

Constructing a House Fit for the Future

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ELECTIONS **Two ticks? Too easy!**

On Election Day your two votes help decide who will represent us in parliament. Your votes do make a difference – here's why...

Your party vote
helps decide how many seats each party gets in parliament – the government will be formed by one or more parties with the support of enough seats to win important votes in parliament.

YOU HAVE 2 VOTES

Vote for only one party

■ PARTY SQUARE
◆ PARTY DIAMOND
♥ PARTY HEART
▲ PARTY TRIANGLE

Vote for only one candidate

CANDIDATE A
CANDIDATE B
CANDIDATE C
CANDIDATE D

Your electorate vote
helps decide who becomes your local MP – the candidate who gets the most votes wins the seat.

Wendy McGuinness

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The current constitutional review gives New Zealanders an opportunity to develop a single, entrenched, written constitution; a comprehensive set of rights and responsibilities; an effective and simplified representation system; and clarity over the role of te Tiriti beyond 2014. This think piece suggests that the way forward should focus on two ideas: (i) moving the concept underlying the Māori electorate seats from a representation framework into a constitutional framework, and (ii) strengthening the linkages between these two frameworks.

BACKGROUND

By international standards, New Zealand's constitution is unusually fluid, relying on a combination of 'formal legal documents, decisions of the courts, and practices'.¹ New Zealand remains one of only three countries that do not have an entrenched, single written constitution (the others are Britain and Israel).²

The constitution's principal formal statement is contained in the Constitution Act 1986.³ It recognises the Queen as the Head of State of New Zealand, and sets out the role of the Executive, the legislature, and the judiciary. The legislature consists of the Sovereign and the House of Representatives, the latter being elected in accordance with the Electoral Act 1993.⁴ However, MPs are not bound to act in the best interests of New Zealand or our constitution; the only oath of allegiance they swear is to the Queen.⁵ Furthermore, the rights and responsibilities of New Zealand citizens as a whole remain unclear, although obviously the concept of rights and duties (responsibilities) does exist. The Citizenship Act 1977⁶ makes provision for some new citizens to take an oath of allegiance under which they undertake to 'faithfully observe the laws of New Zealand and fulfil my duties as a New Zealand citizen', however those duties are gleaned from a range of legislation.⁷ Further, in regard to rights, the Bill of Rights Act 1990 is often criticised for lacking constitutional authority above ordinary legislation. Had the Act become a supreme statute or been entrenched, the courts could strike down any existing or proposed laws that conflict with it.⁸

Te Tiriti is often regarded as a founding document of government in New Zealand, but its role in the constitution remains unclear. In addition to the 1986 Act, the Cabinet Manual lists six major sources of New Zealand's constitution. Interestingly, te Tiriti is listed fifth.⁹ Te Tiriti's operational relevance in the future, as distinct from its historical significance as a founding document, is also uncertain. Te Tiriti is made up of three articles, of which the second – referring to 'Lands and Estates Forests Fisheries and

other properties' – is the only one that remains operationally relevant today. Many believe this article will become less important once the Treaty settlement process is complete (which is envisaged to occur in approximately 2014). Notably, the first article was executed in 1840, when the Māori chiefs 'cede[d] to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty', while the third article, which promised the 'natives ... the Rights and Privileges of British Subjects', was arguably made redundant under the British Nationality and New Zealand Citizenship Act 1948. This Act split New Zealand's citizenship from Britain and enabled all residents of New Zealand to become New Zealand citizens, although the term 'British Subject' was retained on passports until the Citizenship Act 1977.¹⁰

There have been a number of events in New Zealand's past that have led New Zealanders to reconsider their constitutional framework. Notable examples have been the signing of te Tiriti in 1840, the adoption of the Statute of Westminster in 1947, and the passing of the 1986 Act in response to the constitutional crisis of 1984 in which outgoing prime minister Sir Robert Muldoon refused to follow convention and act on the advice of prime minister-elect David Lange. In all three cases there was a national imperative to find a way forward. I question whether a national imperative exists today to improve our constitutional and representational frameworks, and explore what problems such a review might resolve.

Does a national imperative exist today?

The Māori Party considers that the current situation is not optimal, and negotiated a constitutional review as part of its confidence and supply agreement with the National Party. In announcing the terms of the review in December 2010, the parties described it as 'deliberately wide-ranging', and including 'matters such as the size of Parliament, the length of the electoral term, Māori representation, the role of the Treaty of Waitangi and whether New Zealand needs a written constitution'.¹¹

It is understandable that many Māori consider they have a short window in which to secure and embed their rights and responsibilities into New Zealand's constitution. According to Statistics New Zealand projections, in 15 years Māori will make up 16.2% of the total population, the Asian population will comprise 15.8%, and the Pacific population 9.6%. These estimates suggest that the growth rate will rise by 3.4% per year for the Asian population, followed by 2.4% for the Pacific population, and 1.3% for the Māori population.¹² Although Māori have been the predominant minority group in the past, these growth rates indicate that this position is likely to be challenged in the next 20 years.

Further, with increases in international treaties, international company ownership (currently 57.5% of the Top 200 New Zealand companies are 50% or more controlled by overseas interests),¹³ and significant global issues on the horizon that are likely to demand significant resources (e.g. recessions, climate change, food security, pandemics), as well as the considerable lead-time for developing a constitutional solution, it is easy to see why Māori may wish to progress this review.

For other New Zealanders the benefits are less apparent but they do exist. For example, the review provides an opportunity to construct a more robust and flexible constitution for all New Zealanders, deliver a more effective representation system, gain clarity over the rights and responsibilities of both citizens and MPs, develop a better sense of nationhood, explore policy options over time, and develop consensus on the best way to protect New Zealand's unique indigenous culture for future generations.

What is the problem we are trying to solve?

The problem can be broken into two parts: (i) how to improve the quality of our constitutional framework, and (ii) how to improve the effectiveness of our representation framework. Each framework must stand on its own, and be able to be defined, managed and assessed separately. Equally, both frameworks must be transparent, shining light onto each other, so that each guides and tests the actions of the other. Using a sailing metaphor, the constitutional framework acts as a rudder, while the representation framework selects the crew to work the sails; thus, the first tends to remain constant and embedded, whereas the second lends itself to being dynamic and responding to the issues of the day.

The Commissioners who undertook the 1986 Royal Commission on the Electoral System understood that the purpose of the constitutional framework was different from that of the representational framework. They acknowledged that the 'Maori seats may well be the principal symbol of Government's recognition of the Maori people's special standing', but they made it clear that the seats were not, and never had been, 'an appropriate means of securing the Maori constitutional position'.¹⁴

The Commissioners' approach aligns with the work of Canadian academic Hanna Fenichel Pitkin, who in her book *The Concept of Representation*¹⁵ put forward four key views for understanding political representation: formalistic, descriptive, symbolic and substantive.¹⁶ These views offer a language that helps to explain why New Zealand's current system has largely stayed unchanged with regard to the existence of the Māori electorate seats. Pitkin's theory of symbolic representation aligns with the Commissioners' observations that the Māori seats act as a symbol of *te Tiriti*, rather than a means of 'securing the Māori constitutional position'. Arguably, the solution is to remove the symbol from the representation framework and insert a more appropriate obligation into the constitutional framework. This would create a representation framework that is less complex and more robust, where all people are treated equally (i.e. there would be one electoral roll), and put in place a constitutional framework that comprehensively clarifies the rights and responsibilities of the Head of State, the Executive, MPs, and citizens.

In the Sustainable Future Institute's Report 8, *Effective Māori Representation in Parliament*, the Institute found 13 possible mechanisms that could be used separately or together to adjust the parliamentary representation system.¹⁷ For example, instead of the Māori electorate seats, a minimum level of Māori-descent MPs could be guaranteed in the House of Representatives in proportion to those of Māori descent in the general population. This would mean, for example, that if the Māori-descent population as per the

census was 18% of the total population, 18% of MPs would be required to be of Māori descent. If this was not the case after an election, the difference would be made up from the party lists – in other words, the political parties would need to select additional Māori-descent MPs from their lists. However, even this approach is still privileging one person over another, in this case one potential MP over another, and demonstrates the limitations of addressing Māori representation within the electoral framework.

PROPOSAL

My proposal centres on two ideas: moving the concept underlying the Māori electorate seats from the representation framework into the constitutional framework, and strengthening the linkages between these two frameworks.

The first idea is based on the view that the constitution should clarify the rights and responsibilities of the Head of State, the Executive, the judiciary, MPs and citizens. As such, the concept underlying the Māori electorate seats could be rewritten into the new constitution as a set of responsibilities. For example, the constitution could state that: (i) government must ensure Māori culture and heritage is maintained for current and future generations, and (ii) *te Tiriti* is the founding document of government. Importantly, I am suggesting that the constitutional framework should be worded in a way that articulates shared responsibilities rather than privileging the rights of one New Zealander over another. Separating the frameworks in this manner would leave the representational framework free to be applied to the day-to-day issues facing the country, and as such aim to deliver an equitable voice in the House that acts for the good of the nation and all its citizens.

The second idea is based on the need to ensure strong linkages exist between the representational framework and the constitutional framework. This means that each framework must be designed not only to reflect, support and guide the other, but also to provide checks and balances, so that together they form a system that works for the good of the whole country. Critical to the operation of such a system is the need for improved clarity over who governs (MPs) and for what purpose (the constitution); to this end I suggest New Zealand would benefit from requiring all elected MPs to commit, under oath, to operating in accordance with the constitution.

The proposal outlined above is one possible approach. There remains a need for a great deal of research, analysis, discussion and reflection before all the alternative solutions are identified and explored. However, it is my sincere hope that through the constitutional review, we will be able to construct a House of Representatives fit for the future, one that can deliver New Zealanders a more secure platform upon which to build a creative and dynamic nation that enables us all to walk boldly into the future together.



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This Think Piece was prepared to offer an overview of the Institute's Report 8: *Effective Māori Representation in Parliament: Working towards a National Sustainable Development Strategy*. This Think Piece has been included as a paper on the PostTreatySettlements.org.nz website, a collaborative project between the Institute of Policy Studies and Māori Studies (*Te Kawa a Māui*) at Victoria University.

For complete references and to find out more, visit our website: www.mcguinnessinstitute.org



The McGuinness Institute is a non-partisan think tank working towards a sustainable future, contributing strategic foresight through evidence-based research and policy analysis.

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