July 2013

Submission

Ensuring New Zealand's Constitution is Fit for Purpose

Submission to the Constitutional Advisory Panel

MCGUINNESS INSTITUTE

About the McGuinness Institute

The McGuinness Institute is a non-partisan, not-for-profit research organisation specialising in issues that affect New Zealand's long term future. Founded in 2004, the Institute aims to contribute to the ongoing debate about how to progress this nation through the production of timely, comprehensive and evidence-based research and the sharing of ideas. This can take a number of forms including books, reports, working papers, think pieces, workshops and videos.

About the Author

Wendy McGuinness

Wendy McGuinness is the founder and chief executive of the McGuinness Institute. Originally from the King Country, Wendy completed her secondary schooling at Hamilton Girls' High School and Edgewater College. She then went on to study at Manukau Technical Institute (gaining an NZCC), Auckland University (BCom) and Otago University (MBA), as well as completing additional environmental papers at Massey University. As a Fellow Chartered Accountant (FCA) specialising in risk management, Wendy has worked in both the public and private sectors. In 2004 she established the McGuinness Institute (formerly the Sustainable Future Institute) as a way of contributing to New Zealand's long-term future. She has also co-authored a book, *Nation Dates: Significant events that have shaped the nation of New Zealand*.

With Contributions from

Sylvia Avery

Sylvia Avery is a practicing primary school teacher who recently graduated from the University of Otago with a BA in Theatre and Politics and a Graduate Diploma in Teaching (Primary). She attended the finale of the 2012 *EmpowerNZ* workshop and in 2013 we invited her to join the *EmpowerNZ* group for the July 2013 workshop, to assist where possible in providing a practical perspective on improving civic knowledge in New Zealand. See in particular Part 4.

Renata Mokena Lodge

Renata Mokena Lodge has worked at the Institute since February 2013, following the completion of an LLB at Victoria University. Renata has a particular interest in humanitarian development and refugee policy. See in particular constitutional hot spots 4 and 5.

Niki Lomax

Niki Lomax has worked at the McGuinness Institute since March 2012. She played a key role in the organisation of the 2012 *EmpowerNZ* workshop and the 2012 *LongTermNZ* workshop. Niki graduated from the University of Otago in 2011 with a Bachelor of Arts (Hons first class) majoring in history and politics. Niki made a separate submission to the Panel titled *A Better, Digital Democracy*, see *EmpowerNZ* website. Niki wrote Part 2, Initiatives 2, 3 and 4.

Jeremy Todd

Jeremy Todd recently completed an internship at the McGuinness Institute. He participated in the 2012 *EmpowerNZ* workshop, assisted with organising the 2013 *EmpowerNZ* workshop and undertook research for this submission. Jeremy is a graduate of Victoria University and holds a BA in International Relations. See in particular Appendices 3 and 4.

Grace White

Grace is currently a student at Victoria University and has been working at the Institute since March 2011. After completing her Bachelor of Arts majoring in English Literature and Linguistics, she is now working towards her honours degree in English Literature. See in particular constitutional hot spots 3 and 6.

Contents

Part 1: Our Approach

Government of the people, by the people, for the people.
Abraham Lincoln, former president of the United States of America

It will be really important that the final outcome of the constitutional review demonstrates that New Zealand is able to have an intelligent, informed debate about constitutional issues, and that Parliament responds to this debate in an informed and considered manner. If this review creates a precedent and a model for relevant, informed and non-partisan processes, it will be a substantial contribution to New Zealand's evolution towards a modern democracy fit to guide our future as a nation – one country, many people.

The Institute's primary goal is to contribute to the conversation on how the Constitutional Advisory Panel (the Panel), and later Cabinet, might best go about creating a framework that reflects the ideas and opinions of all New Zealanders on how we should govern ourselves in the future. Secondly, we emphasise the importance of creating a narrative that shares a common view of our past, so that current and future New Zealanders can focus on building a shared vision for our future. Lastly, we recommend some changes to our current constitutional landscape.

To consider whether a constitution is 'fit for purpose' requires a very clear understanding of the purpose of a constitution, and an understanding of what being fit means. Part 1 of this submission discusses these two concepts and provides both a statement of purpose and a set of criteria for assessing a constitution. Part 2 describes the Institute's research in this area. In particular, it sets out a summary of our findings from the *EmpowerNZ* initiative undertaken in August 2012. Part 3 draws on these findings and our earlier research to stress-test our suggested criteria using a diverse range of constitutional hot spots. Through this process, we aim to show how the criteria act as a conceptual framework for assessing New Zealand's constitution over time. Part 4 discusses the opportunity that could arise from this process, namely civics education. We conclude, in Part 5, by putting forward a range of recommendations to strengthen our current constitution.

The constitutional hot spots we have chosen were selected because (i) the Institute has previously identified them as important[1] (e.g. Māori representation, environmental obligations, parliamentary oaths), (ii) they arose out of concerns identified by youth through the *EmpowerNZ* or the *LongTermNZ* initiatives (see Part 2), or (iii) they are in an area that has been problematic for the Institute in undertaking our research (e.g. searching Cabinet Minutes). It was not possible to stress-test every issue we identified, hence our focus has been on trying to add to the constitutional conversation through bringing to their attention issues that may not necessarily be addressed by other parties making submissions.

1. The Purpose of a Constitution

It is important to accept that there may be a number of ways to design a constitution that is fit for purpose. Although there is a tendency to separate a system into its individual parts when we either describe or analyse it, we need to ensure that we also consider the system as a whole, identifying the extent to which checks and balances within it work together to strengthen and bring the system into alignment. Using the analogy of the body, it is not simply about the organs of government but also

1 See in particular Report 8: *Effective Māori Representation in Parliament: Working towards a National Sustainable Development Strategy* and Think Piece 14*: Constructing a House fit for the future.*

about how those organs work together – identifying where there is enough muscle and where there is not. It is with this thought in mind that we make 40 recommendations and reflect on whether a constitutional crisis exists, and if it does, what the solutions to this crisis might be.

A common definition of democracy popularised by Abraham Lincoln is: 'Government of the people, by the people, for the people'. Broadly, this encapsulates the purpose of a constitution, describing a way of governing whereby rules are administered for a country's citizens (for the people) by elected representatives (by the people) on the proviso that those rules are supported (of the people). Therefore, the starting point for this review must be a detailed definition of the purpose of New Zealand's constitution; what is the aim of New Zealand's constitution in 2013?

Recommendation

1. **The Panel should put forward a statement of purpose for New Zealand's constitution.**

2. The Criteria for Assessing a Constitution

To assess whether a system is fit for purpose requires clarity over what being fit might look like and creating criteria whereby this may be measured. In order to answer this question, we have followed the example of the Royal Commissioners who wrote the 1986 *Report of the Royal Commission on the Electoral System*. On page 11 of their report, they set out ten criteria for judging voting systems. These criteria were: (a) fairness between political parties, (b) effective representation of minority and special interest groups, (c) effective Māori representation, (d) political integration, (e) effective representation of constituents, (f) effective voter participation, (g) effective government, (h) effective Parliament, (i) effective parties, and (j) legitimacy (Royal Commission on the Electoral System, 1986).

Importantly, the Commissioners noted that the best voting system would not be the one that met any of the criteria completely, but rather the one that provided the most satisfactory overall balance between them, taking into account the country's history and current circumstances.

Both in terms of approach and content, these criteria seem useful. Formulating criteria for assessing the current constitution appears valid and provides a method of approaching complex issues in a transparent manner. This enables anyone who disagrees with the approach to see why there are differences of opinion, and allows the criteria to be changed accordingly. We suggest such an approach would be useful, not just for this current process but in order to facilitate future assessment of New Zealand's constitution in terms of past, present and future options.

Further, the content of these criteria are insightful, not only in terms of specific criteria such as effective government and Māori representation, but also in the way the criteria have been grouped. The first four relate to community interests, the next two are about balance between the needs and interests of individual voters, while the next three are about the political institutions – government, Parliament and political parties. The final criterion addresses legitimacy, taking a view on whether the requirements of the first nine have been adequately fulfilled and are therefore able to deliver decisions that people trust, even when they do not necessarily agree with the ultimate decision.

The Institute suggests that a similar approach might be taken with our constitution, where criteria are not only identified but also divided into useful categories to facilitate further discussion and drive alignment within the system. Importantly, the setting of criteria provides not only an opportunity to

assess our current constitution, but the ability to assess past and future constitutions. For example, if the Panel identified criteria to assess the constitution in 2013, a similar body in 2023 might use similar criteria – providing a useful lens for benchmarking frameworks over time. Based on our experience we put forward nine criteria for consideration by the Panel, see Table 1 below.[2]

Table 1: Nine Criteria for Assessing a Constitution

1. Values – our system of how we govern ourselves aligns with our values and supports our vision for this country. For the purposes of this approach, the Institute draws on the seven values identified in the *Report of the Royal Commission on Genetic Modification* (RCGM, 2001: 11–12).[3]
2. Transparency – (i) citizens know and understand how the constitution works, (ii) all institutions, instruments and conventions must be easily found, unambiguous and accessible, and (iii) the social contract is apparent (in particular, that rights sit alongside responsibilities).
3. Logical processes – easy to communicate, citizens do not need to be experts to understand how it operates, and young New Zealanders are taught the basics. There is a clarity of roles and responsibilities, and an acceptance of accountability.
4. Comprehensive – the constitution must cover all aspects of governance, not just the three branches of government (the legislature, the executive and the judiciary), but also how they interlink.
5. Reliability – the system is stable and remains relatively unchanging over time, and in particular (i) processes are regularly reviewed, (ii) checks and balances are effective, and (iii) discrepancies are publicly reported.
6. Responsive – citizens can easily engage with the system at a number of levels.
7. History – there exists a narrative about our history that is both accurate and shared (consensus over our constitutional history has been achieved); in particular, we must acknowledge our Māori, Pacific and Commonwealth heritage.
8. Future – the constitution is organic, it is designed for the future. In particular, it acknowledges emerging issues and takes these into account (for example, an increase in the global population of those forcibly displaced, and the emergence of climate change refugees).
9. Legitimacy – citizens trust the process and the decisions the system delivers even when they do not agree with those decisions.

2 The Institute's experience includes preparing the report *Māori Representation in Parliament* (Report 8, 2008), organising the *EmpowerNZ* workshop in August 2012 with a view to preparing a draft constitution (*Youth Draft Constitution*, 2012), a report on the workshop (*Report 14, EmpowerNZ: Drafting a constitution for the 21st century*, 2013), undertaking a survey of 42 of the 50 participants ten months later (July 2013), and organising a further workshop for 15 of the *EmpowerNZ* participants to prepare their own submission (July 2013).

3 The Commissioners travelled around New Zealand attending 15 public meetings, 28 workshops, 12 hui, and a youth forum, they also received 10,000 written submissions and conducted 13 weeks of formal hearings involving more than 100 'interested persons' and 300 witnesses (RCGM, 2001: 8). In their report, they noted that as a result of this experience they felt it was possible to name a set of values that 'many New Zealanders would recognise as things we hold in common' (RCGM, 2001: 11). New Zealand values identified in the *Report of the Royal Commission on Genetic Modification* were:

1. The uniqueness of Aotearoa New Zealand,
2. The uniqueness of our cultural heritage,
3. Sustainability,
4. Being part of a global family,
5. The well-being of all,
6. Freedom of choice, and
7. Participation. (RCGM, 2001: 11–12)

The nine criteria can be further classified into five overarching goals:

i. *Criterion 1: Improving Alignment*. The first and most important is our shared values. A shared set of values should anchor our constitution, reflecting what matters most to New Zealanders, the way we live our lives, and the legacy we want to leave for future generations.
ii. *Criteria 2–4: Improving Understanding.* The next three focus on civics: how citizens understand the way we govern.
iii. *Criteria 5–6: Improving Interaction*. These two deal with how citizens interact with the constitutional framework. What is the quality of two-way engagement today and how could this be improved?
iv. *Criteria 7–8: Improving Stability*. These criteria are on the same continuum through time – our constitutional history and our emerging future. The assumption is that the past and the future are connected. We must build a shared view of our constitutional past to develop a shared view of our future.
v. *Criterion 9: Improving Acceptance.* Like the 1986 Royal Commissioners, we believe legitimacy is a very useful criterion for assessing the extent to which citizens might endorse their constitution. The counterfactual is that even if all the first eight criteria are met, society might still not legitimise the decisions of government.

Recommendation

2. The Panel should put forward a set of criteria for assessing a constitution for New Zealand (see the Institute's criteria in Table 1).

Part 2: The McGuinness Institute's Research

Civilisation is hideously fragile ... there's not much between us and the horrors underneath, just a coat of varnish.

C.P. Snow, British chemist, novelist and civil servant

The Institute's overarching project is *Project 2058*, in which we aim to explore, understand and contribute to discussions about New Zealand's long-term future.[4] In doing this, we engage in research, workshops and policy discussions with other New Zealanders who share a similar interest in this area of study. Constitutional issues are at the centre of this debate; we are interested in exploring whether New Zealand is well-positioned to face the challenges ahead. Is everything in order so that we can focus our energy on emerging challenges rather than always trying to engage and resolve past issues? In this part of our submission we briefly describe the research we have undertaken in order to set a context for the discussion and the resulting recommendations that follows in Parts 3–5.

1. Report on Effective Māori Representation in Parliament, 2010

In July 2010 the Institute published a report on the most difficult topic we have ever researched; no other report has challenged us so much. The topic came out of another report we were writing, Report 7: *The Shared Goals of Māori*. What had initially begun as a chapter on Māori representation in Parliament became a stand-alone report. What made this report so difficult to research and write was the level of pain associated with this issue. Put simply, terrible things happened in our past; often this was a result of people being greedy, but there were also many cases where good people did bad things in an attempt to deliver good outcomes, or where good people did good things hoping to deliver good outcomes but still managed to deliver bad outcomes. When you read about our history, in particular the relationship between Māori and Pākehā, it is like hearing your parents argue when you are young; it is disturbing and leaves you feeling very uncomfortable. When you take that experience and repeat it throughout New Zealand, you begin to appreciate both the challenges our history has created and the opportunity the constitutional review provides to heal that pain and move the country forward.

Given this experience, we placed the Māori proverb (repeated on page 11) at the start of the preface to our 2010 report not because it was about representation in a parliamentary sense, but because it was about representation in terms of voicing our thoughts. We concluded it was more important to say what you think than to try to be right; as only by saying what you think are we, as a society, more likely to find the right answers to complex questions. This has driven the Institute's approach, both in researching and drawing our own conclusions and in creating space for others to have conversations. Both reports provided significant insights into recommendations 3–7.

2. The StrategyNZ Initiative, 2011

In March 2011, the Institute hosted its first major event, a workshop called *StrategyNZ: Mapping Our Future*, which aimed to explore how New Zealanders might develop a strategy map for our nation. The workshop was a fusion of the Harvard Business School strategy-mapping model and foresight theory. The Institute brought together over a hundred diverse New Zealanders from throughout the country, the aim being that this group would demographically represent New Zealand in 2058.

4 The year 2058 was selected as it was 50 years from when the project was launched in 2008; far enough away not to create an obstacle to discussion, but close enough to enable meaningful and realistic dialogue.

Out of this workshop, a number of key themes emerged which have continued to influence our work ever since. The first of these is the importance of attracting and retaining talent to New Zealand, while the second is the opportunity presented by the constitutional review to have a conversation about our future. There was also a clear appetite among the workshop participants to develop youth forums and find ways in which they can become part of the solution.

StrategyNZ was also a lesson in the importance of symbolism. In 1908 a competition was run to develop a new Coat of Arms for New Zealand – one that truly represented our young country. One of the challenges put to the ten groups that made up *StrategyNZ* was to produce a Coat of Arms for 2058 – one that would explore what New Zealand does differently, better or uniquely compared to other nations. Interestingly, most *StrategyNZ* groups chose to use 'Aotearoa' instead of 'New Zealand' in their designs and many incorporated traditional Māori symbols (see Figure 1 below). It is therefore interesting to note the name of our country was not raised in our workshops in 2012 and 2013.

The importance of symbolism should not be underestimated, particularly in the context of nationhood and nation-building. This exercise highlighted the importance of national symbols. Just as New Zealand's constitution must be designed to be flexible and constantly evolving, the same should be true of our national symbols, including our name, our flag and our national anthem. The *StrategyNZ* initiative provided significant insights into recommendations 16–20.

Figure 1: The ten designs for New Zealand's Coat of Arms in 2058

3. The EmpowerNZ Initiative, 2011–2013

With a mandate from the participants of *StrategyNZ*, the Institute launched the *EmpowerNZ* initiative in 2011, hoping to satisfy the appetite for youth involvement with the current constitutional review. The initiative sought both to follow the progress of the Panel's work and to foster youth engagement with the constitutional review and other civic issues. The focus was always on dialogue, discussion, and providing young people with an opportunity to share their thoughts on the issues facing New Zealand.

The *EmpowerNZ* initiative was, at its core, an experiment. We aimed to create a space for young people to come together and think deeply about these constitutional issues, in the hope that this discussion would then permeate through youth networks, universities, wider communities and those involved with the constitutional review. This initiative had three key stages (see Table 2 overleaf).

Table 2: Stages and Outputs from EmpowerNZ

Stage	Output
Stage 1: *EmpowerNZ* workshop, August 2012	1. *Draft Constitution* (2012) 2. *Report 14: Drafting a constitution for the 21st century*[5] (2013)
Stage 2: *EmpowerNZ* Participant Survey, June and July 2013	3. Submission to Constitutional Advisory Panel: *EmpowerNZ Participant Survey* (2013)
Stage 3: *EmpowerNZ* workshop, July 2013	4. Submission to Constitutional Advisory Panel: *EmpowerNZ Written Submission* (2013)

In August 2012 the Institute hosted the *EmpowerNZ* workshop, which brought together 50 young people from throughout New Zealand to draft a constitution for the 21st century. The workshop was specifically aimed at law and history students and young people engaged in youth networks. In many ways this group were already experts, but we also made sure they were surrounded by the valuable experience and insights of New Zealanders who have reflected on constitutional issues over a long period of time.[6]

The output of the 2012 workshop was the *Draft Constitution* (see Appendix 1). It was never expected that this document would be the ultimate constitution for New Zealand. Rather, by working towards a tangible output, the aim was to get the participants to focus and progress through many complex discussions in a short space of time.

In June 2013, with the Panel's submission deadline approaching, we thought it would be useful to circulate a survey among the 50 participants asking them the 20 questions the Panel had asked on its 'Constitution Conversation' website, plus an additional four questions that reflected some of the key issues raised at the August 2012 workshop. After 10 months of reflection, we thought it would be interesting to see what the participants – arguably some of the most informed youth on these issues in the country – thought about the specific issues. The results of this survey have been submitted to the Panel separately and can be downloaded from the *EmpowerNZ* website, however we have included a high-level overview of the results in text below (also see Appendix 2 for a brief overview of the specific questions).

The third stage of this initiative was a second workshop held on 4–6 July 2013, which invited all the participants back to Wellington to work on a group submission for the Panel. Again the Institute's key aim was to provide a space for discussion where the opinions of the participants took precedence. The output of this event was the *EmpowerNZ Written Submission*. This submission is also available from the *EmpowerNZ* website.

The *EmpowerNZ* experience has significantly influenced all the Institute's recommendations.

Firstly, we have found that youth have an enormous appetite for engaging on issues like this and they have a lot to offer. Since *EmpowerNZ* we have engaged with youth in a number of other ways, including the *LongTermNZ* workshop in December 2012 which looked at issues relating to fiscal

5 This report, published in February 2013, discusses the method, inputs, process, outputs and outcomes of the workshop. The report is available for download from the McGuinness Institute website.

6 Speakers at the 2012 workshop included (in alphabetical order): Emeritus Professor John Burrows, Charles Chauvel MP, Hon. Peter Dunne MP, Te Ururoa Flavell MP, Paul Goldsmith MP, Hone Harawira MP, Professor Philip Joseph, Hon. Jim McLay (Keynote Speaker), Dame Dr Claudia Orange, Sir Tipene O'Regan, and Metiria Turei MP. The group was also supported by a team of talented young lawyers to facilitate the workshop: Dean Knight (lead facilitator), Jess Birdsall-Day, Natalie Coates, Carwyn Jones, Mihiata Pirini, Marcelo Rodriguez Ferrere, Diane White and Edward Willis.

sustainability, and our *Science Meets Humanities Scholarship Programme*. There is enormous reciprocity in these projects. We provide the participants with opportunities to gain knowledge and have their voices heard, and in exchange we receive new insights and bold perspectives on how these big issues might be resolved.

Secondly, when trying to draw out discussion and develop reasoning, having a clear and tangible output as a goal is an incredibly useful tool. It provides a group with direction and focus, and something to represent their success at the end. After the 2012 workshop a number of participants expressed a desire for more time. The group's expectations had been extremely high, they wanted to get it right! However, the point was not to create something perfect and infallible; the purpose was always the process. The discussions they had along the way, the knowledge they acquired, the absorption of different perspectives, and working through the difficulties of consensus decisionmaking all contributed to the experience. Further, the 2012 workshop created 50 constitutional ambassadors who could then take this conversation back to their communities.

Given the above process, the 2013 survey results are a better reflection of the group's learnings than the 2012 *Draft Constitution*. The survey was completed 10 months after the 2012 workshop, allowing time for further discussion and reflection. The participant's responses were insightful and reflected deep thinking on these difficult issues. Key themes that emerged from the survey results:

1. Areas of consensus

a. Civics education: 100 per cent of participants agreed that New Zealand needs to improve civics education in our school curriculum. Specifically, they thought primary and secondary school students could benefit from having a better understanding of the political system and institutions, the courts, the rule of law, the Treaty of Waitangi, and New Zealand history in general. They thought it was important for young people to form critical thinking skills and political opinions, and that increasing knowledge would in turn improve youth participation and engagement in the political process. Civics education was also a common response to other questions in the survey such as how Māori participation could be improved or how to increase youth participation in our democracy.

b. Term of Parliament: 80.5 per cent of respondents thought the term of Parliament should be increased to four years. This largely stemmed from a desire to facilitate more long-term policy planning and a concern that campaigning too frequently can get in the way of policy-making. As one respondent said: '3 years – as is classically noted – means 1 year of blaming the previous government, 1 year of work and 1 year of campaigning.'

c. Number of MPs: 78.0 per cent thought the current number of MPs was appropriate for a nation of our size. There were no strong arguments presented for or against changing this number.

d. Environmental issues: 71.8 per cent of respondents supported including a commitment to the environment and/or sustainable development and/or future generations in New Zealand's constitutional arrangements. Reasons cited included the importance of the environment in terms of our national identity, our international brand, protection for future generations and the encouragement of long-term thinking. There was no clear consensus on exactly what form this might take, rather a desire to explore ways to operationalise such a commitment.

2. Areas of contention

e. Codified or uncodified: 50 per cent thought New Zealand's constitution should be a single written document, 40.5 per cent thought the status quo should be maintained, and 9.5 per cent were undecided. The clear tension on this issue was between the flexibility and pragmatism of the current system versus the accessibility and transparency a written constitution could provide.

Concern was expressed, from both those for and those against, that distilling our arrangements into one document could lead to oversimplification.

f. Treaty of Waitangi: 47.6 per cent supported making the Treaty a formal part of the constitution, 19 per cent did not support this, and 33.3 per cent were undecided. Many responses emphasised the symbolic significance of the Treaty in relation to the Māori–Crown relationship, but there was less consistency over what this means in practice. The respondents raised questions about the practical difficulties, particularly the issue around the different English and Māori versions of the Treaty, and what 'formal' inclusion would look like.

g. Republic: 51 per cent supported Aotearoa New Zealand becoming a republic, 19.5 per cent did not support a republic, and 29.3 per cent were undecided. The spectrum of views ranged from transitioning to a republic being absolutely imperative for democracy and fundamental to our national identity, through general ambivalence, to a republic being costly and unnecessary.

3. Areas where participants desired more information

h. Supreme law and enforcement: the main area where participants said they didn't know, or that their answer would depend on other factors, was around elevating the constitution or the Bill of Rights to a higher legal status and around who decides whether legislation is consistent with the constitution.

i. Māori seats: 47.6 per cent said we should keep the Māori seats, 26.2 per cent said we should abolish them, and 26.2% remained undecided. There was general agreement that avoiding a tyranny of the majority was important and that Māori need a guaranteed voice in Parliament; however, respondents were less clear about whether the Māori seats were the best method to achieve this. A number said they would like to know more about other mechanisms that could guarantee representation, and that they would be interested to hear from Māori on this issue.

4. Major themes that emerged across the survey

j. The aspirational vision of New Zealand is a nation that is equal, inclusive, fair, tolerant, diverse, multicultural, sustainable, innovative, efficient, democratic, transparent, accountable, with strong leadership (both domestically and internationally). Our constitution should acknowledge our history (the Treaty, the Sovereign and the Crown), emphasise environmental protection, be part of a global community, and be designed to inform and engage the public.

Ensuring that these perspectives were presented to the Panel was important to the Institute, and the survey was an extremely useful mechanism to ensure that all the participants could have more time to reflect and voice their thoughts – something that was much more difficult to achieve with the writing of a *Draft Constitution* in two days in August 2012.

The *EmpowerNZ Written Submission* took an entirely different approach, but again offered something the *Draft Constitution* did not: the opportunity to delve into the issues in such a way that the participants could present both sides of an argument and convey points of consensus and contention. It was clear that the group of 15 who returned for the 2013 workshop were very well equipped to tackle these issues and could have held their own among the nation's constitutional experts. The submission reaches similar points of consensus to the survey, but its main value is that it provides in-depth thinking on most of the issues raised by this review from the perspective of young people – the group with the highest stakes in New Zealand's future. The *EmpowerNZ* initiative provided significant insights into all 40 recommendations.

4. The LongTermNZ Initiative, 2012–2013

In December 2012 we ran a third workshop, *LongTermNZ: Exploring New Zealand's long-term fiscal position*. This workshop saw 27 young people, mostly politics and economics students from throughout New Zealand, attend the *Affording Our Future* conference held by Victoria University of Wellington and the Treasury. The conference was held in preparation for the publication of the Treasury's 2013 statement on New Zealand's long-term fiscal position. Following the workshop the participants spent two days drafting their own *2012 Youth Statement on New Zealand's Long-term Fiscal Position* (using the model used at the *EmpowerNZ* workshop to create a *Draft Constitution*).

One of the key lessons from this workshop, which is reflected in the participants' *2012 Youth Statement*, is the necessity for trade-offs and, as with *StrategyNZ*, the importance of symbols. The logo developed by the designers during the workshop is a good example of this, see Figure 2 below.

Figure 2: LongTermNZ logo, designed at the 2012 workshop

The logo on the front cover was developed at the workshop. The wavy lines represent the continued fluctuations in the long-term health and productivity of the people of New Zealand. Shocks to the economy may come, but we ride the waves and continue on. The four crosses represent in roman numerals the 40 years of fiscal projection into the future. They also represent symbolically the Southern Cross as a marker of our national identity and as an ancient and trusted tool that will remain fixed, guiding us into the future. (LongTermNZ, 2012: 14)

A key focus of the document was the need for resilience and an appreciation of trade-offs in policy-making. To be robust, New Zealand's constitution needs to be able to manage these trade-offs. This should be a key consideration in our on-going constitutional development.

Another key lesson from this process was that an understanding of the budget, the role of the Treasury, and fiscal management should form an integral part of any recommendations regarding civics education in the New Zealand curriculum. When sharing their own experiences, it became clear to the participants that there was considerable inconsistency in how much education they had received relating to personal financial management, and many of them noted that they had not learnt anything about fiscal management at a government level until university, if at all. Fiscal policy is a key driver behind all areas of public policy and it is important that young people have an understanding of the how the system works.

LongTermNZ also reinforced our commitment to working with young people; New Zealand has no greater resource than the potential of our young. Ensuring they have opportunities to engage deeply with complex issues and have their voices heard is immensely important. This will continue to drive our work programme at the Institute, and it is our hope that it will also drive the continuation of this constitutional conversation. The *LongTermNZ* initiative provided useful insight into recommendation 28.

Part 3: Constitutional Hot Spots

Here we use our research summarised in Part 2 to stress-test the criteria (described in Table 1) and develop recommendations for the Panel to consider. The relationship between these constitutional hot spots and the criteria and their overarching goals is reflected in Table 3 below.

Table 3: The Constitutional Matrix

Five Overarching Goals	Nine Criteria	Constitutional Hot Spots					
		1. Māori Representation	2. The Executive Council	3. Oaths and Symbols	4. Environment	5. Rights and Responsibilities	6. Term of Parliament
Improving alignment	1. Values	✓	✓	✓	✓	✓	✓
Improving understanding	2. Transparent		✓			✓	✓
	3. Logical	✓	✓			✓	✓
	4. Complete		✓			✓	
Improving interaction	5. Reliable	✓	✓			✓	
	6. Responsive	✓	✓			✓	
Improving stability	7. History			✓		✓	
	8. Future			✓		✓	✓
Improving acceptance	9. Legitimacy	✓	✓	✓	✓	✓	✓

Hot Spot 1: Māori Representation

Me tu te tangata ki korero i runga i te marae kia whitikia e te ra kia puhipuhia e te hau.
A man should stand and speak on the marae where his words are exposed
to the bright sun and blown about by the wind.
Māori proverb

Defining the Problem

The Institute have been concerned about the quality of representation in regard to Māori interests for some time; in particular how can outcomes for Māori New Zealanders be improved. As a result we researched a number of questions in our 2010 report on *Effective Māori Representation in Parliament*, in particular: whether the Māori electorate seats were effective, and if the 1986 Royal Commission's proposal had been fully implemented, whether Māori representation would be more effective today (questions 7 and 8 respectively). We found that separate electorate Māori seats are unlikely to deliver an optimal parliamentary system and that other options should be explored (page 64 of the 2010 report). Further, we found that the 1986 Royal Commission's recommendation on the removal of the seats was well-considered; the Commissioners' believed all political parties would then compete to represent Māori interests, and as such issues affecting Māori would become more electorally significant

to all political parties (page 68). In other words, maintaining the status quo isolates Māori issues and prevents solutions being developed in an integrated way at the political party level, preventing an understanding of Māori issues being embedded and integrated into public policy when a particular party attains political power.

Discussion

The central question is whether our system of Māori representation is effective, and if not, how it might be improved. This was the starting point of our 2010 report on *Effective Māori Representation in Parliament* (2010). Although we were unable to find a concise working definition of effective representation, we did find a conceptual framework. Hanna Fenichel Pitkin, in her influential work on the concept of political representation, considers that there exist at least four different views of representation:

a. *Formalistic* representation focuses on institutional arrangements, and how representatives gain authority and constituents can make representatives accountable.
b. *Descriptive* representation focuses on the extent to which representatives resemble the demographics, interests or experiences of their constituents.
c. *Symbolic* representation focuses on the meaning that a representative has for those who are being represented. Pitkin defines symbolic representation in terms of human beings who 'stand for a nation just as the flag does', and as such emphasises the symbol's power to evoke feelings or attitudes .
d. *Substantive* representation focuses on the policy outcomes being achieved for constituents by their representatives. Pitkin defines substantive representation in terms of 'acting in the interest of the represented, in a manner responsive to them. (Pitkin, 1967: 92, 97, 209)

When considering change to our current system of representation, it is important to clearly define what type of representation is being conceptualised and ensure that the type of representation New Zealanders want is being delivered. As a public policy think tank, it is the fourth definition, *substantive* representation, that drives us in our thinking on Māori representation; whether policy outcomes are being achieved for constituents is our primary concern.

The Commissioners who wrote the *Report of the 1986 Royal Commission on the Electoral System* considered that the change to MMP did not require the Māori electorate seats to be carried over, and that the goal of effective Māori representation could be achieved under a common roll with a waived threshold[7] for parties that primarily represented Māori interests (Royal Commission on the Electoral System, 1986: 44–101).[8] Most importantly, the Commission was proposing a package of initiatives that would work together to produce more effective outcomes for Māori, and for all New Zealanders. They believed that:

> In the event that Māori were to become dissatisfied with the performance of the existing parties, their vote, if it were organised, could be marshalled behind a Māori party. (Royal Commission on the Electoral System, 1986: 99)

7 The Royal Commission recommended amending the threshold to 4% for all other political parties.

8 New Zealand has two rolls. The largest roll is the general roll, comprising all electors who are not registered on the Māori roll. The Māori roll comprises electors of Māori descent who have chosen to be registered on this roll rather than the general roll. Every five years, just after the New Zealand Census of Population and Dwellings, Māori are given the option to change rolls or for new electors to register. The last option was in 2013. The roll type dictates whether electors are represented in the House by a member from a general electorate or a Māori electorate. The results of the Māori Electoral Option together with the Census data are used to determine the number of Māori and general electorates in Parliament and to revise the electorate boundaries. The 2013 results show a slight movement towards the general roll: Māori on the Māori roll 228,718 (55%) [2006: 222,362 (58%)] and Māori on the general roll 184,630 (45%) [2006: 163,615 (42%)] but overall this does not seem material (Electoral Commission, 2013). See also Figure 12 on page 50 of our 2010 report on *Effective Māori Representation in Parliament*.

From 1986 to today we continue to see a trend towards party-centric politics, in that public policy continues to be developed within the political party membership (in particular the parliamentary caucus and Cabinet), rather than in the House or at Select Committees. Although the House and Select Committees do provide opportunities to discuss public policy, those discussions are often about refining policy or point-scoring; they do not focus on exploring strategic options or integrated solutions. This means that parliamentary seats that operate outside the party process are less likely to have their needs and wants considered, integrated and implemented. Separate electorate seats may give the impression that Māori have significant power to determine outcomes, however in reality this power is likely to be flawed – power in the House is likely to be far less important than having power in a political party of influence. Hence, in answering how best we can bring change that delivers real improvements in areas such as housing, education, health, and employment – it may be that removing the Māori seats is part of the solution.[9,10]

Another trend is youth enrolment and voter turnout. In the 2011 elections, of the estimated 3.27 million New Zealanders eligible for voting, 93.7 % enrolled.[11] Although the overall percentage was similar to previous years, of particular concern is the under 30 year old group; they comprised 22% of the eligible voters but represented 67% of those not enrolled to vote (Parliamentary Library, 2012). Looking into this more closely, young Māori New Zealanders on the Māori roll were more likely to enrol but less likely to vote than their counterparts, an unintended consequence our current system.[12]

Below we discuss a package of initiatives discussed in Report 8; namely the Māori seats, the party list, Te Tiriti and the threshold. Other recommendations made in pages 86–88 of the Institute's report, including a preference for a four-year electoral cycle and that the MP and Executive Council Oaths are discussed later in this submission.

Māori Seats

Māori seats are a mechanism in our electoral framework that is being used to solve a constitutional problem.[13] The two frameworks should be reflective of each other but kept separate, rather like different sides of the same coin. The representational framework should focus on delivering a system in which all voters are treated equally and a House that reflects the citizens of New Zealand (*descriptive representation*). This framework reinforces the notion of *responsible government*, where the Executive Council is in turn responsible to the MPs, and the MPs to their constituents. The constitutional

9 There are a number of cases internationally where race-centric political parties exist or are emerging. In reality they put pressure on larger political parties (and the public at large) to understand their specific concerns and consider their proposed solutions. The development of ideas through political and democratic processes should always be welcome; selecting debate and wise counsel over civil unrest is always desirable.

10 Further, it is important to note that MMP with the Māori seats has created a change in voting behaviour on the Māori roll that is different from that being pursued on the general roll. Approximately 56% of those who voted for a Māori Party candidate gave their party vote to a different party in 2008, possibly because they considered a party vote to the Māori Party would be a wasted vote. As recommended in our 2010 report, more research is needed to understand the unintended consequences of the status quo, and to what extent this works for or against effective representation. This point is discussed in more detail on pages 51–55 of our 2010 report.

11 This included 421,708 New Zealanders of Māori descent, being 12.9% of the total eligible population; of these 55% were enrolled on the Māori roll with 45% on the General roll (Parliamentary Library, 2012).

12 In 2011, total young New Zealanders eligible to vote was 21.8%; total young New Zealanders enrolled was 17.9%, and total young Māori New Zealanders enrolled on the Māori roll was 26.95% (a difference of 9.05%). Total voter turnout on the General roll was 74.2% and total voter turnout on the Māori roll was 58.2%.We do not know the statistics comparing young people that enrolled and voted on the Māori roll verses the General roll, but this would be an interesting statistic. The Māori electoral option is a five year option where political parties aim to attract young people to move to the Māori roll on the basis that it is indirectly a vote for Māori interests through the mechanism of increasing the number of Māori seats at the expense of general seats. Based on the above statistics it is likely that the enrolment of young people on the Māori roll is higher but voter turnout is lower. (Electoral Commission, 2012a; Electoral Commission, 2012b; Parliamentary Library, 2012)

13 Importantly, the 1986 Royal Commissioners recognised that a constitutional issue existed and recommended that Parliament and Government should enter into consultation and discussion with a wide range of representatives of the Māori people about the definition and protection of the rights of the Māori people and the recognition of their constitutional position under the Treaty of Waitangi. See RCES Recommendation 7 (Royal Commission on the Electoral System, 1986: 112). The Institute does have concerns about the idea of one group of New Zealanders having more rights than other New Zealanders, which is why we have proposed a responsibility clause rather than a rights clause - see our recommendation 5.

framework sits beside the electoral framework; it describes the relationship in which power is distributed once elections have taken place (in other words the electoral framework has done its work). It is this latter framework, the constitutional framework, that should acknowledge Te Tiriti.

The dilemma we have is that because Te Tiriti is not currently recognised in our constitutional framework as the founding document of our nation, the abolition of Māori seats could be seen to equate to the removal of tangible recognition of the relationship between Māori and the Crown. The conundrum for the Panel, and therefore for executive when it considers this issue, is not so much whether the Māori seats should go, but what they should be replaced with.

This issue is complicated by the fact that the Māori seats have significant symbolism in regard to the 1840 treaty between Māori and the Queen, and thus provide *symbolic* representation (see Pitkin definition above). We consider, however, that this symbolism would be better protected by the incorporation of the Treaty into the core constitutional framework through an acknowledgement that it is our founding document. Currently Te Tiriti is included in the *Cabinet Manual*[14] as a source of the constitution; however, the *Manual* is not a legal document, and its position sits below the Constitution Act, the prerogative powers of the Queen, New Zealand statutes, English and UK Statutes, and decisions of the courts: in other words, the Treaty is regarded as number six of seven sources of the constitution (See DPMC, 2008: 2).

While providing *symbolic* representation, it can be argued that the Māori seats in fact act as an obstacle to *substantive* representation in terms of effective policy. There are a number of options for increasing substantive representation of Māori in Parliament, which the Institute discussed in our 2010 report *Effective Māori Representation in Parliament*. These include increasing the number of MPs in Parliament, guaranteeing a percentage of Māori MPs in the House, appointing a chief Kaumatua to site alongside the Governor-General, and establishing an independent advisory body on effective representation.

Most importantly, any decision on the removal of the Māori seats must follow considered discussion of the most effective method of providing both *symbolic* and the *substantive* representation. This is a discussion that involves not just Māori but all New Zealanders. For this reason we consider a referendum should take place as the outcome will become a key element of our constitution, and therefore must be owned by all the people of New Zealand.

The Party List

It is clear that when designing a system to deliver *descriptive representation* of selected groups into Parliament there exists a range of mechanisms to consider such as reserved seats (quotas), advisory boards and thresholds. We believe that it would benefit New Zealand to review the range of systems in use globally and to critically evaluate whether their successful elements may be relevant to our local context. These international experiences may provide useful insights, and highlight the range of options available to strengthen our electoral framework. However, any option must be able to deliver the outcomes that New Zealanders desire, based on our unique history, culture and values (see page 31 of the report).

In New Zealand the party list offers an opportunity to ensure that the House of Representatives better reflects the changing ethnic and gender make-up of the community, in other words, *descriptive representation*. The party list mechanism could be calibrated to ensure that, taken together

14 The *Cabinet Manual* 'is Cabinet's document, concerns Cabinet's own processes and is issued with Cabinet's authority ...The general public is not its primary audience ... The *Cabinet Manual* does not rule Cabinet; rather its authority derives from Cabinet. Just as Cabinet is not a legally constituted body, the *Manual* is not a legal document.' The *Manual's* authority is derived from the Cabinet's decision to adopt the *Manual's* procedures at the outset of each new administration. (Kitteridge, 2006) See also the following section on the Executive Council.

with the electorate MPs, the membership of the House meets a minimum standard of ethnic and gender diversity.

This proposal, if implemented, would not impact on electorate candidates as they would automatically become an elected Member in the House. This proposal would affect the party lists, but the power to select candidates would still remain with the party. However there would be two significant differences, firstly the party would continue to provide the party list to the Electoral Commission (about a month before the election), but they would also make the addition of the candidates ethnicity/ethnicities. Secondly, after the election the Commission could use this information to select additional members to the House to ensure representation is *descriptive* (reflective) of the population.

Under this model, political parties are likely to seek out ethnically diverse New Zealanders to become List MPs. This may be controversial but other countries are looking at similar initiatives.

We appreciate that this would require potential MPs to publish their self-selected ethnicity and may be an issue for some, however, the reality is that this naturally happens during the campaign prior to an election. Further, self-selected ethnicity is also researched and reported in Parliamentary Library reports. In other words, since this information is already publicly available, all we are suggesting is that this information is formalised before the election and used after the election to select MPs from the party list to ensure a minimal level of representation exists in the House.[15]

Although this sounds complex and time consuming for the Electoral Commission to calculate, it should in practice be timely and cost-effective. The Commission could calculate the electorate MP mix in the House on election night, and then work out how many additional MPs from the list is required who are of Māori ethnicity. They would be selected first until the quota is met. Using, for example, the National Party, if they were allowed twenty more from their party list, their party list would be used to select the ethnic mix needed to make up the necessary minimum standard (for example: 5 MPs from the party list would need to have Māori ethnicity). In our view this would be a lot less complex and costly than how the Māori roll determines the Māori electorates (the latter would not be required at all under this model) and would deliver *descriptive representation* in the House.

Most importantly this proposal assumes that outcomes for ethnic groups will be improved if MPs of the same ethnic group are in the caucus of political parties, working hard to develop, pursue and implement policies that will deliver long-term solutions. Arguably history tells us that some of the most strongest advocates for Māori interests has in fact been non-Māori,[16] so an informed engaged society is the best insurance policy for Māori interests. This is one of the many reasons why civics education is discussed so prominently in Part 4 of this submission.

Te Tiriti

In answer to what the Māori seats should be replaced with, we suggest the following two clauses should be included in our constitution:

15 Minimum representation would be a percentage developed by the Electoral Commission, and could equally be applied to gender or other ethnic groups.

16 In Parliament, arguably our first Prime Minister, Hon James Fitzgerald, as noted by historian David McIntyre: 'was an outspoken advocate of Māori rights, race assimilation and peace. In a pamphlet in 1860 he had called for the transfer of Māori affairs from the governor to the responsible ministry and had opposed Governor Thomas Gore Browne's alternative scheme for placing Māori affairs under an appointed council responsible to the Crown. On 6 August 1862 he made an eloquent plea for equal civil and political rights for all New Zealanders. He suggested that Māori chiefs should be brought into the administration and into the Legislative Council and that the Māori people should receive one third of the representation in the House of Representatives, subordinate legislative bodies and courts of law.' He wanted to recognise the Māori King and let him be "Superintendent of his own province". He declared that "there are only two possible futures before the Māori people. You must be prepared to win their confidence, or you must be prepared to destroy them". (McIntyre, 2012)

(i) Acknowledgement Clause: the constitution must recognise New Zealand's constitutional past in a clear, accurate and concise statement. This means acknowledging Te Tiriti as this country's founding document.

(ii) Responsibility Clause: The constitution must recognise that the New Zealand Parliament has a responsibility to protect, preserve and support the development of Māori culture.[17] This must be the responsibility of New Zealanders, as there is no other government in the world capable of delivering on such a goal.

Given this review is the first occasion Māori have had to explore and communicate what they might want constitutionally in terms of Te Tiriti, we have no idea whether Māori leaders would be content to give up the Māori seats for the acknowledgement and parliamentary responsibility clauses above. We do not know what Māori New Zealanders think, but this review is an opportunity to find out. We consider there exists for the first time the ability to separate the symbolism of the Māori seats from the electoral framework and design an electoral framework that delivers better policy outcomes for all New Zealanders.

This proposal would provide two important stepping stones towards more meaningful conversations on New Zealand's long-term future. The first would ensure that Te Tiriti has a special place in our constitution (which in practice is already recognised in other areas of law and our school curriculum) and the second would move the conversation from *why* to *how* to protect, preserve and support Māori culture. We consider these changes would reflect what most New Zealanders already support in practice.

The Threshold

There is much debate over what should be the minimum level of support a party needs in order to gain representation in Parliament. The current threshold is either 5% of the party vote or winning a single constituency seat. The current threshold of 5% is relatively high in comparison with other proportional representation systems internationally (Electoral Commission, 2012),[18] with significant arguments both *for* and *against* a threshold (or the level of threshold).[19]

As noted above, the in 1986 the Royal Commissioners considered this threshold should be waived for parties primarily representing Māori interests. In a 1993 Department of Justice report on the Electoral Reform Bill, officials considered that a threshold especially designed for 'the concept of a party "primarily representing Māori interests" is problematic' due to it being subjective and difficult to define (Ministry of Justice, 2001: 3).[20] The Institute agrees with the Department of Justice's conclusion; the threshold cannot easily be applied specifically to a party primarily representing Māori, or any other minority ethnic group (the Commissioners also suggested this possibility) (Royal Commission on the Electoral System, 1986: 101).

17 This aligns with the United Nations Declaration on the Rights of Indigenous Peoples (adopted by the General Assembly in September 2007). The declaration affirms the rights of indigenous peoples to maintain culture, spiritual traditions, histories and philosophies, and recognises the rights to their lands, territories and resources. The declaration constitutes a minimum standard to be pursued and prohibits discrimination against indigenous peoples (Wiessner, n.d.). New Zealand originally voted against the adoption of the declaration, along with the United States of America, Canada and Australia, due to concerns of legal incompatibility. However, all four countries have since moved to endorse the declaration, New Zealand announcing in April 2010 that it would support the declaration (Watkins, 2010).

18 MMP is one type of proportional representation system. As noted by the Electoral Commission 'The majority of the Council of Europe member States with mixed member voting systems have thresholds of between 4% and 5%, while countries with a proportional list system tend to have thresholds of between 2% and 5% (Electoral Commission, 2012)'.

19 Generally speaking, arguments in favour of a threshold (or for a higher threshold) highlight the greater stability achieved through greater ease of forming governments and passing legislation, and the elimination of more extreme elements. Arguments against a threshold (or for a lower threshold) suggest this would achieve more democratic and representative outcomes, more enfranchised electors and less distortion of voting behaviour, and would allow new parties to form (Bishop, 2006: 10–14).

20 As cited in the report of the MMP Committee: *Inquiry into the Review of MMP* (Ministry of Justice, 2001).

However, we do consider a 5% threshold to be too high.[21] In 2010 we suggested a minimal threshold of 2%, as opposed to no threshold, on the basis that there should be a required level of support before a party is represented in the House. Given that the 2011 election delivered four political parties above the threshold (see * in Table 4 below), and that a number of other parties may have reached 2% if voters had believed their party vote would count, the threshold of 2% may in practice deliver more effective representation (see ** in Table 4 below), arguably delivering more players and less king makers.

Our thinking is that 5% is too high and acts as an obstacle to emerging political parties, whereas 2% is likely to deliver a more representative Parliament, one that would enable Māori interests to be represented and public policy developed through party politics, either by major political parties or through the smaller parties 'primarily representing Māori interests'. This argument would also apply for other minority groups such as Pacific Island or Asian interests.

Table 4: Official Count Results of the 2011 Election[22]

Party	Party Votes	Vote %	Electorate Seats	List Seats	Total Seats
National Party*	1,058,636	47.31	42	17	59
Labour Party*	614,937	27.48	22	12	34
Green Party*	247,372	11.06	0	14	14
New Zealand First Party*	147,544	6.59	0	8	8
Māori Party**	31,982	1.43	3	0	3
Mana**	24,168	1.08	1	0	1
ACT New Zealand**	23,889	1.07	1	0	1
United Future**	13,443	0.60	1	0	1
Conservative Party	59,237	2.65	0	0	0
Aotearoa Legalise Cannabis Party	11,738	0.52	0	0	0
Democrats for Social Credit	1,714	0.08	0	0	0
Libertarianz	1,595	0.07	0	0	0
Alliance	1,209	0.05	0	0	0

These recommendations together aim to improve *substantive* representation for all New Zealanders. The five recommendations contain a bottom-up strategy and a top-down strategy. Given that public policy outcomes are best developed and implemented within the political party structure, the Māori seats should be removed and the threshold lowered to enable new and emerging political parties to enter the House (the bottom-up strategy – recommendations 3, 4 and 7). In contrast, acknowledging Te Tiriti as the founding document of this nation recognises that two sovereigns signed the Treaty in 1840, the 'Separate and Independent Chiefs of New Zealand' and the 'Queen of the United Kingdom of Great Britain and Ireland'.[23] Further, the addition of a responsibility clause as a core component of our constitution ensures Parliament works hard to deliver on the protection, preservation and support of Māori culture (the top-down strategy – recommendations 5 and 6).

21 The 1993 Electoral Reform Bill initially put forward a 4% party vote threshold (along with the one electorate seat threshold), however Parliament concluded 5% was an appropriate level and the threshold was set at 5% in the 1993 electoral referendum.

22 See Electoral Commission, 2011.

23 The use of actual signatories is intentional, as it indicates the reality.

Recognising our past, and the desire by two peoples to create a new and dynamic country, is a great platform on which to build a vision worth pursuing in 2013 and celebrating in 2040 – 200 years after Te Tiriti was originally signed.

Recommendations

3. **The Māori seats should go, but they must be replaced with a solution that moves the symbolic purpose of the seats into our core constitution (see recommendations 4–7).**

4. **The Party List system should be used to provide assurance of minimal representation.**

5. **Te Tiriti should be acknowledged in our constitution as this country's founding document.**

6. **Parliament should be made responsible in our constitution for protecting, preserving and supporting the development of Māori culture.**

7. **Lower the threshold to 2% for all political parties.**

Hot Spot 2: The Executive Council

Sunshine must be, by its nature, the very best disinfectant.
Louis Dembitz Brandeis, Associate Justice of the Supreme Court of the United States

Defining the problem
One of the three branches of Government is the Executive.[24] The Executive Council was established as the highest institution within government, however, since the introduction of MMP its roles and that of Cabinet are becoming increasingly ambiguous. Even though the Executive Council is the highest formal institution of government, in reality it appears to be an institution lacking any real decisionmaking power, relevance or public profile to the public at large. We consider this ambiguity creates problems in terms of transparency, accountability and good governance, and creates ongoing uncertainty for citizens.

Discussion
Importantly, in this section we are not trying to imply any error of law or indiscretion; we merely raise questions over whether ambiguity does exist and whether this review provides an opportunity to make these roles and relationships more transparent and delineates clear lines of responsibility and accountability.

Ambiguity
Situations where Cabinet appears to surpass (or equivalent to) the Executive Council are numerous:

i. There is no Executive Council Manual, but there exists a large and comprehensive *Cabinet Manual*.
ii. Within this Manual (the *Cabinet Manual*) is the only official description of New Zealand's

24 The Executive is one of the three branches on Government. The Legislature is made up of Parliament, the Governor-General, Members of Parliament and Select Committees, their role is to make law. The Executive is made up of the Cabinet Ministers and the public sector, their role is to initiate and administer laws. The Judiciary is made up of judges and their task is to apply the law. (Ministry of Justice, n.d.). The Executive Council membership is determined by the Prime Minister and is made up of Ministers of the Crown and other Members of Parliament. It is and presided over by the Governor-General, who is not a member of the Council but is selected by the Prime Minister to be affirmed by the Queen every five years (DPMC) (n.d.[c]).'Nowadays, about a year before the serving Governor-General's term comes to an end, Cabinet selects the successor. After sounding out its pick, the Prime Minister advises the Queen. If she is happy, the leader of the Opposition is consulted, and the recruitment process is concluded. Governors-General usually serve a term of five years.' (MCH, 2012a)

constitution, but it is not a legal document, nor is the Cabinet a seperate-legal entity.

iii. The Executive Council only records its meetings in terms of an agenda, whereas working papers and official minutes, and records of decisions are the domain of Cabinet.

iv. The Clerk of the Executive Council is also the Secretary of the Cabinet, and is directly responsible to the Governor-General and to the Prime Minister for providing advice on constitutional matters.

v. Some consider the Executive Council and Cabinet are equivalent. '[T]he Executive Council can generally be seen as the equivalent formal body to that of Cabinet, although its membership is broader and includes Ministers outside of Cabinet' (Kitteridge, 2006).

vi. If the Executive Council is the most important institution, why then is the DPMC not called the Department of the Prime Minister and Executive Council (DPMEC)? [25,26]

vii. Who Chairs the Executive Council, the Governor-General or the Prime Minister (if the Prime Minister, why does the literature say the Governor-General presides?)?

Cabinet is not mentioned in the law of our land,[27] is not a legal entity that can be held accountable, is not directly responsible to the House of Representatives, and is not the direct employer of members of the public service.[28] Given these facts, it is surprising that the role of Cabinet has become so dominant in public affairs and within the public service. Our understanding is that Cabinet is, in legal terms, technically only a subcommittee of the Executive Council. It is only the Executive Council that has constitutional power by law, whereas Cabinet exists simply by convention. Even experts consider Cabinet itself has a rather elusive character (Kitteridge, 2006). We ask whether there is sufficient clarity between these very different organisations considering they have such different roles, functions and legal status.

Further, just as Cabinet is not a legally constituted body, the *Cabinet Manual* is not a legal document. The *Manual* 'is Cabinet's document, concerns Cabinet's own processes and is issued with Cabinet's authority' and therefore the general public is not its primary audience. The *Manual's* authority is only derived from the Cabinet's decision to adopt the *Manual's* procedures at the outset of each new administration. The *Manual* came into existence in 1948 and is updated every five or six years. As noted by Rebecca Kitteridge, Deputy Secretary of the Cabinet in 2006 noted: 'The key point is although amendments to the *Manual* may *reflect* and *promulgate* change, they do not in themselves, *effect* change' (Kitteridge, 2006). For this reason, although we do recommend changes to the *Manual* in our recommendations, we do not consider they are adequate to *effect* change, hence our recommendations in Part 5 for a codified constitution, a single written constitution that is supreme law.

Transparency

Further, we question whether the roles of the Executive Council and Cabinet could be improved through an increased commitment to transparency over both discussions held and decisions made.

25 The Department of the Prime Minister and Cabinet (DPMC) is one of the three central agencies responsible for coordinating and managing public sector performance (the others are the State Services Commission and the Treasury). DPMC's overall area of responsibility is in helping to provide, at an administrative level, the 'constitutional and institutional glue' that underlies our system of parliamentary democracy, supporting executive government (DPMC, n.d.[a]).

26 The key outcome of the DPMC is to achieve good government with effective public service support. In achieving this outcome, DPMC has adopted five contributing outcomes that reflect the department's key streams of work:

1. Decisionmaking by the Prime Minister and Cabinet is well informed and supported.
2. *Executive government is well conducted and continues in accordance with accepted conventions and practices.*
3. The Governor-General is appropriately advised and supported in undertaking his constitutional, ceremonial and community-leadership roles.
4. The intelligence system and national security priorities are well led, coordinated and managed.
5. *State sector performance is improved*. [Italics added] (DPMC, n.d.[a])

27 Only the Executive Council is mentioned in the Constitution Act 1986.

28 This is the role of the Commissioner, see section 6 of the State Sector Act 1988.

The Official Information Act 1982 (OIA) was put in place to enable 'more effective public participation in the making and administration of laws and policies, and increasing the accountability of Ministers and officials'. However, it is dependent on the public knowing what specific information to request. Alongside the Public Records Act 2005, the OIA is the main document that governs the extent to which government documents are publicly available and how they can be accessed. The purpose of the Act states:

> The Official Information Act 1982 balances the public's right of access to official information against the government's need to withhold information where there is good reason to do so. Section 5 of the Act sets out the key principle of availability:
>
> The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it.
>
> The purposes of making information available, as set out in section 4 of the Act, include the promotion of good government and enhancement of respect for the law by *enabling more effective public participation in the making and administration of laws and policies, and increasing the accountability of Ministers and officials*. [Italics added] (DPMC, 2008: para 8.13, 8.14)

Of particular interest to the Institute is how information can be accessed about Executive Council and Cabinet meetings. In 2011, the *Declaration on Open and Transparent Government* was approved by Cabinet. The declaration states that, 'Building on New Zealand's democratic tradition, the government commits to actively releasing high value public data' (DIA, n.d.). In accordance with this, all government departments and agencies are expected to actively work toward making data more readily available. The Institute views public access to information as crucial to our constitutional arrangements and recommends greater transparency in terms of awareness of what information is available and how it can be accessed.

Cabinet minutes are sent only to Ministers and are distributed within two to three days of a Cabinet meeting. Ministers usually receive two copies of a Cabinet minute, one copy is for the Minister and the other is for the Minister to give to the chief executive of the department, if the Minister wishes.[29] Cabinet minutes are sometimes released following a request under an OIA or made publicly available at the discretion of a minister.[30] However, in our experience, although Cabinet minutes often include a minute number they frequently fail to refer to a date, and unless you know exactly what you are looking for (as in dates and specific topics) accessing a Cabinet minute is very difficult.

A further concern is the difficulty of searching archived minutes. Under the Public Records Act 2005, it is mandatory for all public records, including Cabinet and Executive Council minutes, to be transferred and stored at Archives NZ. Twenty-five years after their last action, the Cabinet and Executive minutes become available automatically. Where access to minutes is restricted it is arranged between the Chief Archivist and the Cabinet office and must be in line with the OIA and Public Records Act 2005.[31] These archived minutes are searchable using the Archway search function,

29 The outcome of Cabinet's consideration of the committee's decisions is recorded in Cabinet minutes entitled 'The report of the ... Cabinet committee'. These minutes detail in table format whether Cabinet confirmed or amended each decision. If a decision has been amended, it will be the subject of a separate Cabinet minute (DPMC, n.d.[b]).

30 Personal communication between DPMC and the McGuinness Institute.

31 Personal communication between Archive New Zealand Department for Disposal and Acquisitions and the McGuinness Institute.

however only minutes that are stored at the Archive are searchable and it is very difficult to search minutes by specific criteria, for example date, minister, topic or department (Archives NZ, n.d.).

Although Chapter 8.30 of the *Cabinet Manual* (2008) states that these papers are not exempted under the OIA (see below), the mere fact that they are invisible to the public creates an obstacle that in practice means they are exempt unless you know specifically what you are looking for.

> There is no blanket exemption for any class of papers under the OIA. Cabinet material is therefore covered by the Act in the usual way, and every request for Cabinet material must be considered on its merits against the criteria in the Act. (DPMC, 2008: para 8.30)

Despite the fact that in theory the OIA ensures that the public are allowed access to Cabinet and Executive Council minutes, our own attempts to access documents have been at times difficult. Issues surrounding access include:

- Being able to ascertain what information is available. Currently there is no standardised system that makes obvious what information is available.
- Trying to track/link Cabinet Minutes by subject over time is extremely difficult.
- Dates are often missing.
- Difficulty in knowing where information can be found; for example, a Cabinet minute might sit on the website of a specific government department, but not where one would expect, such as the website of the DPMC.
- The format of the documents is not user-friendly, standardised or searchable by particular words or phrases.

Lastly, even though *conventions* are not rules, but descriptions of best practice, that does not mean they cannot be written down in a comprehensive and logical manner. The *Cabinet Manual* is clearly an attempt to do this, but we remain unsure whether all conventions have been recorded.

Accountability

Without transparency it is not possible to achieve the next step towards good governance – accountability. Accountability is fundamental to responsible government. We think of governance in terms of the legal entity, and who can be held accountable.

There are three issues that the Institute considers to be problematic constitutionally in regard to accountability. The first is the establishment (or disestablishment) through Cabinet of organisations that do not have any legal status. For example, in 2009 the Bioethics Council was disestablished in a Cabinet Minute (CAB Min [09] 8/5B). It is our opinion that this should have been a decision of the Executive Council. The existence of such organisations should be a matter of statute or the Executive Council, not simply a Cabinet decision.

The second issue is that the transfer of commitments over whole-of-government work programmes from one Prime Minister's ministry to another has displayed an absence of accountability. For example, in 2001 Cabinet agreed to develop a National Sustainable Development Strategy in response to our international commitments (see CAB Min [01] 21/5A). To our knowledge, while no observable progress has occurred towards this goal, the intention remains on the Cabinet table despite the change of government. There is a lack of clarity around whether commitments like this transfer

between different ministries (each Prime Minister's chairmanship[32]), between different parliaments (as in three-year terms) and different governments (e.g. political parties in power). We consider there should be more transparency over what an incoming ministry will support in regard to past decisions/initiatives and what it will not. This is based on the concept of responsible government, the premise that the Executive Council is responsible to the House, its caucus and the public.

Thirdly, the transfer of commitments over ministerial work programmes from one Prime Minister's ministry to another has displayed an absence of accountability. For example, the signing of strategies in government are ad hoc (see SFI, 2007) and there exists a lack of clarity around what happens to 'work in progress' at the end of a particular Prime Minister's ministry. Also, in our opinion, it is not always clear when a minister of the Crown signs a strategy or any other such document, whether he or she is signing on behalf of the Executive Council, Cabinet or simply her/himself as a Minister of the Crown. Further, whether when a Minister signs a strategy or other document that has already been signed by a department head, whether the person accountable is the Chief Executive, the Executive Council, Cabinet or the Minister.

It is our view that:

- The establishment and disestablishment of any government institutions should be signed off by the Executive Council, in order to ensure the checks and balances necessary for prudent decisionmaking;
- There should be more clarity over issues such as who is responsible for the creation and disestablishment of central and local government institutions;
- Records of such institutions and their terms of reference should be a matter of public record as standard practice, such as a public register;
- While the decision to undertake new programmes of work might be made by Cabinet, records should be tracked in such a way that connections and institutional knowledge are readily apparent;
- There should be clear goals, milestones and timelines for work programmes, as well as a clear understanding of who is responsible for tracking this process, and
- Ministers should sign-off all departmental strategies as best practice.

Recommendations

8. The *Cabinet Manual* should be republished, and called the *Executive Council Manual*.

9. That all the conventions should be listed in the proposed *Executive Council Manual*.

10. The proposed *Executive Council Manual* should include a commitment to openness. Ministers and departments should be encouraged to actively release minutes to the public. Further, the principles on which such decisions are made should be withheld from the public, such as when information should not be released to the public and thus made *confidential* or treated as *top secret*.

11. All minutes that are *made public* or become public under an OIA should be on a public register maintained by the Clerk of the Executive Council. All public minutes should be searchable by date, topic, Minister or government department (ideally searchable on the DPMC website).

32 So, for example, while the Fifth Labour Government (1999–2008) was run under one ministry, that of Prime Minister Helen Clark, the Fourth Labour Government (1984–1990) had three different ministries: those of Prime Minister David Lange (1984–1989), Prime Minister Geoffrey Palmer (1989–1990), and Prime Minister Mike Moore (1990).

12. **All minutes *not made public* should still be reported on the database above, listing the date and whether they are *confidential* or *top secret*. If *confidential*, the database should list the minute number and the subject heading so members of the public are able to request access under an OIA. If *top secret* the minute number should still be *made public* but have no subject heading.**

13. **That a section be added to chapter 5 of the *Cabinet Manual* (ideally the proposed *Executive Council Manual*) which explains the procedure for transference of outstanding issues and commitments between ministries, parliamentary terms and governments of political parties.**

14. **That Cabinet be reaffirmed as a committee of the Executive Council in all literature and websites.**

15. **Consideration should be given to renaming the Department of Prime Minister and Cabinet (DPMC) the Department of the Prime Minister and the Executive Council (DPMEC).**

Hot Spot 3: Oaths and Symbols

It is not the oath that makes us believe the man, but the man the oath.
Aeschylus, Greek dramatist

Defining the problem
In the interests of enhancing people's understanding of what the constitution means, it is important to ensure that the visible parts of the constitution uphold its basic ideals and values. The oaths align the goals of the Legislature, the Executive and the Judiciary and are the strands that connect the three branches of government, setting in concrete their duties and purpose. The question is whether, the current oaths and symbols are currently strong enough, and whether they require further strengthening. In our view, the problem is that they are not up to date and do not represent best practice.

Discussion
Below we discuss oaths and our national symbols.

Oaths
A constitutional hot spot identified by the Institute are the oaths sworn by the Governor-General, Ministers and Members of Parliament at the induction to their posts. Currently, the oaths (see Appendix 3) focus on allegiance to God, the Queen, and (in the case of the Executive Council) confidentiality.

It is easy to write off the oaths, asserting that they are purely symbolic, and therefore of no material importance. Further, there have even been suggestions that the oath is undemocratic as it establishes another criterion for taking office outside being elected by the people (Ministry of Justice, 2004: 7). However, within the oaths and symbolic processes of government there is an opportunity to codify and make visible what is important in our constitution, creating a narrative that increases not only our understanding about what the constitution stands for but how it works. This in turn helps to preserve a sense of the past, present and future of our constitution and clarity over a shared purpose.

Over the past few decades there has been increasing pressure on government to review and modernise the oaths. For example, in her 1999 maiden speech, the Hon. Margaret Wilson, suggested that a pledge to the New Zealand people should replace the pledge to the Queen. MP Tau Henare going so far as to cross his fingers behind his back when he took the oath, as he believed his allegiance lay with

New Zealand as a country (Ministry of Justice, 2004: 7).

In November 2003, the government set up an inter-departmental working group to review certain oaths and affirmations (Parliamentary Library, 2005). Following this, in May 2004, the Ministry of Justice released, *Review of Oaths and Affirmations* which establishes the need for reform stating:

> There has not been a thorough review of oaths for nearly 50 years. It is time to consider whether existing oaths express the current values and beliefs of New Zealanders. Some oaths are now outdated or inconsistent and the language used in some oaths may seem old fashioned or difficult to understand. From time to time people who take oaths and those who administer them have suggested that our oaths need changing. Many countries (including the United Kingdom, on whose oaths New Zealand's are based) have reviewed their oaths in recent years. (Ministry of Justice, 2004)

The review ignited debate between the monarchists and republicans, demonstrating the oath's potency as a constitutional issue. The Monarchist League argued that '[a] declaration of allegiance to New Zealand, or to the Prime Minister, would be a poor substitute [for the Queen]' (Monarchist League of New Zealand, 2004), while the New Zealand Republic group argued that removing references to the Queen was not 'republicanism by stealth' but simply a reflection of the contemporary values of New Zealanders (New Zealand Republic, 2004). The New Zealand Republic group also highlighted the fact that '[t]he Australians have already updated their oath of citizenship so that there is no mention of the Queen, while maintaining the exact same constitutional monarchy as New Zealand' (New Zealand Republic, n.d.).

In September 2004, the Government agreed to repeal the teacher's oath and prepare amendments to oaths and affirmations in both Māori and English. Further, the working group was directed to consider modernising the language of certain oaths and, in December 2004, the Government decided to begin the process for updating the oaths (Parliamentary Library, 2005). The Minister of Justice, Phil Goff, introduced into Parliament the Oaths Modernisation Bill 2005, which included:

- Amending the parliamentary oath to include loyalty to New Zealand and respect for the democratic values of New Zealand and respect for the rights and freedoms of its people;
- Amending the citizenship oath to include loyalty to New Zealand, and respect for the democratic values of New Zealand and respect for the rights and freedoms of its people;
- Providing a Māori version of each oath. The Act provides that using a Māori equivalent of any of the oaths set out in that Act shall have full legal effect;
- Amending the Act to prescribe a Māori language version of the words with which an affirmation must begin. (Government Administration Committee, 2005)

The bill was approved by the Monarchist League who stated, 'While it may be questioned what 'loyalty to New Zealand', and 'respect for its democratic values' actually mean, it is heartening that no attempt was made to remove the oath of allegiance to the Queen' (Monarchist League of New Zealand, 2005). The Republican Movement were also pleased, stating that '[t]he best thing about the new oaths is that they can easily be changed when we become a republic' (New Zealand Republic, 2005).

Overall, the Government Administration Committee received 11 submissions and heard two submitters, the major issues that were raised included; 'the right to make an affirmation instead of an oath, the status of a Māori version of an oath or declaration, and the modernisation of the Judicial and Parliamentary Oaths' (Government Administration Committee, 2005). However, 'the

Government Administration Committee examined the Oaths Modernisation Bill and was unable to reach agreement on whether the Bill should be passed. The Bill was reported back to the House without amendments' (Government Administration Committee, 2005). Although the Bill passed its first reading, the second reading in June 2010 was not successful.

In 2007, Māori Party MP, Hone Harawira, put up an amendment (Supplementary Order Paper 103) to the committee hearing the Oaths Modernisation Bill asserting that the oaths should 'uphold the Treaty of Waitangi'. In 2011, after his split from the Māori Party and resignation from Parliament, Harawira successfully re-entered Parliament as leader of the Mana Party. At his swearing in, Harawira was removed from the Chamber by the Speaker of the House, for refusing to pledge the affirmation as required by law (Watkins, 2011).

Overall, the controversy surrounding the oaths demonstrates their power to define the central elements of our constitution. Clearly, the oaths are central to the constitutional debate, and thus should be considered alongside any broader reforms.

The McGuinness Institute supports the recommendations proposed by the Oaths Modernisation Bill and firmly believes that the Bill should be reintroduced to Parliament. However from our perspective, there are three other amendments that should be considered:

(i) New Zealand Environment Clause

The environment is an important part of New Zealanders' cultural identity, and protecting our land, oceans, waters and air for future generations should be an integral part of our constitutional arrangements. A healthy society is not only dependent on a healthy government, but also a healthy physical environment. Therefore, it follows that alongside a commitment to the people there should also be a commitment to our environment.

(ii) Duty to Care Clause

It is important that those taking the oath acknowledge their duty as elected representatives. This shift in focus is already occurring in other Commonwealth countries, notably Australia and Canada. For example, the Canadian Oath of the Members of the Privy Council states:

> I will in all things to be treated, debated and resolved in Privy Council, faithfully, honestly and truly declare my mind and opinion. (Ministry of Justice, 2004: 6)

Although this part of the oath sits alongside the pledge to the Crown, it shifts the focus onto the duties and responsibilities of an elected representative. Further, in 2001 the Australian House of Representatives Standing Committee on Procedure released *Balancing Tradition and Progress: Procedures for the Opening of Parliament* in which a recommendation was made that the allegiance pledged by Members of Parliament and Senators be changed so that they centre on their duty to the Australian people. The representatives of the Australian Capital Territory Parliament may choose between swearing fealty to the Crown or the people of the Australian Capital Territory (Ministry of Justice, 2004: 8).

(iii) Secrecy Clause

All Members of the Executive Council must take an oath (see our Appendix 3)[33] stating: 'that I will not directly nor indirectly reveal such matters as shall be debated in Council and committed to my secrecy' (DPMC, 2008: para 1.46). However, although this does not technically hinder the ability of the public to access information, the fact that Members of the Executive Council cannot talk about such discussions and the agenda is not made available as a matter of course, leads to the same result – the public are disenfranchised. Further the clause is out of line with the 2011 *Declaration on Open and Transparent Government*. As the oath only relates to the Executive Council, it is unclear how the oath applies to members of Cabinet and Cabinet meetings.[34]

Ultimately, it seems that the focus of the oaths should reflect the idea of a social contract between the government and the people, emphasising that the government is there to preserve the rights of the people at their instigation and that citizens meet their part of the bargain, their responsibilities. In this way, the basic ideals of our government would become embedded in government ceremony, in our national symbols (such as our New Zealand flag, our coat of arms and our national anthem) and emphasised in the public conscious.

Symbols

National symbols should be a source of pride and a reflection of a nation's collective values. In New Zealand, our key national symbols are historic representations of nationhood that do not represent our modern national identity. While honouring the past is important, perhaps this review should be seen as an opportunity to open a discussion about what these symbols should look like in the future. Particularly, if that future is one that sees us becoming a republic.

(i) New Zealand flag

New Zealand recognises two official flags; however, only one of these is recognised as an official flag of New Zealand – the New Zealand flag:

> Its royal blue background represents the blue sea and sky surrounding us, and the stars of the Southern Cross signify our place in the South Pacific Ocean. The Union Flag recognises our historical foundations and that New Zealand was once a British colony and dominion. (MCH, 2012b)

Although the Māori (Tino Rangatiratanga) flag does not carry official status, it is considered a symbol of our nation and the relationship between the Crown and Māori (MCH, 2012b). Since 2010, the Tino Rangatiratanga flag has flown alongside the New Zealand flag at nationally significant events and on significant sites including Parliament, the Beehive, the National War Memorial, Te Papa, the National library of New Zealand and a number of government buildings (McGuinness Institute, 2012: 151).

There has been a push in recent years to change the design of our official flag by the late Lloyd Morrison and his non-profit charitable trust, NZFlag.com. NZ Flag.com aims to create debate surrounding our national flag, stating that our current flag is outdated and improvement could be made so our flag represents New Zealand's values in the 21st century (NZFlag.com, n.d.[a]).

33 All Ministers of the Crown are members of the Executive Council. The Council is presided over by the Governor-General, who is not a member of the Executive Council. The Executive Council usually meets every Monday, after Cabinet, if there are items for consideration. Most Executive Council items are first confirmed by Cabinet after consideration by the Cabinet Legislation Committee (LEG). Matters that require action by the Executive Council include: regulations (which are made by Order in Council); other Orders in Council; proclamations; warrants setting up Royal Commissions and Orders in Council appointing commissions of inquiry; and various appointments, including chief executives of government departments. The need for Executive Council action on a particular matter will be indicated in the relevant statutory provision by the words 'in Council' (that is, 'the Governor-General in Council' or 'by Order in Council') (DPMC, n.d.[c]).

34 Cabinet exists by convention rather than law. Cabinet meetings are attended by Ministers inside Cabinet, however with the permission of the Prime Minister, Ministers outside Cabinet sometimes attend for discussions on specific items. Cabinet meetings are not attended by departmental officials; the only officials present are the Secretary and Deputy Secretary of the Cabinet (DPMC, n.d.[d]).

Further, NZFlag.com aims to encourage the government to initiate a referendum on this national symbol and to develop an independent body to implement changes to our flag (NZFlag.com. n.d.[b]).

(ii) Coat of Arms

From 1840 to 1911 New Zealand used the British Royal Army Coat of Arms. An official New Zealand Coat of Arms was adopted in 1911, following a nationwide design competition and updated in 1956. This 1956 version remains our current Coat of Arms.

> The first quarter of the shield shows four stars that represent the Southern Cross, then three ships symbolising the importance of New Zealand's sea trade. In the second quarter a fleece represents the farming industry. The wheat sheaf in the third quarter represents the agricultural industry, and the crossed hammers in the fourth quarter represent mining.
>
> The supporters on either side of the shield are a Māori Chieftain holding a taiaha (a Māori war weapon) and a European woman holding the New Zealand Ensign. St Edward's Crown, shown above the shield, was used in the Coronation ceremony of Her Majesty Queen Elizabeth II. The crown symbolises Her Majesty as Queen of New Zealand under the New Zealand Royal Titles Act 1953. (MCH, 2013a)

Similar to the historic symbolism of the New Zealand flag, the Coat of Arms is a relic of old New Zealand and does not adequately represent our Pacific nation in the 21st century. This constitutional review provides the opportunity to update our Coat of Arms to reflect our changing national identity. Perhaps the government could consider running a competition like that of the early 1990s. As the examples from *StrategyNZ* show, it could be an opportunity for a creative alternative (see Figure 1, page 6) and an opportunity to empower youth too engage with the future of this country.

(iii) National Anthem

New Zealand has two national anthems, *God Defend New Zealand* and *God Save the Queen*. *God Defend New Zealand* was first performed in 1876 but not adopted as an official national anthem until 1976. Both national anthems are still used at official occasions, like the opening of parliament, Government House receptions, church services and ANZAC Day (MCH, 2013b).

As we have argued above in relation to oaths, these anthems no longer represent the realities of modern society. Our national anthem should be inclusive and a source of pride and patriotism. Further, it would be ideal to have one modern version that connects with young people and promulgates New Zealand's collective vision to the world.

Recommendations

16. **All oaths should include a commitment to the people of New Zealand.**

17. **All oaths should include a commitment to protect the quality of the land, oceans, waters and air of New Zealand for current and future generations.**

18. **The Executive Council's oath should include a commitment to one's duty as an elected representative (along the lines of the Canadian oath).**

19. **The clause on confidentiality in the Executive Council's oath should be removed, to conform with the goal of achieving more transparent government.**

20. **All national symbols should be assessed as a package, such as our New Zealand flag, our Coat of Arms, and our national anthem to ensure they align with and protect the values that reflect our past, present and future.**

Hot Spot 4: Environment

For me, then, to be Pākehā on the cusp of the twenty-first century is not to be European; it is not to be an alien or a stranger in my own country. It is to be a non-Māori New Zealander who is aware of and proud of my antecedents, but who identifies as intimately with this land, as intensively and as strongly, as anybody Māori. It is to be ... another kind of indigenous New Zealander.

Michael King, New Zealand historian

Defining the Problem

While we recognise the value of environmental capitals in legislation, they do not have constitutional standing. As previously discussed in hot spot 3: New Zealand Oaths, our environment is an integral part of our national identity and international brand. There is an urgent need to codify environmental rights and responsibilities and emphasis a commitment to future generations. New Zealand is falling behind international best practice in this regard.

Discussion

In July 2013 the Institute surveyed 42 young people as part of our *EmpowerNZ* initiative (see Part 2). In response to the question: Do you think New Zealand's constitutional arrangements should include a commitment to the environment/and or sustainable development/and or future generations? 71.8% answered in the affirmative 2.6% (one person) answered in the negative, and 25.6% stated they were undecided, largely because they did not know how this commitment might best be included in our current constitution.

When asked what other rights participants would like to see in the Bill of Rights legislation, 11 of 42 responded with recognising Environmental rights. Some comments from the survey are as follows:

> The environment is central to New Zealand's global image and more importantly to how we see ourselves. Currently, information on climate and ecological deterioration and volatility fails to spur the average NZ into activity or valuable reflection. If our government was to promote and legislate appropriately then awareness and action can be both instigated and incubated.

> As we step into the future we step more and more into the unknown. Methods to protect ourselves and the world from potential environmental disaster should be constitutional.
>
> New Zealand is committed to preserving the bio-sphere in which it resides. This commitment reflects the understanding that our planet provides us with all we need for life, and that this must be sustainably managed so that all may benefit equally from its bounty. Each person has the right to such an environment, globally free of waste and pollution, that preserves their health, prosperity, and human dignity, and that of their children and families. (EmpowerNZ, 2013)

The significance of the environment as a core New Zealand value is further demonstrated through numerous pieces of legislation and policy. Prominent examples include: the concept of 'sustainable management' which constitutes the purpose of the Resource Management Act 1991 and the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012. 'Sustainable management' requires recognition of the foreseeable needs of future generations and the safeguarding of air water soil and ecosystems. These principles are also recognised in the purpose of the Hazardous Substances and New Organisms Act 1996, which employs a precautionary approach requiring decision makers to 'take into account the need for caution in managing adverse effects where there is scientific and technical uncertainty about those effects.' Our national policy statements recognise the importance of renewable energy and freshwater management and we are signatories to numerous international obligations, reaffirming the value of the environment. The environment is no longer viewed separately from future development and the management of resources in society. It is essential that an integrated approach is utilized and environmental considerations are taken into account when developing public policy and drafting legislation.

To date, approximately 92 countries have brought environmental clauses or charters into their constitutional frameworks to guide the decisionmaking processes of their elected representatives (Boyd, 2012). This has happened in many different ways, some countries have made aspirational commitments, while others have legislated strict rules and procedures.

David Boyd, one of Canada's leading environmental lawyers and author of *Environmental Rights Revolution: A Global Study in Constitutions* has extensively researched the effectiveness of environmental provisions in national constitutions. In a 2012 *Environment Magazine* article he states that: those countries with environmental protections in their constitution have stronger environmental laws, enhanced enforcement, greater government accountability, more access to information and more public participation (Boyd, 2012).

An interesting example is France's *Charter of the Environment* which became part of its constitution in 2005 (see Table 5). It is highly future focused and complements their Sustainable Development Plan by putting the right to live in a balanced and healthy environment at the same level of importance as human rights. In practice, as well as serving an educative and aspirational purpose, the charter has some strict guidelines such as the 'precautionary principle' which shifts the onus of proof for environmental impact onto those wanting to introduce new technologies such as sprays and genetically modified organisms. It also contains the 'polluter pays' principle which means that any person or business that generates waste must pay for the clean-up (CIDCE, 2005).

The *Charter for the Environment* was cited when France became the first country in the world to ban a controversial mining technique known as hydraulic fracturing or 'fracking'. The highest administrative court in France, 'The Council of the State', has based more than a dozen decisions on the *Charter for the Environment* on issues ranging from nuclear power to the preservation of mountain lakes. The Charter is influencing legislation, government policy, court decisions and the education system (Boyd, 2012).

Recommendations

21. **A section should be included in the *Cabinet Manual* (ideally the proposed *Executive Council Manual*) that acknowledges the need to protect the environment and reaffirms the right of present and future generations to live in a healthy and scenic environment.**

22. **A Charter of the Environment be prepared and included as a source of the New Zealand constitution in the *Cabinet Manual* (ideally the proposed *Executive Council Manual*), or if it is decided to have a written codified constitution, this right and responsibility should be written into the new written constitution.**

17. **All oaths should include a commitment to protect the quality of the land, oceans, waters and air of New Zealand for current and future generations.** [This earlier recommendation is repeated for completeness]

Table 5: France's Charter of the Environment

The French people, Considering,

- That resources and the balance of nature have conditioned the emergence of humanity;
- That the future and the very existence of humanity are inseparable from its natural environment;
- That the environment is the common heritage of humanity;
- That man exercises a growing influence over the conditions of life and over his own evolution;
- That biological diversity, the fulfilment of the person and the progress of human society are affected by certain means of consumption or of production and by the excessive exploitation of natural resources;
- That the preservation of the environment must be sought at the same level as the other fundamental interests of the Nation;
- That in order to ensure sustainable development, the choices designed to respond to the needs of the present must not compromise the capacity of future generations and other people to satisfy their own needs;

Proclaim:

Article 1: Everyone has the right to live in a stable environment which respects health.

Article 2: All persons have a duty to take part in the preservation and the improvement of the environment.

Article 3: All persons must, under the conditions defined by law, forewarn of adverse factors that they are likely to carry into the environment or, failing that, to limit their consequences.

Article 4: All persons must contribute to repair the damage that they cause to the environment, under the conditions defined by law.

Article 5: As soon as realisation of damage could affect the environment in a serious and irreversible manner, even though [its recognition] might be uncertain in the current state of the scientific knowledge, public authorities should monitor, by the application of the precautionary principle in their relevant domains, the implementation of risk assessment procedures and the adoption of proportionate, provisional measures in order to prevent the realisation of the damage.

Article 6: Public policies should promote sustainable development. To this effect, they should reconcile the protection and enrichment of the environment, with economic development and social progress.

Article 7: All persons have the right, under the conditions and limits defined by law, to have access to information relating to the environment held by public authorities and to participate in the elaboration of public decisions having an impact on the environment.

Article 8: Education and training about the environment should contribute to the exercise of the rights and duties defined by the present Charter.

Article 9: Research and innovation should participate in the preservation and the enrichment of the environment.

Article 10: The present Charter inspires France throughout her European - and her international action.
(CIDCE, 2005)

Hot Spot 5: Rights and Responsibilities

Not a claim for new rights but a protection against new wrongs.
Charles A. Reich, American legal and social scholar

Defining the problem
In New Zealand society we often conceptualise rights separately from responsibilities. Specifically, we tend to think of individual rights equating to governmental responsibility, while individual responsibility (including separate legal entities such as companies) is often left out of the conversation. This lack of recognition equates quickly to a lack of appreciation of the interconnectedness of society, and allows one to consider rights and actions without considering societal impacts and unintended consequences.

Discussion
The rhetoric of rights
Rights do not exist in isolation; to provide tangible security they must be conceptualised in context. For example, the right to a healthy environment enshrines with it a responsibility to protect.

The current portrayal of rights may accelerate our ability to compartmentalise them. Current rhetoric means that when one considers rights one does not have to think about responsibility, and as a consequence the 'integrated' nature of societal participation and acceptance of trade-offs is often overlooked. This is not a problem with our rights; it is a problem with how we think about our rights. Rights should not be conceptualised as having to be earned; everyone is deserving of rights by virtue of their humanity. But rights do impose duties and responsibilities, and involve an inherent balancing process. We say that a person has a right to food only if we regard that person's individual interest in food as significant enough to justify the imposition of a duty (to satisfy their right to food) on others. This *right* to food likewise implies that individual interest in food is too important to be sacrificed to other, lesser interests held by other members of the community. This person's *right* is to be given a degree of priority in the process of balancing community interests (Geiringer & Palmer, n.d.). If a person has a right to food they must also have a responsibility not to act in a way that will deprive others of their right to food. Political rhetoric should acknowledge this inherent social contract and avoid presenting a compartmentalised view of societal participation. Rights need to be conceptualised in a way that ensures people cannot separate actions from their impact on society.

Our recommendation is the coupling of the terms 'rights' and 'responsibilities' to encourage the two be conceptualised in an integrated manner. A focus on the holistic nature of societal participation is crucial to ensure sound understanding is obtained.

Engagement with minority communities
This idea of rights and responsibilities is important to consider in terms of how New Zealand adapts to becoming an increasingly multicultural nation. A broader constitutional conversation needs to recognise the multicultural nature of New Zealand's future, and the cultural and linguistic barriers some groups face in joining the constitutional discussion. There need to be specific engagement strategies that reach out to minority communities such as the Asian and Pasifika populations. This would reflect the multicultural realities of present and future New Zealand.

According to Statistics New Zealand, at the 2006 census the Pasifika population in New Zealand was 6.6%, and this is expected to rise to 9.6% by 2026. It is expected that the Asian population will reach 15.8% by 2026, which is similar to the projection for Māori in 2026 (16.2%).

Language barriers and disparities in civic knowledge mean that specific engagement strategies and processes are required. Civic education that encourages debate and results in all citizens becoming actively engaged in New Zealand's political system will have flow-on effects on our quality of *substantive* representation. Furthermore, it will facilitate greater collaboration between government and citizens, and encourage the political agenda to encompass the long-term needs of all citizens, across generations (SFI, 2010b: 82).

The state must recognise a responsibility to ensure all New Zealanders have a sound understanding of the system of parliamentary representation, engage with the system and know their rights and responsibilities as citizens. Information in the wider community on the rights and responsibilities of New Zealand citizens and their role in the electoral system must be relevant, targeted and easily accessible.

Global responsibility

The compartmentalising of rights and responsibilities also exists at a global level. Our constitutional thinking needs to shift to 21st-century ideas about what a constitution *could do*, rather than what it *should do*. Some of the biggest challenges we will face are global in nature and require long-term thinking. One of the most formidable of these challenges is the global populations of those without legal status (i.e. refugees, asylum seekers and stateless people).

The global population of those forcibly displaced last year reached 45.2 million, while the population of people of concern for the United Nations was 35.8 million (UNHCR, 2012). In the face of such a global landscape, New Zealand should renew its commitment to providing meaningful protection to the global population of refugees and stateless people.

The nation-state system exacerbates statelessness, as the loss of protection by one's own government leads to the absence of legal status in every country. Only a state can provide tangible protection from harm, and the loss of a person's ability to possess rights can be equated to their expulsion from humanity. Renewed responsibility for the global refugee and stateless populations should be recognised by all state actors. The right to belong to a political community and have one's status as a member of humanity guaranteed by law was called the 'right to have rights' by Hannah Arendt (Arendt, 1968: 177). The protection of human dignity should constitute a supreme principle flowing through any constitution; the presence of rights guaranteeing freedom of movement and expression do not provide any relief to those without the ability to possess rights in the first place. The right to have rights, or a state commitment to protect human dignity, should be reaffirmed in our constitutional system.

The renewing of global responsibilities in regard to the forcibly displaced is desperately needed. New Zealand's constitutional framework should afford to all citizens and non-citizens the right to belong to a political community. It should recognise the right to claim asylum as a fundamental human right. It should affirm the inalienable right of non-citizens to obtain the same state treatment and due process as citizens, and it should affirm that people without New Zealand citizenship will never be deprived of fundamental rights or due process because they are not citizens.

Recommendations

23. **That the Bill of Rights becomes the Bill of Rights and Responsibilities.**

24. **That a commitment is made to ensure all New Zealanders are educated about their rights and responsibilities in regard to the constitution.**

25. **That New Zealand affirms a constitutional commitment to the protection of human dignity, including the right to belong to a political community and the right of non-citizens to obtain the same treatment and due process afforded to citizens.**

Hot Spot 6: Parliamentary Term

[The three-year parliamentary term is the] greatest enemy of good policy development and good law making

Sir Geoffrey Palmer, former New Zealand Prime Minister

Defining the problem

It is the Institute's opinion that the current parliamentary term of three years should be extended to four years. As stated in our Report 8: *Effective Māori Representation in Parliament*, we have considered the length of New Zealand's three-year election cycle and conclude that it is likely to hamper innovative and ambitious long-term planning. The three-year election cycle is more likely to drive politicians to focus on short-term gains, which translates in practice into one year of settling in, one year of activity, and one year of campaigning for the next election.

Discussion

Notably, in Australia, key points put forward in support of a four-year term are that it would facilitate better economic planning for private and public sectors; provide government with longer periods of concentration on policy development and delivery; reduce the number and costs of elections, and improve parliamentary planning. Suggested disadvantages include the possibility that the public may have to endure an unpopular government for longer; voters would vote less frequently – thus the 'inherent wisdom' of voters is only relevant once every four years, and an unstable minority government would struggle for longer (Australian Collaboration, n.d.).

It is also interesting to note that the *EmpowerNZ* survey overwhelmingly supported the introduction of a four year parliamentary term (80.5% of those surveyed).

Although the Institute supports the introduction of a four year term in theory, in reality we believe that its success would be dependent on the implementation of a number of other recommendations outlined in this submission. We do consider that there would need to be any change to the number of Members of Parliament.

The idea that the four year parliamentary term would facilitate better policy development is extremely valid. However it is our belief that cohesive policy development with a future focus is dependent on a cohesive government with a clear constitutional vision, where the branches of government successfully provide the checks and balances. In order for the advantages of a four year term to be realised, it is essential that the processes and interactions within our electoral framework and our constitutional framework are not only independently robust and effective, but also align and empower the other to achieve optimal outcomes for all New Zealanders. See in particular recommendations 8–15.

Recommendation

26. The three-year parliamentary term should be replaced with a four-year term as part of broader constitutional reforms.

Part 4: The Opportunity: Civics Education

If the schooling system does not rapidly close the gap between what it does, and what it should do in response to the demands of the 21st century, it will simply become irrelevant.
David Hood, New Zealand educationalist

A recurring theme throughout this constitutional conversation has been the need to improve civics education. The widespread lack of understanding about the workings of government and the constitution has served as a major barrier to public engagement and will continue to do so unless this is resolved. This issue has been raised before. In 2002 John Wallace, the chair of the 1986 Electoral Commission, noted after his experience of engaging with New Zealanders on constitutional issues:

> There is a wider educational need, which concerns our whole community. New Zealand citizens, by and large, have a poor understanding of the basic features of our democracy and our constitution. If they do not know about the importance to them of our democratic rights, they are likely to cease to value those rights, to the detriment of all. In many other democracies there is emphasis on providing good teaching about those rights at school, and this despite the crowded curriculum. We would be wise to emulate their example. (Wallace, 2002: 739)

In 2005, the *Inquiry to Review New Zealand's Existing Constitutional Arrangements* concluded that the government needed to:

> ...foster greater understanding of our constitutional arrangements in the long term, [and] increased effort should be made to improve civics and citizenship education in schools to provide young people with the knowledge needed to become responsible and engaged citizens. (Constitutional Arrangements Committee, 2005:5)

Yet over the last eight years there has been no observable push from the government to improve civics and citizenship education in our schools. Therefore, the current review presents an enormous opportunity.

Improving civics education in New Zealand was a major theme that emerged from *EmpowerNZ*. Many of the participants commented at the workshop that had they not taken law at university, many of the things being discussed would have been entirely new to them. When asked in the survey if they thought civics education needed to be improved in New Zealand, 100 per cent of respondents agreed. Civics education was also offered as an answer in the *EmpowerNZ* survey to other constitutional questions like how to improve the protection of rights, how to improve youth participation in democracy, and how to improve Māori engagement. In 2011 eligible voters under 30 years comprised 22% of the total voting age population, but accounted for 67% of those not enrolled to vote (Parliamentary Library, 2012). Youth participation is clearly an issue and education, the participants concluded, could be the answer.

A similar conclusion was drawn by the participants in the *LongTermNZ* workshop, who felt that their education on issues relating to government fiscal management and the importance of fiscal policy had been either inconsistent or non-existent. The Institute believes that civics education should be defined in the curriculum as including financial and fiscal management, and that a distinction be drawn between the two: financial management being personal, and fiscal management being public. If they are to be engaged members of society, young people need to understand where money comes from and where it goes, and the inherent trade-offs involved in this process. The Treasury's latest statement

on New Zealand's long-term fiscal position (published 2013) provides a useful and accessible resource for this purpose. This feeds into recommendations 27 and 28 below.

Getting this issue of civics on the agenda in individual schools will be a challenge. To this end we consider New Zealand could make enrolment part of the secondary school curriculum. The enrolment age for voting could be lowered to 16 so that schools could include this as part of their civics programme. In addition we believe New Zealand could consider lowering the voting age to 16 years of age. We appreciate that this would require further research to assess whether voting would be meaningful for 16 year olds, but our perspective is that it would ensure young New Zealanders gain a practical understanding of what citizenship means and get into the habit of voting as part of their journey to becoming an adult.

Wanting to understand how to put civics education into practice, the Institute sought advice from an individual with expertise in both civics and education. Sylvia Avery is a practising primary school teacher who recently graduated from the University of Otago with a BA in Theatre and Politics and a Graduate Diploma in Teaching (Primary). She attended the finale of the 2012 *EmpowerNZ* workshop, and in 2013 we invited her to join the *EmpowerNZ* group for the July workshop to assist where possible in providing a practical perspective on improving civics knowledge in New Zealand.

The section below, written by Sylvia, outlines the key areas in our current education system and offers specific recommendations for how civics and citizenship education could be improved in New Zealand.

Improving civics and citizenship education in New Zealand

As a primary school teacher, who is also interested in and studied politics, I have observed that there is a substantial deficit in civics education among my peers, colleagues, and my students. At the *EmpowerNZ* workshop in July, it was fantastic to be part of a discussion that aimed to remedy this. When thinking back to our own education, we all agreed that many schools overlook big issues or discuss them without real substance. For this constitutional conversation to have real meaning to the lives of New Zealanders, New Zealanders first need to be equipped with the knowledge to engage in this conversation.

The New Zealand Curriculum

The vision of the New Zealand Curriculum is to have students actively involved and contributors to the well-being of New Zealand through social, economic and environmental contexts. To create actively involved citizens in the political realm we need to teach them these skills in schools.

The New Zealand Curriculum is very wide-ranging and open to interpretation. This is great because it leaves room for creativity and innovation from teachers, allowing us to teach according to the needs of our students and address the gaps in students' knowledge. Regarding civics, the Level 3 Social Sciences Achievement Objective states that students will 'gain knowledge, skills, and experience to understand how groups make and implement rules and laws' (Ministry of Education, 2007: 73). This Achievement Objective does not outline exactly what factual and conceptual ideas students need to have learnt within those years. One way to improve civic knowledge could be for this objective to emulate the mathematics section in the Curriculum which is more prescribed and has detailed objectives to make sure that all students in New Zealand get taught that specific information.

As discussed at the July 2013 workshop, ideas and areas it was felt that are lacking in students learning around civics include, but are not limited to, knowing what a constitution is, what Te Tiriti o Waitangi/the Treaty of Waitangi means in a modern context, what the New Zealand Bill of Rights Act 1990 is, what the roles of the judiciary, the legislature and the executive branches of government are and how the democratic process operates in New Zealand. These concepts could be included within the social sciences page of the curriculum, ensuring that they are taught the same information to all New Zealanders.

Making civics education an explicit and compulsory part of the New Zealand Curriculum means that it is content that will not be forgotten as it currently is. The Curriculum is the centre point of all planning for teachers. Currently teachers teaching Level 3 only need to teach students to understand how groups make and implement rules and laws. This lack of specificity allows for content such as understanding what a constitution is to be overlooked and therefore not taught. If it is clearly outlined under a particular Achievement Objective that students need to know what a constitution is then this concept would be taught to all students. These particular objectives, outlined in recommendation 28 (a - e), reflect the knowledge gaps identified by the participants of *EmpowerNZ*. They believed these areas had been overlooked within their own education and that they remain overlooked at lower levels of the New Zealand Curriculum. This is further evidenced by their responses to the July 2013 *EmpowerNZ* survey.

Appropriate age

Civics education is often thought of as something that should be taught to students at an older age, preferably in secondary school. My experience as a teacher and working with primary-aged children is that young children are absolutely capable of engaging with these issues. Level 3 of the curriculum, which covers Years 4–7 (ages 8–12), is an ideal level to delve into these issues. Focusing on this age group means that teachers can engage children in important issues before they may become uninterested in school and before truancy becomes more problematic for some students. Civics education is ultimately about critical thinking, a skill that is both necessary and achievable for students at this age. This age group can also work independently and research into new topics. Furthermore, the dominant content focus of this age group is not restricted to numeracy and literacy as it is with younger students, so they have time to focus on other content areas such as social sciences in their day. Engaging students at a young age helps foster lifelong learning around a subject. Interactive games are a great way to teach this content and the primary environment is ideal for games.

Civics resources

To engage and assist children in learning teachers need resources. Just as in mathematics children need resources such as counters to support their learning, in civics education children need games, and books to support their learning. This could be in the form of an electronic game, played on an iPad or classroom computer, where students learn about the separation of powers and the roles of the judiciary, the legislature and the executive branches of government. For example, this game could have scenarios where the students would have to make decisions on which branch of government should be the one to make decisions and hold the power in the given scenario. The *game world* would then change depending on the students' decisions, and from this students could discuss and discover the implications of giving power to certain branches of the government. These resources need to be fun, engaging and reflect current pedagogy in New Zealand.

Upcoming opportunities

Furthermore, there are a number of opportunities that could be useful for implementing better civics education. Many students from around New Zealand frequently visit the Constitution Room at the

Archives New Zealand's (shortly to be moved to the National Library). This current room does not contain all relevant material[35] and is currently not ideal for younger students; more could be done to make this experience more accessible to all ages. Looking further ahead, 2040 will mark 200 years since the signing of the Treaty of Waitangi (which is just over 26 years away). The Ministry of Education should be actively preparing to ensure this anniversary is observed in all schools in a way that is facilitative to broadening civic knowledge.

Student teachers

In creating a better civics education environment within our schools it is essential that teachers are equipped with the knowledge and skills to educate. I noticed with my classmates at the University of Otago that there was a deficit in civic knowledge with students studying teaching. In the Diploma of Teaching (Primary) the Treaty of Waitangi was discussed, however no other civics issues were looked at. This results in teachers who are underdeveloped in teaching the civics and citizenship content. As part of all teacher training services in New Zealand there should be a section taught that is dedicated to civics, where teachers learn about New Zealand's constitutional arrangements and how to teach that to students. Introducing student teachers to documents such as the *Cabinet Manual* and the Treasury's statements on New Zealand's long-term fiscal position would also be useful.

Current teachers

As a consequence of this deficit at teachers college, and the historic deficit in their own primary and secondary education, current teachers have not been equipped with the knowledge of New Zealand's constitutional arrangements. Current teachers therefore need professional development to increase their own knowledge. Professional development could come in the form of conferences and workshops that take teachers through resources and games that they could use in their own classrooms. The New Zealand Education Institute (NZEI), the primary-teachers union, has created a Centre for Excellence that is aiming to create professional development opportunities that are relating to areas of the curriculum that are not literacy or numeracy. This institution would be an ideal place for organising and setting up courses dealing with civic education. They could also set up links with teachers and organisations that have knowledge in this area such as the Electoral Commission.

The panel

By the end of this process the Panel will be experts in not only our current arrangements, but all sides of the arguments relating to the future of these arrangements. This makes them an invaluable resource to the country, and specifically to teachers and students. It would be great if these 12 members could continue to engage following this process, targeting teachers in particular.

Recommendations

27. 'Civics education' should be defined as education relating to all knowledge young New Zealanders require to be engaged citizens; including an understanding of our constitutional arrangements as well as an understanding of the New Zealand economy and government fiscal management.

28. The New Zealand Curriculum: the Curriculum needs to include more detailed objectives around civics education. These could include:

a. Understanding what a constitution is,

35 For example, the original Letters Patent, which we understand is located on the 10th floor of the Beehive, could also be added to this collection (Kitteridge, 2006).

b. **Understanding the roles of the judiciary, the legislature and the executive branch of government,**
c. **Understanding the current role of the Treaty of Waitangi,**
d. **Understanding what the New Zealand Bill of Rights Act 1990 is,**
e. **Understanding how the democratic process operates in New Zealand, and**
f. **Understanding the role of Treasury, in particular the purpose of the Budget and New Zealand's statements on long-term fiscal position.**

29. **Appropriate age: civics education should start in depth at Level 3 rather than waiting until secondary school.**

30. **Upcoming opportunities: the relocation of the Constitution Room to the National Library and the 200 year anniversary of the Treaty of Waitangi should be used as opportunities to broaden civic knowledge.**

31. **Civics resources: resources need to be developed by the Ministry of Education, ideally in collaboration with the proposed independent constitutional body (recommendation 40), and distributed to all schools to assist teachers and students within the next two years.**

32. **Student teachers: civics education should form a core component of teacher training at colleges and universities.**

33. **Current teachers: teachers need professional development, led by a group such as the New Zealand Education Institute's Centre for Excellence, to increase their own civics knowledge.**

34. **Enrolment Age: the enrolment age for voting should be lowered to 16 so that schools can include this as part of their civics programme, and research should be undertaken to consider whether the age of voting should be lowered to 16 years.**

35. **The Panel: the members of the Panel should act as an ongoing resource to promote civics following this review.**

Part 5: Implementation

So my take is, we simply push on, ignore the pessimism, and lead by example. Then suddenly we find ourselves surrounded by success and telling ourselves that it was always meant to be this way.

Sir Paul Callaghan, physicist and visionary

We believe that the constitutional hot spots identified in this submission provide key insights into how our constitutional arrangements could be strengthened to produce a better framework for building a democracy now and in the future. But will the recommendations noted above be enough?

We know that by 2050 the population of the planet is likely to reach 9.6 billion, of whom a significant portion (possibly 80%) will be city-based (UN, 2013). New Zealand is unlikely to escape the effects of this population boom, at the very least because of an increased demand for resources. We have an obligation to future generations to pre-emptively consider these consequences and plan accordingly. The results of this changing global landscape may alter the relationships between businesses, communities and the government. Most importantly, the state will be required to balance individual rights, corporate rights and community rights, creating pressures that will require careful management. These may include property ownership rights, civil rights, land use rights and our responsibilities to our pacific neighbours in regard to climate change refugees.

Constitutionally, New Zealanders tend to move slowly

New Zealand's constitutional development to date has been slow. We were 40 years behind Canada and six years behind Australia in adopting Dominion status, and we did not abolish the right to appeal to the British Privy Council and establish our own Supreme Court until 2003. In contrast, Canada created its own Supreme Court in 1875, abolishing all appeals to the Privy Council by 1888,[36] and Australia effectively removed its affiliation to the Privy Council in 1986.[37] Notably, in New Zealand most significant changes have occurred as a result of reactions to outside forces rather than being generated from inside Parliament. Where internal changes have occurred, they have tended to be through conventions rather than laws and regulations. The organic development of convention means that there exists no comprehensive list of current conventions, although to some extent they are included in the 2008 *Cabinet Manual*. New Zealanders' approach to our constitution could therefore be described as cautious, almost as if we have a fear of putting our thoughts into writing. However, convention is a poor excuse for lack of transparency and accountability.

Therefore we welcome this review, the first in the country's history, which has invited all New Zealanders to share their observations and thoughts on our current constitutional framework and how it might be improved. This opportunity is unique in our history and one that should be applauded.

A codified constitution

The constitution is the most important instrument for managing the reciprocal relationship between citizens and the state, yet we have not looked after it. It remains largely invisible and, where visible, unfathomable. A description of our constitution in the operational manual for members of Cabinet (a body that does not exist in law) is not sufficient and it does not purport to be a comprehensive list of all conventions. More transparency is necessary.

Further, in Part 1, Section 2 of this submission we concluded that the last of the nine criteria for assessing the constitution is legitimacy. In other words, a successful constitution is one that, even

36 See Canada's Criminal Procedure Amendment Act 1888.

37 See Australia's Australia Act 1986.

when government decisions are not always agreed with, New Zealanders generally accept that an agreed process has been followed and all voices have been heard. Arguably much of New Zealand's energy and resources are spent on looking backwards, solving old problems. Therefore we conclude that a move to a codified constitution is needed; a single written document that is supreme law. This way New Zealanders will have certainty over our core values, our beliefs and the procedures underpinning our system of government.

If such a move was implemented, New Zealand could move to a four-year electoral term and create more space for exploring public policy options. The time between election cycles would be sufficient to implement policy, reflect on lessons and think about the best way forward. This additional year would also enable Ministers to develop better working relationships, creating more certainty among business leaders and stakeholders, both in New Zealand and overseas.

Governance of our constitution

In the past, our ability to manage constitutional crises in New Zealand has been reliant on having the right people in the right roles acting in the best interests of the country, as opposed to having robust systems. The crisis of 1984 is a good example of this. As Jim McLay (former Deputy Prime Minister and New Zealand's current Permanent Representative to the United Nations) noted in his address at the 2012 *EmpowerNZ* workshop, his constitutional advice 'was based on common sense and propriety' but, at the time, no established convention existed to guide the key players to the best course of action (McLay, 2012: 17–18). Similarly, it could be argued that our ongoing inability to manage tensions between local and central government is a product of the absence of clear guidance. This issue has arisen throughout our history, from the tensions that fed factionalism in the earliest days of responsible government through to the re-emergence of this tension in recent months with issues such as (i) the sacking of Environment Canterbury's councillors, (ii) making New Zealand King Salmon's application to increase the number of farms in the Marlborough Sounds nationally significant (removing local decisionmaking) and (iii) the move from some local councils to amend their plans to control the use of GMOs in their districts.[38]

Other recent events have also contributed to a sense that there exists an absence of clear guidance and the policing of best practice. This has been exemplified by the public concern surrounding the recent Government Communications Security Bureau and Related Legislation Amendment Bill 2013 (the GCSB Bill) and revelations relating to domestic surveillance. Further, a number of recent events have raised issues relating directly or indirectly to our constitutional framework:

- the relationship between the Executive Council and the Parliamentary Service (e.g. the A. Vance scandal);
- the treatment of private data (e.g. the ACC and WINZ data breaches, the Kim Dotcom saga);
- land ownership by overseas interests (e.g. Crafar Farms);
- the implications of international trade agreements (e.g. Trans-Pacific Partnership Agreement), and
- the potential for monopolies to damage our national *100% pure* brand (e.g. Fonterra, over alleged contamination of milk products, price fixing and dirty dairying).

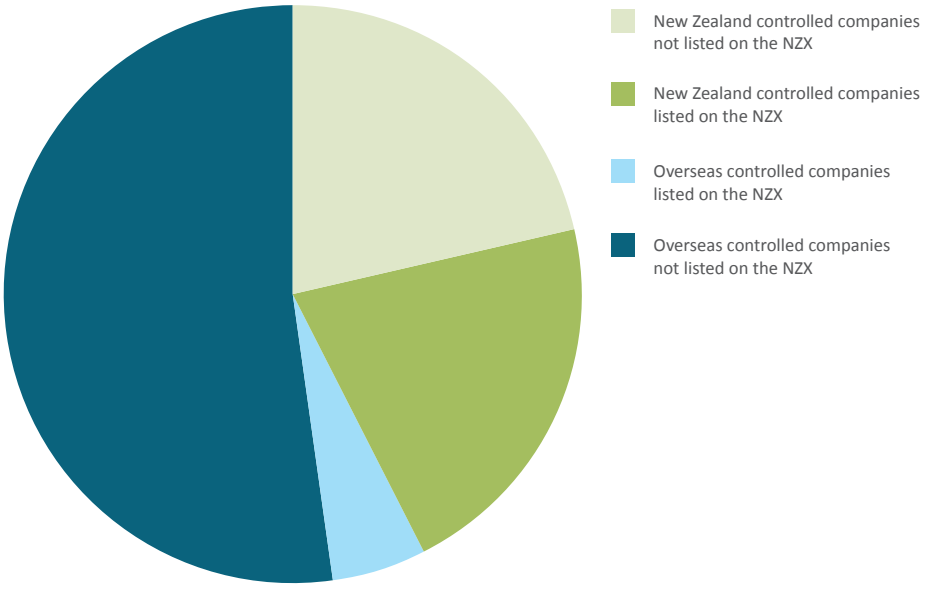
Importantly, business, particularly international companies, rely on our constitution to deliver certainty. As we noted in our 2011 publication *Integrated Annual Report Survey of New Zealand's Top 200 Companies*:

38 For more on these issues see the McGuinness Institute's Think Piece 16: *New Zealand King Salmon: Was it a good decision for New Zealand?, Working Paper 2013/01: Notes on the New Zealand King Salmon Decision, and An Overview of Genetic Modification in New Zealand 1973–2013: The first forty years* (in press).

> The economies of small countries can be strongly influenced by overseas-controlled companies, and New Zealand is no exception. 57.5% of the Top 200 companies are '50% or more controlled by overseas interests', and only 26.5% are listed on the New Zealand Stock Exchange (NZX). In other words, almost three-quarters of our Top 200 companies are not traded publicly on the New Zealand Stock Exchange (see Figure 3 below). Therefore, it is in our interests to ensure that the more invisible companies – those that are owned and traded elsewhere – treat our citizens and country well. (SFI, 2011b: 9)

With such a significant number of foreign-owned companies operating in New Zealand, it is imperative that we have clear rules outlining the obligations and expectations of these companies, as well as creating a structure that fosters certainty and growth.

Figure 3: Top 200 Companies by NZX and by overseas control
Source: SFI, 2011b



Our current system, which is based on organic evolution and flexibility, is at a significant disadvantage when dealing with issues that erode public trust or business confidence, and appear to compromise civil liberties. An uncodified constitution leaves both the public and businesses unsure of what the high-level principles and rules are, and in particular who is responsible for what. While convention is a legitimate feature of our common law system, it does not lend itself to public understanding and accountability. This is why the Institute believes New Zealand needs a codified constitution – a strong set of core values and systems embedded in a constitution – so that we can focus our energies on optimising our place in the world and delivering optimal outcomes for all New Zealanders.

However, even if all of the above-mentioned recommendations were implemented, important questions still remain. Such as; who would be in charge of deciding what reforms should be made, what issues would require referenda, who would be responsible for implementing these reforms, who would act as a constitutional watchdog, and what would the process be for determining the compatibility of legislation with the constitution. We explore some of these questions below.

Process after the Panel disestablishes

There has been a considerable amount of scepticism about the power of any recommendations the Panel makes in the context of political realities. Panel members themselves have acknowledged that once their report is submitted they have no power to implement their recommendations. Therefore, the Panel should include in its report recommendations on the way forward, in the hope that, unlike the 2005 *Inquiry to Review New Zealand's Existing Constitutional Arrangement (the Inquiry)*, the outcomes of the constitutional conversation are not ignored.

An independent constitutional body

One of the key problems is that, although the Clerk to the Executive Council and to Cabinet (they are the same person) provides constitutional advice to the Governor-General and executive members of Parliament, there is no provision (to our knowledge) for citizens, or indeed other Members of Parliament, to gain access to such advice. In light of this, we recommend setting up an independent constitutional commission that would provide guidance, serve as a watchdog to report on constitutional developments and problems with legislation, and also serve an educative function by providing information and facilitating discussion among members of the public. This aligns with one of the recommendations of the 2005 *Inquiry*, which suggests the establishment of an independent 'Constitution Institute' to improve New Zealanders' understanding of constitutional arrangements and issues. For more on this review, and other review processes, both in New Zealand and overseas, see Appendices 4 and 5.

The New Zealand Parliament is unicameral rather than bicameral,[39] which means we have fewer checks and balances than other similar Westminster-style parliamentary systems, such as Australia and Britain. In 1951 New Zealand abolished the upper house, known as the Legislative Council, which for many years gave the executive what Geoffrey Palmer calls 'unbridled power' to pass legislation unchecked (see his book, *Unbridled Power: An interpretation of New Zealand's Constitution and Government*).

We consider the introduction of MMP has improved the situation but more safeguards are needed. We believe an independent constitutional body would be a healthy constitutional safeguard for our democracy. The roles of such a body (institute or commission) might include, but not limited to:

- promoting knowledge and understanding about the workings of government;
- reporting to Cabinet on constitutional problems with proposed legislation;
- keeping track of constitutional developments and making such information widely available;
- considering the role of the Treaty of Waitangi in our constitutional arrangements, and
- facilitating on-going discussions among New Zealanders about our constitution and its future.

The republic issue

The role of this body in fostering public knowledge will be more important in the coming decades than ever before. It seems inevitable that New Zealand will become a republic in the foreseeable future. There are a number of things that are likely to coalesce in the next decade: (1) the completion Treaty settlement process (the current government is aiming to complete this by the 2014/15 financial year), (2) the ascension of HRH the Prince of Wales to the throne, and as a likely consequence (3) the resurgence of the republican debate in Australia.

39 Unicameral refers to the practice of having one legislative chamber (such as in New Zealand where parliament consists of only one chamber, the House of Representatives), and bicameral is the practice of having two legislative chambers (such as in the United Kingdom where parliament consists of the House of Commons and the House of Lords).

There are ways to do this that honour the past, present and future. The *EmpowerNZ Draft Constitution* offers a great example of this:

> Recognising that:
> a. We are an independent nation;
> b. We were founded on Te Tiriti o Waitangi;
> c. We have historical connections to the United Kingdom;
> d. We have an important role to play in the Asia Pacific region;
> e. We support the considered and progressive evolution of our constitutional arrangements; and
> f. We wish to move boldly forward into the future:
> We create a Republic of Aotearoa New Zealand. (See Appendix 1)

It is interesting that the participants chose to refer to New Zealand as 'Aotearoa New Zealand'. This reflects an increasing trend to acknowledge the Māori name for New Zealand, with many organisations around New Zealand choosing to use 'Aotearoa New Zealand' in their formal title.[40] The use of 'Aotearoa' on the *StrategyNZ* Coat of Arm designs (see Figure 1, page 6) is a further example of this trend.

Transitioning to a republic will require lengthy, considered discussion and wide public consultation, underpinned by an informed public. This constitutional body should be established with the foresight to foster civics education and public knowledge so that as many people as possible can be part of this conversation. The republic question will inevitably be the biggest challenge for our constitutional arrangements in the coming decades, and any recommendations made by the Panel should aim to prepare New Zealand for this.

Emerging issues

In New Zealand we have proven to be a nation of cautious constitutional progression. However, it appears to us that the current narrative, particularly around issues relating to the GCSB, the use of urgency, and inconsistencies with the Bill of Rights, has the potential to amount to a crisis of public confidence that could be very damaging. It should be the role of a constitutional body to prevent such narratives leading to a constitutional crisis, recommending appropriate measures to ensure public confidence in the system. A constitution in and of itself is meaningless without 'buy in' from all parts of society.

To successfully negotiate emerging issues, New Zealand will require a constitution 'fit for the 21st century'.[41] Historically, the concepts of sovereignty and citizenship have been clearly defined. This is no longer the case. As the concerns relating to the Trans Pacific Partnership negotiations have highlighted, in a globalised world with a global marketplace, international agreements could have the potential to erode national sovereignty unless there are adequate safeguards in place. With regard to citizenship, the 20th century saw the creation of a new global problem – what now amounts to some 45.2 million forcibly displaced people (see hot spot 5) – and the 21st century will see the creation of another new problem, climate refugees. This will not be the only new problem we face in the coming century.

40 Examples include, but are by no means limited to, Amnesty International Aotearoa New Zealand, Aotearoa New Zealand Association of Social Workers, Creative Commons Aotearoa New Zealand, the Green Party of Aotearoa New Zealand, the Injury Prevention Network of Aotearoa New Zealand, and the Presbyterian Church of Aotearoa New Zealand.

41 The Institute is undergoing discussions with Bryce Johnson from Fish and Game and Shaun Hendy from the New Zealand Association of Scientists, to prepare a discussion paper on the need for mandated foresight in the public sector. This paper will discuss institutional options; the working title is *An Argument for Mandating Foresight*.

The inherited, evolutionary system we currently have does not lend itself well to foresight. We have the knowledge to anticipate these new issues, or at the very least to be aware that new issues will arise, and our constitutional arrangements should reflect this.

We should also be thinking now about 2040 and New Zealand's bicentennial, celebrating 200 years since the signing of the Treaty of Waitangi. The 1940 Centennial Exhibition was a magnificent display of 'pioneering spirit' against a backdrop of the Second World War and just before the 1947 Statute of Westminster that declared New Zealand fully autonomous from Britain. In 1940 New Zealand was still very much Britain's 'dutiful daughter'. So what will the celebrations in 2040 say about our national identity? With only 27 years until this anniversary, preparation should begin now, to ensure the bicentennial is both reflective of our society and an educative and reflective process for our nation.

We see the current review as an opportunity to strengthen our constitution in preparation for the coming century. The Ministry that takes the bold step of getting our constitution in order will go down in history as the Ministry that moved New Zealand from a backward looking nation, to one that puts our energy and resources into embracing our future.

Recommendations

36. **New Zealand needs a codified constitution, a single written document that is supreme law.**

37. **That an independent constitutional body be set up to provide advice to all stakeholders and to act as a watchdog on constitutional issues.**

38. **Consider whether the Executive Council, rather than Cabinet, is the more appropriate body to be the recipient of the Panel's report.**

39. **That an independent constitutional body be set up to provide advice to all stakeholders and to act as a watchdog on constitutional issues and help inform citizens on New Zealander's constitution.**

40. **That the Panel suggests the next steps in terms of who is best placed to decide, implement and safeguard its recommendations.**

The 40 Recommendations

Part 1: Our Approach

1. The Purpose of a Constitution

1. The Panel should put forward a statement of purpose for New Zealand's constitution.

2. The Criteria for Assessing a Constitution

2. The Panel should put forward a set of criteria for assessing a constitution for New Zealand (see the Institute's criteria in Table 1).

Part 3: Constitutional Hot Spots

Hot Spot 1: Māori Representation

3. The Māori seats should go, but they must be replaced with a solution that moves the symbolic purpose of the seats into our core constitution (see recommendations 4–7).

4. The Party List system should be used to provide assurance of minimal representation.

5. Te Tiriti should be acknowledged in our constitution as this country's founding document.

6. Parliament should be made responsible in our constitution for protecting, preserving and supporting the development of Māori culture.

7. Lower the threshold to 2% for all political parties.

Hot Spot 2: The Executive Council

8. The *Cabinet Manual* should be republished, and called the *Executive Council Manual*.

9. That all the conventions should be listed in the proposed *Executive Council Manual*.

10. The proposed *Executive Council Manual* should include a commitment to openness. Ministers and departments should be encouraged to actively release minutes to the public. Further, the principles on which such decisions are made should be withheld from the public, such as when information should not be released to the public and thus made *confidential* or treated as *top secret*.

11. All minutes that are *made public* or become public under an OIA should be on a public register maintained by the Clerk of the Executive Council. All public minutes should be searchable by date, topic, Minister or government department (ideally searchable on the DPMC website).

12. All minutes *not made public* should still be reported on the database above, listing the date and whether they are *confidential* or *top secret*. If *confidential*, the database should list the minute number and the subject heading so members of the public are able to request access under an OIA. If *top secret* the minute number should still be *made public* but have no subject heading.

13. That a section be added to chapter 5 of the *Cabinet Manual* (ideally the proposed *Executive Council Manual*) which explains the procedure for transference of outstanding issues and commitments between ministries, parliamentary terms and governments of political parties.

14. That Cabinet be reaffirmed as a committee of the Executive Council in all literature and websites.

15. Consideration should be given to renaming the Department of Prime Minister and Cabinet (DPMC) the Department of the Prime Minister and the Executive Council (DPMEC).

Hot Spot 3: Oaths and Symbols

16. All oaths should include a commitment to the people of New Zealand.

17. All oaths should include a commitment to protect the quality of the land, oceans, waters and air of New Zealand for current and future generations.

18. The Executive Council's oath should include a commitment to one's duty as an elected representative (along the lines of the Canadian oath).

19. The clause on confidentiality in the Executive Council's oath should be removed, to conform with the goal of achieving more transparent government.

20. All national symbols should be assessed as a package, such as our New Zealand flag, our Coat of Arms, and our national anthem to ensure they align with and protect the values that reflect our past, present and future.

Hot Spot 4: Environment

21. A section should be included in the *Cabinet Manual* (ideally the proposed *Executive Council Manual*) that acknowledges the need to protect the environment and reaffirms the right of present and future generations to live in a healthy and scenic environment.

22. A Charter of the Environment be prepared and included as a source of the New Zealand constitution in the *Cabinet Manual* (ideally the proposed *Executive Council Manual*), or if it is decided to have a written codified constitution, this right and responsibility should be written into the new written constitution.

See also Recommendation 17

Hot Spot 5: Rights and Responsibilities

23. That the Bill of Rights becomes the Bill of Rights and Responsibilities.

24. That a commitment is made to ensure all New Zealanders are educated about their rights and responsibilities in regard to the constitution.

25. That New Zealand affirms a constitutional commitment to the protection of human dignity, including the right to belong to a political community and the right of non-citizens to obtain the same treatment and due process afforded to citizens.

Hot Spot 6: Parliamentary Term

26. The three-year parliamentary term should be replaced with a four-year term as part of broader constitutional reforms.

Part 4: The Opportunity: Civics Education

27. 'Civics education' should be defined as education relating to all knowledge young New Zealanders require to be engaged citizens; including an understanding of our constitutional arrangements as well as an understanding of the New Zealand economy and government fiscal management.

28. The New Zealand Curriculum: the Curriculum needs to include more detailed objectives around civics education. These could include:

    a. Understanding what a constitution is,
    b. Understanding the roles of the judiciary, the legislature and the executive branch of government,
    c. Understanding the current role of the Treaty of Waitangi,
    d. Understanding what the New Zealand Bill of Rights Act 1990 is,
    e. Understanding how the democratic process operates in New Zealand, and
    f. Understanding the role of Treasury, in particular the purpose of the Budget and New Zealand's statements on long-term fiscal position.

29. Appropriate age: civics education should start in depth at Level 3 rather than waiting until secondary school.

30. Upcoming opportunities: the relocation of the Constitution Room to the National Library and the 200 year anniversary of the Treaty of Waitangi should be used as opportunities to broaden civic knowledge.

31. Civics resources: resources need to be developed by the Ministry of Education, ideally in collaboration with the proposed independent constitutional body (recommendation 40), and distributed to all schools to assist teachers and students within the next two years.

32. Student teachers: civics education should form a core component of teacher training at colleges and universities.

33. **Current teachers: teachers need professional development, led by a group such as the New Zealand Education Institute's Centre for Excellence, to increase their own civics knowledge.**

34. **Enrolment Age: the enrolment age for voting should be lowered to 16 so that schools can include this as part of their civics programme, and research should be undertaken to consider whether the age of voting should be lowered to 16 years.**

35. **The Panel: the members of the Panel should act as an ongoing resource to promote civics following this review.**

Part 5: Implementation

36. **New Zealand needs a codified constitution, a single written document that is supreme law.**

37. **That an independent constitutional body be set up to provide advice to all stakeholders and to act as a watchdog on constitutional issues.**

38. **Consider whether the Executive Council, rather than Cabinet, is the more appropriate body to be the recipient of the Panel's report.**

39. **That an independent constitutional body be set up to provide advice to all stakeholders and to act as a watchdog on constitutional issues and help inform citizens on New Zealander's constitution.**

40. **That the Panel suggests the next steps in terms of who is best placed to decide, implement and safeguard its recommendations.**

Acknowledgements

The Institute would like to thank all those who have worked with us, broadening our understanding of New Zealand's constitution and the possibilities for its future. It has been a privilege to both listen and contribute to New Zealand's constitutional conversation.

In particular we would like everyone who was involved with *EmpowerNZ* and *LongTermNZ* for their commitment and enthusiasm for the initiative, and the Constitutional Advisory Panel for their hard work and support.

The Panel

Emeritus Professor John Burrows QC (Co-chair), Sir Tipene O'Regan (Co-chair), Peter Chin, Deborah Coddington , Hon Sir Michael Cullen, Hon John Luxton, Bernice Mene, Dr Leonie Pihama, Hinurewa Poutu, Professor Linda Tuhiwai Smith, Peter Tennent, Dr Ranginui Walker, and the Secretariat.

The *EmpowerNZ* participants

Kirsty Allan, Tele'a Andrews, Sarah Baillie, Todd Barrowclough, Jessica Bush, Louis Chambers, Reed Fleming, William Fussey, Emma Gattey, Paula Gillon, Tiaki Hana Grant-Mackie, Charlotte Greenfield, Rachael Jones, Yezdi Jal Karbhari, Zachary Kedgley-Foot, Alex Ladyman, Richard Ley-Hamilton, Dipti Manchanda, Ruth Markham-Short, Lauren McGee, Kieran Meredith, Tiana Morgan, Duran Moy, Andrew Neate, Pania Newton, Chris Nicholls, Lydia Nobbs, Helen O'Leary, Alice Osman, Ihapera Paniora, Elye Parata-King, Higano Perez, Joshua Pietras, Rosa Polaschek, Sophie Pollak, Oska Rego, Stacey Riordan, Emily Schwikkard, Sarah Scott, Christian Silver, Ryan Smits Maclaine, Maithili Sreen, Jack Starrett Wright, Kieran Stowers, Diana Tam, Jeremy Todd, Morgan Watkins, Julia Whaipooti, Julia White, and Jeremy Wilson.

The *EmpowerNZ* facilitators

Dean Knight (lead facilitator), Jess Birdsall-Day, Natalie Coates, Carwyn Jones, Mihiata Pirini, Marcelo Rodriguez Ferrere, Diane White, and Edward Willis.

The *EmpowerNZ* design team

Gillian McCarthy (lead), Katy Miller, Machiko Niimi, and Megan Salole (illustrator).

The *EmpowerNZ* speakers

Paul Goldsmith MP (host), Emeritus Professor John Burrows, Charles Chauvel MP, Hon Peter Dunne MP, Te Ururoa Flavell MP, Hone Harawira MP, Professor Philip Joseph, Hon Jim McLay (keynote speaker), Sir Tipene O'Regan, Metiria Turei MP, Hon Justice Joseph Williams, Dame Dr Claudia Orange and Te Papa Tongarewa for their ongoing support.

***LongTermNZ* participants**

Ben Abraham, Jason Armishaw, Emma Banks, Rachel Boswell, Louis Chambers, Ashleigh Cox, John Hughes, Susie Krieble, Athene Laws, Finn O'Dwyer-Cunliffe, Elye Parata-King, Leona Plaisier, Elizabeth Prasad, Christopher Read, Karri Shaw, Diana Tam, Paul Young, Julia White, Amy Wood and Darren Zhang.

***StrategyNZ* participants**

Group 1: Alison Nevill (process chair), Don Christie, Ben Guerin, Sue Hanrahan, Simon Harvey, Ruth McLennan, Christian Silver, Joseph Stafford, Richard Randerson, Grace Ridley-Smith, Ema Weepu and
Katy Miller (Designer).

Group 2: Jan Bieringa (Process chair), Anthony Cole, Geoff Hamilton, Mark Hargreaves, Caleb Jago-Ward, Raf Manji, Hugh McDonald, Sue Peoples, Joanna Randerson, Grant Ryan, Angus McBryde (Designer).

Group 3: Phil Tate (Process chair), Paul Atkins, Donald Clark, Tim Clarke, Hamish Gow, Maria Ioannou, Michael Moore-Jones, Hugh Norriss, Hilary Sumpter, Wayne Silver and Jeremy Star (Designer).

Group 4: Leanne Silver (Process chair), Jill Bowman, Scott Dalziell, Trish Franklin, Peter Furnish, Carolyn Gullery, Neville Henderson, Roger Tweedy, Hayden Wilson and Joshua Jeffery (Designer).

Group 5: Murray Wu (Process chair), Mick Abbott, Shona Albert-Thompson, Desmond Darby, Andrea Frost, Ben Mason-Atoni, David McGuinness, Rodger Pringle, Kat Thomas, John Tocker and Machiko Niimi (Designer).

Group 6: Ged Lynch (Process chair), Stuart Barson, Marina Battisti, Lance Beath, Yvonne Curtis, Richard Logan, Kieran Meredith, Onur Oktem, Heike Schiele, Matthew Sole and
Josie Lee Brough (Designer).

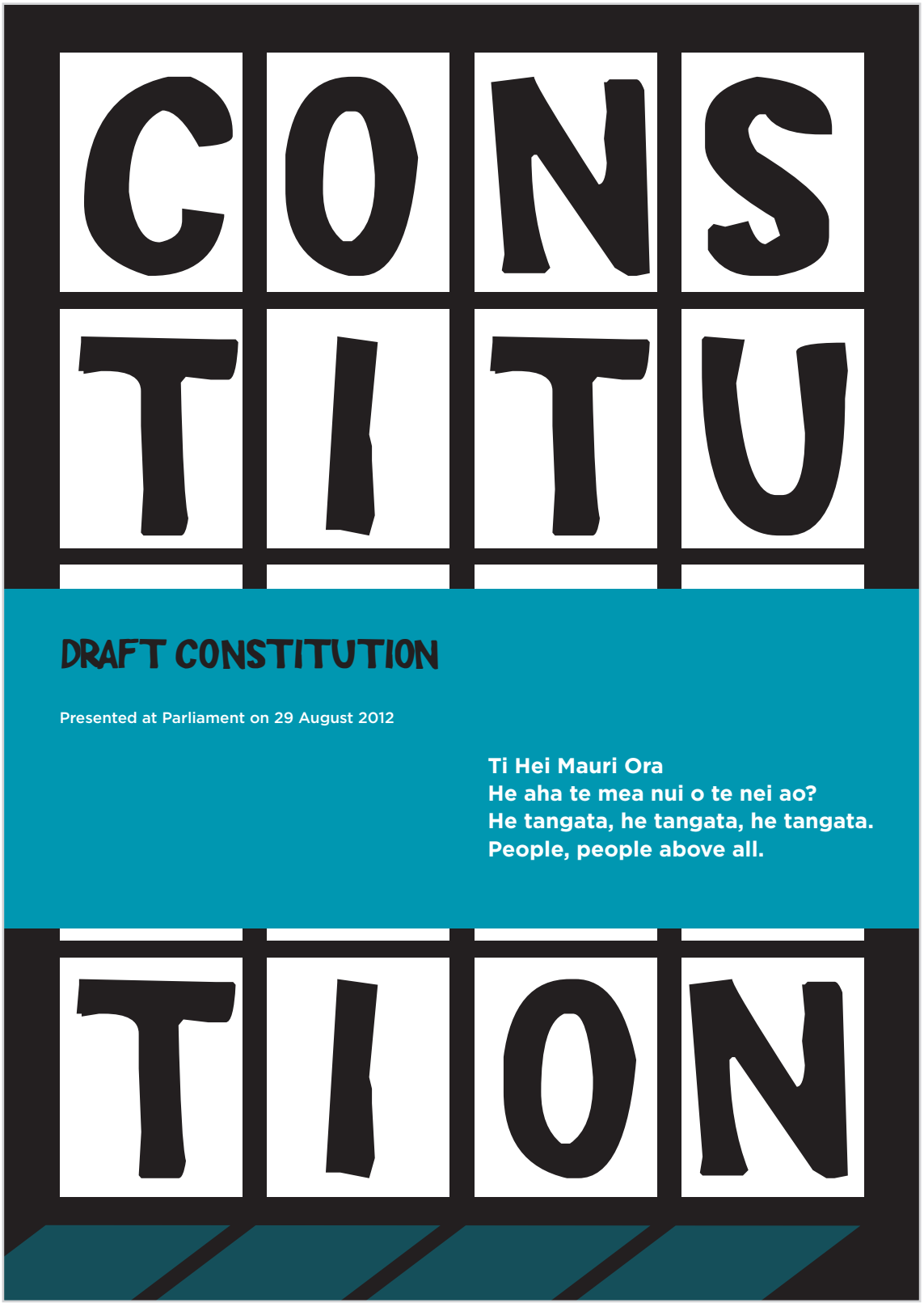
Group 7: Leanne Holdsworth (Process chair), Vibhuti Chopra, Marie Collin, Krystal Gibbens, Anake Goodall, Stephen Hay, Beat Huser, Rebeka Whale and Gillian McCarthy (Designer).

Group 8: Marty Donoghue (Process chair), Storm Adams-Lloyd, Rodney Adank, Rachel Bolstad, Lauren Christie, Debbie Dawson, Mia Gaudin, Damian Lawrence, Gareth Moore-Jones, Sascha van der Plas, Te Ao Pritchard (Te Ao Hinengaro, Te Awhi Paa Trust & Te Runanga o Rauakawa) and Scott Savage (Designer).

Group 9: Jonathan Routledge (Process chair), Sheryl Boxall , Amy Fletcher, David Glover, Beth Houston, Anna Jacobs, Susan Jones, Fred Staples, Sarah Wakes, James Wall-Manning, Christian Williams and Lara Rapson (Designer).

Group 10: Ella Lawton (Process chair), Stephanie Bickerstaff, Kaila Colbin, Nina Harrap, Chris Lipscombe, Megan McMullan, Barbara Nicholas, Sarah Ottrey, Ashok Parbhu, Brian Penetaka Dickson, Peter Rankin, Rodney Scott, Rhys Taylor and Rob Cape (Designer).

Appendix 1: EmpowerNZ Draft Constitution 2012



KUPU WHAKATAKI
PREAMBLE

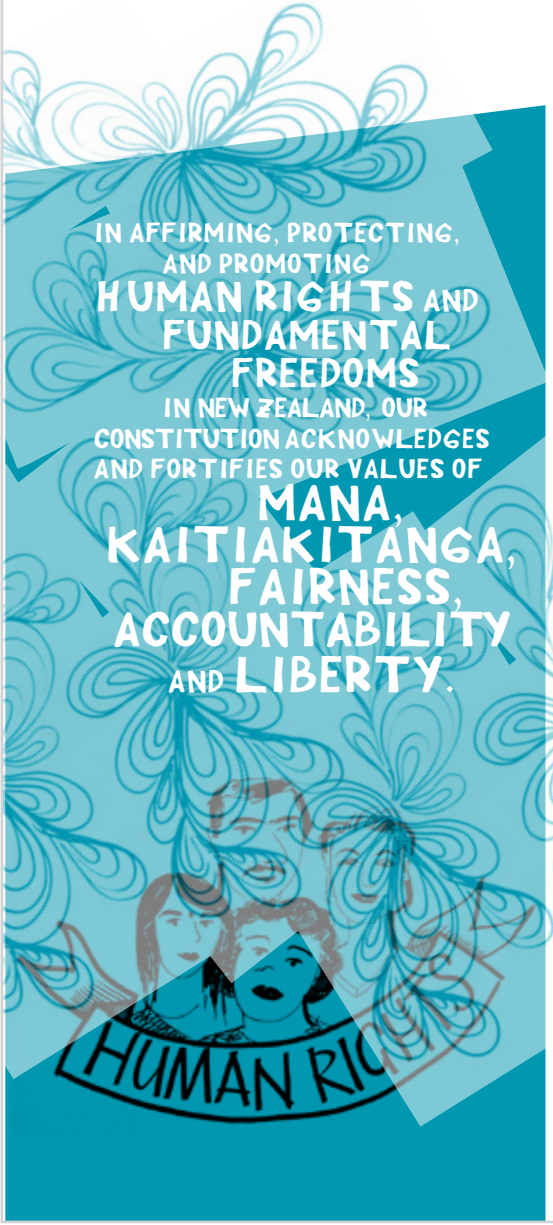
Our whenua, Aotearoa New Zealand, exists to preserve and protect the interests of the People in equal dignity, promoting our life in this land, through:

1. Mana, dignity and tolerance;
2. Kaitiakitanga, sustainability, durability and continuity;
3. Fairness, equality and accessibility;
4. Accountability, transparency, respect and legitimacy;
5. Liberty, freedom and opportunity.

These values, we agree, shall never be infringed upon by prejudice, fashion or ideology.

Acknowledging our whakapapa, we give life to and endorse this, our Constitution.

MANA
KAITIAKITANGA
FAIRNESS
ACCOUNTABILITY
LIBERTY



1. NGĀ TIKANGA TANGATA
RIGHTS AND RESPONSIBILITIES

1.1 This Constitution adopts the rights encompassed in Part 2 of the New Zealand Bill of Rights Act 1990.

1.2 We further adopt the following rights and responsibilities:

a. Every person has the right to access, without exception or discrimination:
   i. adequate housing and sanitation;
   ii. a reasonable standard of healthcare;
   iii. basic education; and
   iv. adequate food and clean water.
   The Government must take reasonable legislative and other measures within its available resources to achieve progressive realisation of the rights contained in this provision;

b. The right to open and transparent government;

c. The right to freedom from discrimination on the basis of gender identity;

d. The Government is responsible for ensuring the protection of children and the vulnerable, including the aged and people with disabilities;

e. The Government will respect and promote, through law, the principles of kaitiakitanga in relation to the environment. The principles of kaitiakitanga are defined in the Resource Management Act 1991; and

f. The right to academic freedom.

CONSTITUTIONAL COMMISSION

1.3 An independent Constitutional Commission made up of experts is established, whose function is to assess whether legislation and policy is consistent with the rights enshrined in this Constitution. The commission must report any inconsistencies to the House of Representatives as they arise.

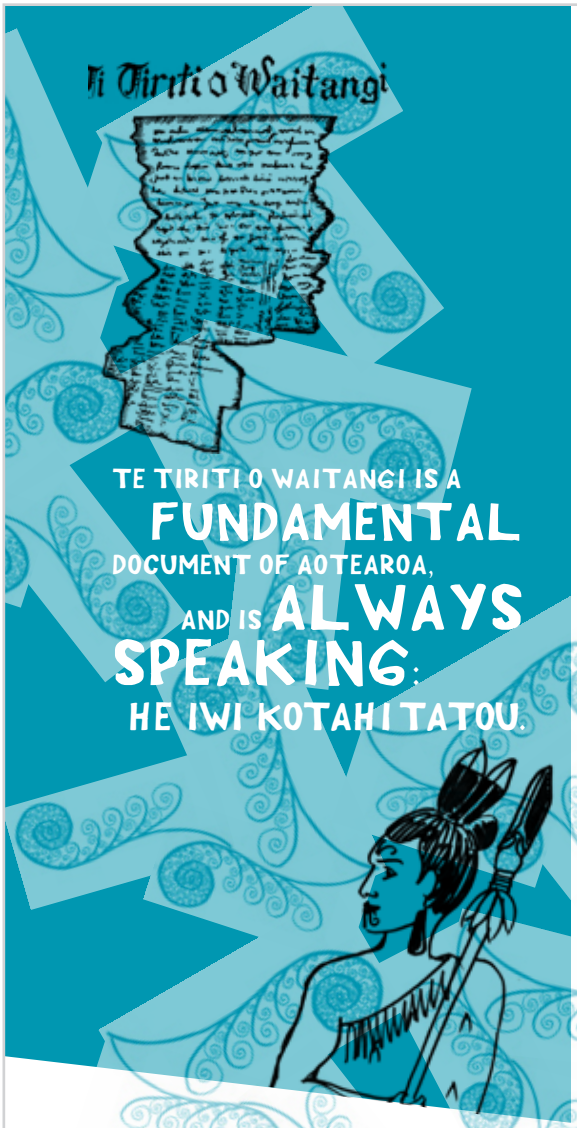
1.4 The commission must report any inconsistencies at the first and third readings of every Bill. Parliament must consider these inconsistencies.

JUDICIAL RESPONSIBILITIES

1.5 All enactments must be interpreted and applied consistently with the rights enshrined in this Constitution. If consistency is impossible, the Judiciary can declare the relevant provision(s) unconstitutional (provided that such a declaration does not affect the validity or operation of any enactment or law). The Legislature is obliged to respond to any declaration of unconstitutionality.

1.6 The rights and freedoms contained in this Constitution may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2 / DRAFT CONSTITUTION



2. MĀORI ME TE KARAUNA
MĀORI-CROWN RELATIONSHIP

2.1 This Constitution operates to give effect to the principles of Te Tiriti o Waitangi.

2.2 The People of Aotearoa recognise that there was a system of governance, customs and traditions in place that preceded the present Westminster system.

2.3 The Declaration of Independence 1835 is the first official document of New Zealand that affirmed Māori sovereignty.

TE TIRITI

2.4 The purpose of this part is to give effect to the spirit and intent of Te Tiriti o Waitangi.

2.5 In order to fulfil this purpose the indigenous rights within Te Tiriti are hereby affirmed.

2.6 The Waitangi Tribunal shall be responsible for periodically undertaking an inquiry into indigenous rights flowing from Te Tiriti. By this process, the Tribunal shall investigate and promulgate these respective rights and responsibilities.

2.7 The right to bring a claim under section 6 of the Treaty of Waitangi Act 1975 is affirmed.

2.8 The Tribunal may provide a remedy to a claimant if a breach of a right arises from a breach of the principles of Te Tiriti.

3 / DRAFT CONSTITUTION

3. NGĀ RINGA O TE KĀWANATANGA
ORGANS OF GOVERNMENT

REPUBLIC OF AOTEAROA NEW ZEALAND

3.1 Recognising that:
- a. We are an independent nation;
- b. We were founded on Te Tiriti o Waitangi;
- c. We have historical connections to the United Kingdom;
- d. We have an important role to play in the Asia Pacific region;
- e. We support the considered and progressive evolution of our constitutional arrangements; and
- f. We wish to move boldly forward into the future:

We create a Republic of Aotearoa New Zealand.

3.2 All obligations owed to Māori by the Crown under Te Tiriti o Waitangi are now transferred to the state of the Republic of Aotearoa New Zealand.

HEAD OF STATE

3.3 The Head of State is the Kaitiaki.

3.4 The Kaitiaki shall:
- a. Be elected by 75% majority of the House of Representatives; and
- b. Exercise the existing powers of the Governor-General not otherwise expressly revoked by this Constitution on behalf of New Zealand.

ORGANS OF GOVERNMENT

3.5 The organs of government exist and operate to serve the People.

3.6 The three organs of government are:
- a. The Legislature;
- b. The Executive; and
- c. The Judiciary.

LEGISLATURE

3.7 The Legislature consists of a unicameral house made up of representatives elected in accordance with the provisions of the Electoral Act 1993.

3.8 The House of Representatives has a fixed term of four years.

3.9 Within the Legislature, we value:
- a. Proportional representation;
- b. Transparent and accountable process;
- c. Equal access;
- d. Voice of the People;
- e. Diversity; and
- f. Democracy.

EXECUTIVE

3.10 The Executive is made up of the Executive bodies set out in Part 2 of the Constitution Act 1986, except as otherwise provided by this Constitution.

4 / DRAFT CONSTITUTION

3.11 The Executive will be accountable and transparent. It will operate in a fair and transparent manner, and be responsible for its decisions.
3.12 The Prime Minister shall be appointed by Parliament, and will be known as Tumuaki.
3.13 The Tumuaki will be a member of the Government.
3.14 The Tumuaki is head of the Executive branch of government.
3.15 The Government must have the confidence of the House of Representatives.
3.16 Ministers must fulfil their responsibilities to their electorate, their party and their portfolios.

JUDICIARY

3.17 The Judiciary must be independent and free of interference.
3.18 The Attorney-General will appoint judges based on the recommendations of an independent Judicial Commission.
3.19 The Judicial Commission shall be comprised of judges, lawyers and other experts, appointed in an open and transparent manner.

4. MĀNGAI O TE MOTU
THE VOICE OF THE PEOPLE

PROVISIONS PERTAINING TO LEGISLATIVE POWER

4.1 The Legislature shall continue to operate in accordance with the provisions in Part 3 of the Constitution Act 1986 subject to any contrary provisions contained in this Constitution.
4.2 The Legislature shall operate in accordance with an open and transparent process for the betterment of the People.
4.3 The Legislature shall act in a democratic manner, as the voice of the People.

PROVISIONS PERTAINING TO ELECTORAL PROCESS

4.4 The parliamentary term shall be four years and the electoral term shall be fixed. This clause may be amended only by 75% majority in the House of Representatives or on acceptance by a majority in a national referendum (see clause 5.3).
4.5 Section 45 of the Electoral Act 1993, providing for Māori seats in the House of Representatives, and the entrenched provisions of section 268 of the Electoral Act 1993, shall continue to have effect.
4.6 This Constitution shall ensure that the electoral system is based on the principles of democracy and proportional representation.
4.7 The People of New Zealand shall have equal access to the democratic process.

5. NGĀ WHAKARITENGA
OPERATIONAL ELEMENTS

ADOPTION

5.1 This Constitution has been adopted through:

a. A Citizens' Assembly confirming the text of the Constitution; and

b. A referendum that secured 60% of approval of registered electors.

REVIEW

5.2 This Constitution shall be reviewed at 20-year intervals from the date of adoption by:

a. A meeting of a representative constitutional assembly whose purpose is to review the entire Constitution and determine whether changes may be necessary; and

b. If there are recommended changes to Part 1, 2 and 5 (other than clause 5.3), that those changes will come into effect on acceptance by a 60% majority in a national referendum; all other changes must be in accordance with clause 5.3 of this constitution.

ENTRENCHMENT

5.3 The Part establishing the Organs of Government (Part 3), the Voice of the People (Part 4) and this clause (clause 5.3) shall not be repealed or amended unless that repeal or amendment:

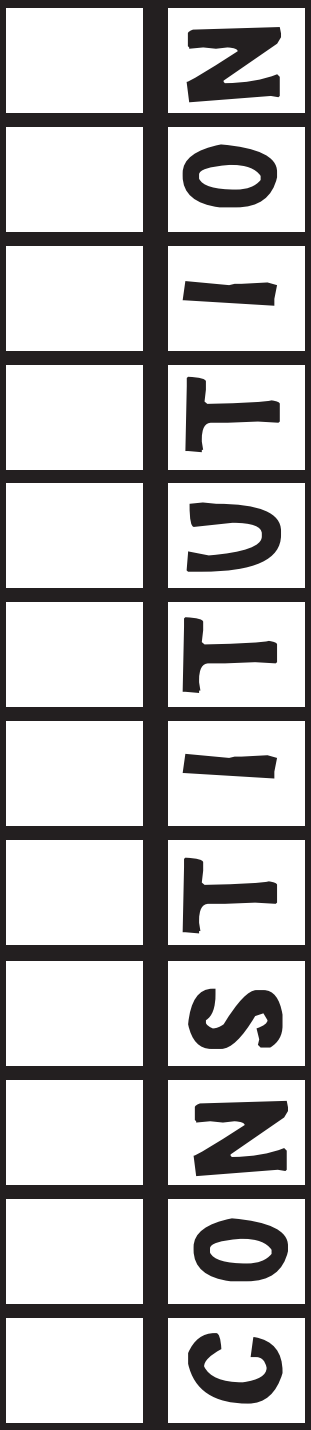
a. Is passed by a majority of 75% of all members of the House of Representatives; or

b. Has been carried by a majority of the valid votes cast at a poll of all electors eligible to vote in New Zealand.

PRIVATIVE CLAUSE

5.4 Nothing in this Constitution gives the Judiciary the power to declare any enactment to be invalid. For the avoidance of doubt, this means that breach of this Constitution is not a justification for declaring any legislation to be invalid.

6 / DRAFT CONSTITUTION



Participants

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Dipti Manchanda
Ruth Markham-Short
Lauren McGee
Kieran Meredith
Tiana Morgan
Duran Moy
Andrew Neate
Pania Newton
Chris Nicholls
Lydia Nobbs
Helen O'Leary
Alice Osman
Ihapera Paniora
Elye Parata-King
Higano Perez
Joshua Pietras
Rosa Polaschek
Sophie Pollak
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Jeremy Todd
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Julia Whaipooti
Julia White
Jeremy Wilson

Facilitators

Dean Knight (Lead)
Jess Birdsall-Day
Natalie Coates
Carwyn Jones
Mihiata Pirini
Marcelo Rodriguez Ferrere
Diane White
Edward Willis

Designers

Gillian McCarthy (Lead)
Katy Miller
Machiko Niimi

Illustrator

Megan Salole

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Hon Peter Dunne MP
Te Ururoa Flavell MP
Hone Harawira MP
Professor Philip Joseph
Hon Jim McLay
Sir Tipene O'Regan
Metiria Turei MP
Hon Justice Joseph Williams
Dame Dr Claudia Orange, and
Te Papa Tongarewa for their ongoing support.

Fifty participants between the ages of 16 and 28 came to Parliament from throughout New Zealand to draft this Constitution at the EmpowerNZ Workshop on 28 and 29 August 2012.

Learn more about this initiative at www.empowernz.org
Read the interactive constitution at www.empowernzconstitution.org
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Appendix 2: EmpowerNZ Survey Results 2013

	Survey Questions	Survey Results		
1	What are your aspirations for Aotearoa New Zealand?	-	-	-
2	How do you want our country to be run in the future?	-	-	-
3	Do you think our constitution should be written in a single document or found across a range of sources as it currently is?	Yes, written 50.0%	No 40.5%	Undecided 9.5%
4	Do you think our constitution should have a higher legal status than other laws (supreme law)?	Yes, supreme 45.2%	No 28.6%	Undecided 26.2%
5	Who should have the power to decide whether legislation is consistent with the constitution: Parliament or the Courts?	Parliament 31.0%	Courts 54.8%	Undecided 14.3%
6	Does the Bill of Rights Act 1990 protect your rights enough? Why or why not?	Yes, it protects our rights 19.0%	No 59.5%	Undecided 21.4%
7	What other things could be done to protect rights?	-	-	-
8	Do you think the Bill of Rights Act should have a higher legal status than other laws (supreme law)?	Yes, supreme 45.2%	No 31.0%	Undecided 23.8%
9	Who should have the power to decide whether legislation is consistent with the Act: Parliament, Courts, another entity?	Parliament 14.3%	Courts 61.9%	Another entity 23.8%
10	What additional rights if any could be added to the Act?	-	-	-
11	Thinking of the future, what role do you think the Treaty of Waitangi could have in our constitution?	-	-	-
12	Do you think the Treaty should be made a formal part of the constitution?	Yes, Treaty included 47.6%	No 19.0%	Undecided 33.3%
13	How should Māori views be represented in Parliament?	Keep seats 47.6%	Abolish seats 26.2%	Undecided 26.2%
14	How could Māori electoral participation be improved?	-	-	-
15	How should Māori views and perspectives be represented in local government?	Status quo 31.0%	Change current framework 33.3.%	Undecided 35.7%

	Survey Questions	Survey Results					
16	How many members of Parliament should we have?	< 80 2.4%	80–99 4.9%	100–119 7.3%	120 78.0%	120–149 7.3%	150+ 0.0%
17	How long should the term of Parliament be?	< 2yrs 2.4%	3yrs 12.2%	4yrs 80.5%	5yrs 4.9%	6yrs 0.0%	6yrs+ 0.0%
18	How should the election date be decided?	By the Prime Minister 34.1%		By the Governor General 34.1%		Other 31.7%	
19	What factors should be taken into account when the size and number of electorates are decided?	-		-		-	
20	What should happen if a member of Parliament parts ways with the party from which he or she was elected?	No action 34.1%		Reinstate the Electoral (Integrity) Amendment Act 2001, or similar 41.5%		Something else 24.4%	
21	Should Aotearoa New Zealand become a republic?	Yes, a republic 51.2%		No 19.5%		Undecided 29.3%	
22	Does New Zealand need to improve civics education in our school curriculum?	Yes, needs improvement 100.0%		No 0.0%		Undecided 0.0%	
23	How could youth participation in our democracy be improved?	-		-		-	
24	Do you think New Zealand's constitutional arrangements should include a commitment to the environment/and or sustainable development/and or future generations?	Yes, requires a commitment 71.8%		No 2.6%		Undecided 25.6%	

Note 1: Shaded boxes indicate a majority of participants (50% or more) agree.

Note 2: A detailed summary of the survey is available on the *EmpowerNZ* website and was submitted separately to the Panel as a formal submission.

Appendix 3: New Zealand Oaths

Source: Ministry of Justice, 2004.

Section 4 of The Oaths and Declaration Act 1957 makes provision for the oath-taker to make an affirmation rather than an oath, whereby 'You swear by the almighty god' is replaced with 'I [name] solemnly, sincerely, and truly declare and affirm'. Further, Section 5 makes provision for oaths taken by persons who do not have a religious belief:

> Where an oath has been duly administered and taken, the fact that the person to whom the same was administered had at the time of taking the oath no religious belief shall not for any purpose affect the validity of the oath.

Governors-General's Oath

See Regulation 6(b) of the Letters Patent (2006).

> I, [*name*], swear that, as Governor-General and Commander-in-Chief of the Realm of New Zealand, comprising New Zealand; the self-governing states of the Cook Islands and Niue; Tokelau; and the Ross Dependency, I will faithfully and impartially serve Her [*or* His] Majesty [*specify the name of the reigning Sovereign, as thus*: Queen Elizabeth the Second], Queen of New Zealand [*or* King of New Zealand], Her [or His] heirs and successors, and the people of the Realm of New Zealand, in accordance with their respective laws and customs. So help me God.

Executive Council members Oath (including the Prime Ministers)

See s17 of the Oaths and Declarations Act 1957.

> I, [*name*], being chosen and admitted of the Executive Council of New Zealand, swear that I will to the best of my judgment, at all times, when thereto required, freely give my counsel and advice to the Governor-General for the time being, for the good management of the affairs of New Zealand. That I will not directly nor indirectly reveal such matters as shall be debated in Council and committed to my secrecy, but that I will in all things be a true and faithful Councillor. So help me God.

Members of Parliament Oath

See s11 of the Constitution Act 1986.

Note: A Member of Parliament shall not be permitted to sit or vote in the House of Representatives until that Member has taken the Oath of Allegiance in the form prescribed in Section 17 of the Oaths and Declarations Act 1957.

> I, [*name*], swear that I will be faithful and bear true allegiance to Her [*or* His] Majesty [*Specify the name of the reigning Sovereign, as thus*: Queen Elizabeth the Second], Her [*or* His] heirs and successors, according to law. So help me God.

Parliamentary Under-Secretary's oath

See s20 of the Oaths and Declarations Act 1957.

> I, [*name*], swear that I will well and truly serve Her [*or* His] Majesty [*specify the name of the reigning Sovereign, as thus*: Queen Elizabeth the Second], Her [*or* His] heirs and successors, according to law, in the office of Parliamentary Under-Secretary. So help me God.

Judicial oath

See s18 of the Oaths and Declarations Act 1957.

> I, [*name*], swear that I will well and truly serve Her [*or* His] Majesty [*specify the name of the reigning Sovereign, as thus*: Queen Elizabeth the Second], Her [*or* His] heirs and successors, according to law, in the office of [*specify*]; and I will do right to all manner of people after the laws and usages of New Zealand, without fear or favour, affection or ill will. So help me God.

Armed Forces oath

See s3 of the Defence Regulations 1990.

> I, [*name*], solemnly promise and swear that I will be faithful and bear true allegiance to our Sovereign Lady the Queen, her heirs and successors, and that I will faithfully serve in the New Zealand Naval Forces/the New Zealand Army/the Royal New Zealand Air Force [*delete the Services that are not appropriate*], and that I will loyally observe and obey all orders of Her Majesty, her heirs and successors, and of the officers set over me, until I shall be lawfully discharged. So help me God.

Police Oath

See s37 of the Police Act 1958.

> I, [*name*], do swear that I will well and truly serve our Sovereign Lady the Queen in the Police, without favour or affection, malice or ill-will, until I am legally discharged; that I will see and cause Her Majesty's peace to be kept and preserved; that I will prevent to the best of my power all offences against the peace; and that while I continue to hold the said office I will to the best of my skill and knowledge discharge all the duties thereof faithfully according to law. So help me God.

Citizenship Oath

See Schedule 1 of the Citizenship Act 1977.

> I, [*full name*], swear that I will be faithful and bear true allegiance to Her (*or* His) Majesty [*specify the name of the reigning Sovereign, as thus*: Queen Elizabeth the Second, Queen of New Zealand,] Her (*or* His) heirs and successors, according to law, and that I will faithfully observe the laws of New Zealand and fulfil my duties as a New Zealand citizen. So help me God.

Appendix 4: Past Inquiries in New Zealand

The 1986 Royal Commission on the Electoral system

A major strength was that engagement and education complimented an impartial inquiry into what the options are and what their strengths and weaknesses would be. It laid the foundation for the public to make a decision on the issue through referenda.

The 1986 Royal Commission is a relevant object of inquiry because the electoral system is an important part of our constitutional arrangements and it is an example of a successful change process in that the key recommendation was implemented by government with public support.

The 1986 Royal Commission of Inquiry into the Electoral system can be considered a success because:

a. The government of the day responded to the public desire for change
b. There was an extensive and wide ranging inquiry into what that change should be and where public opinion was on the issue
c. The inquiry was perceived as independent and impartial
d. The recommendations led to a majority of the public engaging in the decisionmaking process and popular mandated change

As well as investigating where public opinion was on the issues (it received more than 800 submissions from the public), the Commission served to inform public opinion by providing options and recommendations. As The Hon. Sir John Wallace who chaired the Commission pointed out in 2002;

> The Commission will, however, probably be best remembered for its analysis of the advantages and disadvantages of a proportional voting system, which we called Mixed Member Proportional (MMP), as against First Past the Post (FPP), and its recommendation that FPP should be replaced by MMP. (Wallace, 2002: 179)

It is, however, a very useful report as the Commissioners considered Māori representation, see discussion in constitutional hot spot 1.

2005 Inquiry to review New Zealand's existing constitutional arrangements

In 2004 the Prime Minister Helen Clark announced the formation of a select committee of the House of Representatives to conduct an Inquiry into New Zealand's existing constitutional arrangements. It should be noted that both the National Party and the New Zealand First Party did not participate.

The Inquiry made three key recommendations of which only one has been implemented by way of the current Constitutional Conversation. The recommendations were from the 2005 inquiry as follows:

1. Some generic principles should underpin all discussions of constitutional change in the absence of any prescribed process.

    a. The first step must be to foster more widespread understanding of the practical implications of New Zealand's current constitutional arrangements and the implications of any change.

    b. Specific effort must be made to provide accurate, neutral, and accessible public information on constitutional issues, along with non-partisan mechanisms to facilitate on going local and public discussion.

c. A generous amount of time should be allowed for consideration of any particular issue, to allow the community to absorb and debate the information, issues and options.

d. There should be specific processes for facilitating discussion within Māori communities on constitutional issues.

2. To foster greater understanding of our constitutional arrangements in the long term, increased effort should be made to improve civics and citizenship education in schools to provide young people with the knowledge needed to become responsible and engaged citizens.

3. The Government might consider whether an independent institute could foster better public understanding of, and informed debate on, New Zealand's constitutional arrangements, as proposed in this report. (Constitutional Arrangements Committee, 2005: 5)

Extent Implemented

Recommendation 1

The 'generic principles' outlined for constitutional change have been for the most part followed in the current review. There has been the provision of accurate and neutral information, a generous time has been allowed for consideration of the issues and there have been specific processes for facilitating discussion with Māori (see *Consideration of Constitutional Issues: Terms of Reference*).

Recommendation 2

The government accepted the second recommendation but unlike many countries that are similar to New Zealand, civics or citizenship is not a mandatory part of the curriculum meaning that New Zealand students will learn about the workings of government to varying degrees depending on their school. Civics or citizenship learning is embedded in the principles, values and key competencies of the curriculum and mostly fits into the social studies programme but unlike many other countries it does not give explicit guidelines. In Australia the curriculum states that it 'will support students to relate well to others and foster an understanding of Australian society, citizenship and national values through the study of civics and citizenship' (Australian Department of Education, Employment and Workplace Relations, n.d).

Recommendation 3

The government did not accept the recommendation of an independent institute to foster better public understanding of New Zealand's constitutional arrangements.

Appendix 5: Constitutional Review Processes of Australia and Canada

The experiences of Australia and Canada are of particular relevance to New Zealand because of our shared heritage, common law legal system and multicultural societies.

Australia

The Australian Federal Constitution differs from our arrangements in that it contains provisions for how the constitution must be amended. It has a 'double majority' threshold meaning that any change requires fifty per cent of the general population and a majority of the states voting yes. Compared to New Zealand, this process is much more rigid and strict and as a result out of some 44 attempts to change the Australian constitution since 1906, only 8 have passed.

This highlights a major strength of the New Zealand constitutional arrangements – that we can tailor our approach to constitutional change to the importance of the issue. It also begs the question of whether constitutional change can happen too easily in New Zealand and without the consent of the public.

Case Study 1: The Constitutional Centenary Foundation (CCF)

In the decade leading up to the new millennium, Australians had a national conversation about their constitutional arrangements. It began with a conference in 1991 on the centenary of the Australian Constitutional Convention and delegates were asked to put aside their prejudices and preconceptions and try to think about the issues from each other's point of view. They drew up a list of constitutional issues that required national discussion and they proposed to launch a nationwide conversation that would last the decade. The Co-Chair of the Constitutional Centenary Foundation (CCF) that emerged from that conference spoke at the Building the Constitution Conference in Wellington in 2000. She said that the CCF was:

> '... carefully established on the basis that [it] was non-partisan. It was not directed to achieving constitutional change or any particular change. Its purpose ostensibly was much more simple: to assist informed public debate on all aspects of the constitutional system.' (Saunders, 2000)

Saunders also pointed out that a lack of public knowledge was one of the reasons that the foundation was set up in the first place and that the major positive impact after the decade long review was that many more Australians, including many young Australians now knew about the constitution.

Canada

The Canadian experience in constitutional amendment has been somewhat similar to Australia in that they have rigid constitutional rules for how change occurs and efforts to make changes have failed from a lack of public engagement (Constitutional Arrangements Committee, 2005: 22).

The Canadian amendment process requires identical amendments to be passed in the House of Commons, the Senate and a two thirds majority of the provincial legislative assemblies representing at least 50% of the population. Since 1982 only ten minor changes have been passed. The major attempts at changing the constitution known as the Meech Lake Accords (1987-90) and Charlottetown Accords (1990-92) have both failed from a lack of public support.

Case Study 2: The Citizen's forum on Canada's Future (also known as the Spicer Commission)

In November 1990 the Federal Government of Canada set up a Commission of Inquiry known as the Citizens Forum on Canada's Future out of fear the countries unity was being threatened by cultural and linguistic differences specifically with the growing isolation of Quebec and marginalisation of the Aboriginal Canadians. The task was to find out what kind of Country Canadians wanted for themselves and their children. The forum was made up of eminent Canadians and they held community meetings all across Canada involving more than 400,000 Canadians. There was also a separate children's forum in which more than 300,000 school children participated.

To make the process as accessible as possible the forum visited Canadians where ever they were most comfortable and they set up an 'Idea Line' people could call to talk about their ideas for Canada's future. More than 75,000 people called up with ideas.

The Enquiry made good use of hundreds of volunteers by bringing people together from across Canada who wanted to get involved and training them on the issues and how to hold meetings in their respective communities.

The report of the forum describes the discussion groups of between six and two dozen people as the heart of the consultation process and the meeting process was designed so it couldn't be dominated by talkative people and would draw out contributions from the more quiet participants (see Citizens' Forum on Canadian Unity, 1991).

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