (1980) 10 *VUWLR* 289.

RQ Quentin-Baxter “Themes of constitutional development: the need for a favourable climate of discussion” (1984) 15 *VUWLR* 12.

Han-Ru Zhou “Revisiting the ‘Manner and Form’ Theory of Parliamentary Sovereignty” [2013] 129 *LQR* 610.

F Other

John Ansell “Geoffrey Palmer: A Racist, Pure and Simple” (September 2016) *Kiwi Frontline* <sites.google.com/site/kiwifrontline>.

FM Brookfield “Republican New Zealand: Legal Aspects and Consequences” (Australasian Law Teachers Association Conference, Hobart, September 1994).

Alice Chote “An Obligation to Ask: A Constitutional Convention for Constitutional Referendums in New Zealand” (LLB (Honours) Research Paper, Victoria University of Wellington, 2012).

Lizzie Dearden “Brexit research suggests 1.2 million Leave voters regret their choice in reversal that could change result” *Independent* (online ed, 1 July 2016).

Margaret Edwards “Is There a Role for Royal Commissions and Commissions of Inquiry in Twenty-First Century New Zealand?” (LLM Thesis, Victoria University of Wellington, 2002).

Liz Farmer “Tweet, the People” *Observer* (February 2013).

Max Fisher “After ‘Brexit,’ 3 Centuries of Unity in Britain Are in Danger” *New York Times* (online ed, Washington, 25 June 2016).

Thorvaldur Gylfason and Anne Meuwese “Digital Tools and the Derailment of Iceland’s New Constitution” (CESifo Working Paper No. 5997, July 2016).

Thorvaldur Gylfason “Chain of Legitimacy: Constitution Making in Iceland” (presented at the “Perspectives on Constituent Assemblies” conference, Columbia University, 1–2 April, published as CESifo Working Paper No. 6018, July 2016).

Hans Kudnani “Rather than offer clarity, Brexit has sown confusion in Europe” (online ed, 21 August 2016).

Geoffrey Palmer “Law Reform and the Law Commission in New Zealand after 20 Years – We Need to Try Harder” New Zealand Centre for Public Law (paper presented to the New Zealand Centre for Public Law, Wellington, 30 March 2006).

Geoffrey Palmer “Launch of *A Constitution for Aotearoa New Zealand*” (Parliament, Wellington, 21 September 2016).

Claire Trevett “Cost of flag referendum \$4 million under budget” *New Zealand Herald* (online ed, 15 June 2016).

Owen Woodhouse “Government Under the Law” (JC Beaglehole Memorial Lecture, 1979) 57 Council Brief 5.

David van der Zouwe “Clarification of the Position of the Treaty of Waitangi in New Zealand’s Constitution” (LLM Research Paper, Victoria University of Wellington, 2005).