

**The Problem of Constitutional Law Reform in New Zealand: A  
Comparative Analysis**

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## I. Introduction

In most other countries, an utterance of the word ‘constitution’ by those in government would undoubtedly incite public interest and debate, especially where reform is proposed. In New Zealand, however, the attitude towards anything remotely ‘constitutional’ (other than the Treaty of Waitangi, perhaps) is met with indifference and a general willingness to pass the buck and leave the big questions untouched. The Kiwi reaction seems perplexing, especially given the inherent significance of a constitution and its impact on “our economy, our society, our culture and our politics.”<sup>1</sup> However, the root of the problem, if indeed it is a problem, is twofold: there is a general lack of knowledge about constitutional matters in New Zealand and, where there is knowledge, there is a general disinterest in constitutional matters and preparedness to leave these matters to Parliament. As such, constitutional change can occur ‘overnight’ without debate and we may not know, or care about such changes.<sup>2</sup> Rather than saying we don’t care *because* we don’t know, this paper analyses the fact that we don’t care *or* know as part of a larger problem – the lack of clarity and certainty surrounding the process of constitutional law reform in New Zealand.

In light of this problem, this dissertation seeks to achieve four things. The first is to conduct a comparative analysis of past approaches to constitutional change between New Zealand, Canada and the United Kingdom. The second is to develop normative principles and/or criteria for ‘effective’ constitutional change based on this analysis, and propose how they would be implemented. The third is to measure New Zealand’s current review of constitutional arrangements against these criteria, and the fourth is to conclude what the future of constitutional change in New Zealand may look like if these principles were to be implemented in the absence of a defined and prescriptive process.

In this dissertation I acknowledge that due to the nature of New Zealand’s constitution, ‘constitutional change’ can occur in many different ways. As such, I

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<sup>1</sup> Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand’s Constitution and*

<sup>2</sup> Matthew Palmer “What is New Zealand’s constitution and who interprets it? Constitutional realism and the importance of public office-holders” (2006) 17 PLR 133 at 133.

intend to focus my attention on the type of constitutional change brought about by considered decisions made by the New Zealand public or by directly elected representatives on their behalf. This is because my dissertation is set in the context of an ongoing constitutional review brought about by a confidence and supply agreement between the National and Maori parties after the 2008 general election. The review is being undertaken by the Constitutional Advisory Panel whose terms of reference do not, and effectively cannot, consider the impact of the judiciary on the constitution<sup>3</sup> as an independent branch of government. For this reason, a comprehensive study of the judiciary and how it affects the constitution is outside the scope of my research. As Fisher J in *Berkett v Tauranga District Court*<sup>4</sup> stated: “the Courts themselves have always chosen to regard themselves as bound by such Acts [of Parliament] and until any written constitution to the contrary they can be relied upon to do so in the future.”<sup>5</sup> This position will inform any discussion of the judiciary’s relationship to the constitution, which will be touched upon where it is appropriate to do so.

Furthermore, this dissertation acknowledges that the Treaty of Waitangi is a founding constitutional document for New Zealand,<sup>6</sup> but will discuss its position in New Zealand’s constitution only where necessary. An in-depth analysis of this aspect of New Zealand constitutional law would require an entire dissertation dedicated to the subject, and is probably best left to Matthew Palmer.<sup>7</sup>

In terms of structure, in Part II I will tackle the comparative exercise between Canada, the United Kingdom and New Zealand, which will inform the development of criteria for effective constitutional change in Part III.

Part IV will describe the current constitutional review in New Zealand, its origins, terms of reference and especially its methodology for carrying out the review.

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<sup>3</sup> Except in the question of whether New Zealand should adopt a written constitution, whereby the judiciary would (probably) be accorded the responsibility of enforcing the constitution as supreme law by striking down any legislation inconsistent with the constitution.

<sup>4</sup> *Berkett v Tauranga District Court* [1992] 2 NZLR 206.

<sup>5</sup> At 8.

<sup>6</sup> Cabinet Office *Cabinet Manual 2008* at 1.

<sup>7</sup> See Matthew Palmer *The Treaty of Waitangi in New Zealand’s Law and Constitution* (Victoria University Press, Wellington, 2008).

Part V will ask whether the current review process is constitutionally ‘up to scratch’ based on the criteria developed in Part III, consider the future of constitutional change in New Zealand and conclude whether or not we need to adopt a defined process regarding constitutional reform.

## II. The Comparative Exercise

In this analysis it is important to first consider New Zealand's constitution and our history of constitutional change to reveal what triggers change and whether there is a general trend as to how we go about it in the absence of a written constitution. I will then move on to the comparative exercise with Canada and the United Kingdom. These countries are both valuable as comparators to New Zealand in this context for a number of reasons. Firstly, both Canada and the United Kingdom are common law jurisdictions that have each, at some point in time, had the same 'scattered' or 'incomplete' constitutional arrangements as New Zealand.<sup>8</sup> Furthermore, both countries have made conscious decisions to embark on constitutional reform in the absence of the traditional catalysts – societal upheaval, civil war or the inception of a new nation where a new regime of law is the intended consequence.<sup>9</sup> The comparative exercise will briefly consider each country's constitutional arrangements before describing and analysing certain instances of constitutional change. The processes by which these decisions have been implemented reveal some common denominators, whether social, political or legal, that have either given or taken away from the legitimacy of the constitutional reform. It is these common denominators that will inform the development of the criteria for an effective process of constitutional change, which will be addressed in Part III.

### A. *The New Zealand Experience*

#### 1. New Zealand's constitution

New Zealand's constitution is not found in a single document. Nor is the Treaty of Waitangi in its original form(s) incorporated into our statute books, nor can judges strike down legislation they deem to be unconstitutional. While we cannot say with absolute certainty what our constitution *is*, it can generally be described as:

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<sup>8</sup> In other words, countries who lack formal and entrenched constitutions with judicial supremacy are candidates to compare with New Zealand.

<sup>9</sup> Peter Hogg *Constitutional Law of Canada* (student ed, Thomson Carswell, Ontario, 2007) at 1.2.



“... found in formal legal documents, in decisions of the courts, and in practices (some of which are described as conventions). It reflects and establishes that New Zealand is a monarchy, that it has a parliamentary system of government, and that it is a democracy. It increasingly reflects the fact that the Treaty of Waitangi is regarded as a founding document of government in New Zealand. The constitution must also be seen in its international context, because New Zealand governmental institutions must increasingly have regard to international obligations and standards.”<sup>10</sup>

This statement derives its legitimacy from having been “agreed to by Cabinets of different political persuasions,”<sup>11</sup> though it should not be assumed to be definitive. For example, John McGrath QC has said our constitution is a simple mix of law and convention,<sup>12</sup> while Bruce Harris has described it as “rather an eclectic mix of United Kingdom and New Zealand enacted statutes, common law (including the royal prerogative) ... and non-justiciable conventions.”<sup>13</sup> Sir Ivor Jennings considered that where no “authoritative choice” has been made as to what is constitutional (i.e. in the absence of a single written document), the matter is at the mercy of academics.<sup>14</sup>

By far the most ambitious attempt at defining New Zealand’s constitution has been undertaken by Matthew Palmer<sup>15</sup> who approaches the constitution as a ‘constitutional realist’. From this perspective he says “the meaning of a law, or a constitution, exists in the understandings and actions of those people involved in the application and interpretation of that law or constitution”<sup>16</sup> and that “a rule should be regarded as constitutional if it plays a significant role in influencing the generic exercise of public power – whether through structures, processes, rules conventions or even culture.”<sup>17</sup>

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<sup>10</sup> Cabinet Manual, above n 6, at 1.

<sup>11</sup> Constitutional Arrangements Committee *Report of the Constitutional Arrangements Committee: Inquiry to Review New Zealand’s Existing Constitutional Arrangements* (August 2005) at 19.

<sup>12</sup> John McGrath “The Crown, the Parliament and the Government” (1999) 7 Waikato L Rev 1 at 2.

<sup>13</sup> Bruce V Harris “The Constitutional Future of New Zealand” (2004) NZ L Rev 269 at 274.

<sup>14</sup> Ivor Jennings *The Law and the Constitution* (5<sup>th</sup> ed, Hodder and Stoughton Educational, Surrey, 1959) at 37.

<sup>15</sup> Matthew Palmer is a constitutional lawyer and academic who has held various senior public service roles including Deputy Solicitor-General.

<sup>16</sup> Palmer, “What is New Zealand’s constitution and who interprets it?”, above n 2, at 135.

<sup>17</sup> At 137.

Palmer's comprehensive account divides New Zealand's constitution into seven categories: the sovereign; democracy; the executive; Parliament; the judiciary; protection for citizens; and the limits of national government.<sup>18</sup> Empirically, these categories comprise 80 elements in total, 56 per cent of them being Acts of Parliament from New Zealand or the United Kingdom, 60 per cent of them being formed in the 1980s or after and 70 per cent being associated with Labour or Labour-led governments.<sup>19</sup>

Equally as important in Palmer's realist account are those whose interpretation of the constitution is authoritative in practice when applied to a particular set of circumstances.<sup>20</sup> While Parliament and the courts play their traditional legislative and judicial roles respectively, many of the identified elements of the constitution are interpreted by a small number of public office-holders whose accountability should be scrutinized based on the significant amount of the constitution they interpret.<sup>21</sup>

Overall, our constitution is piecemeal and unorthodox. New Zealand is one of only three countries in the world that chooses to organize relations between government and society without the aid of a written constitution.<sup>22</sup> The nature of our constitution goes a long way in explaining New Zealand's approach, if we have one, to constitutional law and the process by which it is reformed. At present, New Zealand does not appear to have a coherent or principled approach to constitutional reform, which can be mistaken for "ambivalence",<sup>23</sup> though as mentioned above is probably indicative of the broader issue of lack of clarity as to how constitutional reform is, or should be, achieved.

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<sup>18</sup> At 142-145.

<sup>19</sup> At 145-147.

<sup>20</sup> At 149.

<sup>21</sup> At 153. Ten such public-office holders stand out for Palmer: the Prime Minister; Solicitor-General; Secretary of the Cabinet/Clerk of the Executive Council; Clerk of the House of Representatives; Governor-General; Attorney-General; State Services Commissioner; Controller and Auditor-General; Speaker of the House of Representatives; and the Ombudsmen.

<sup>22</sup> Israel and the United Kingdom also have 'unwritten' constitutions.

<sup>23</sup> Matthew Palmer "New Zealand Constitutional Culture" (2007) 22 NZULR 565 at 575. Palmer lists some geographic, demographic and economic factors that he says reveals a streak of ambivalence by New Zealanders towards those who wield public power.

## 2. Does New Zealand have an approach to constitutional reform?

Without a specific, prescribed way of embarking on constitutional change outside of the normal legislative process, New Zealand's recent constitutional history suggests several observations as to how we go about reform.

Due to the unwritten nature of our constitution, the question of what is 'constitutional' remains imprecise. The word 'constitutional' generally relates to "an established set of principles governing a state",<sup>24</sup> while the term 'constitutional law' is generally "concerned with the history, structure, and functioning of central government carried on in accordance with the law, constitutional convention and the expectations of liberal democratic government."<sup>25</sup> However, in the absence of any formal codification of such principles New Zealand is left to soul-search each time an issue arises that could be considered constitutional. It is often left to the judiciary to debate the grey areas in cases such as *Simpson v Attorney-General (Baigent's case)*,<sup>26</sup> *Moonen v Film and Literature Board of Review*,<sup>27</sup> *Attorney-General v Ngati Apa*,<sup>28</sup> and most recently in *New Zealand Maori Council v Attorney-General*.<sup>29</sup> While the judiciary is constitutionally powerless to strike down any parliamentary enactments, developments in the common law and in the interpretation of statutes are meaningful and certainly contribute to the constitutional landscape.

New Zealand, or at least the government of the day, prefers to achieve constitutional change via the enactment of statutes or by holding a referendum. The parliamentary law-making process is arguably the most appropriate, or the least inappropriate, forum for constitutional change due to its inherently democratic character. Each of the pieces of legislation referred to in the coming paragraphs has been a response to reports by government-appointed groups and there has been ample opportunity for public

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<sup>24</sup> Oxford English Dictionary Online "constitutional, *adj*" (2013) Oxford University Press <[www.oed.com](http://www.oed.com)>.

<sup>25</sup> P A Joseph *Constitutional and Administrative Law in New Zealand* (Thomson Reuters, Wellington, 2007) at 1.1.

<sup>26</sup> *Simpson v Attorney-General* [1994] 3 NZLR 667 [*Baigent's case*].

<sup>27</sup> *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 9.

<sup>28</sup> *Attorney-General v Ngati Apa* [2003] 3 NZLR 643.

<sup>29</sup> *New Zealand Maori Council v Attorney-General* [2013] NZSC 6.

consultation.<sup>30</sup> The adoption of MMP and the Electoral Act has been the only change where Parliament has required a referendum to determine popular support, perhaps reflecting New Zealand's inherent value of democracy. The issue of referenda has been controversial since, becoming a tool for the opposition over matters such as the 'anti-smacking' legislation<sup>31</sup> and the proposal to sell state-owned assets under the Public Finance (Mixed Ownership Model) Amendment Act 2012. Overall, it appears that New Zealand is content to use general elections to indicate preference for the allocation of constitutional decision-making powers, and to be vocal during the law-making process when issues of public significance arise.

### **3. Examples of constitutional reform in New Zealand**

In this dissertation I do not intend to delve much further back into New Zealand's constitutional history than the 1980s, except to acknowledge that we inherited a significant amount of constitutional material from the United Kingdom. As our colonial history becomes just that – history – New Zealand has tackled constitutional obstacles in its own way. While it is incorrect to say that New Zealand has a prescribed approach to constitutional law reform (an inherent feature of our unwritten constitution), a survey of recent constitutional 'moments' should reveal what triggers constitutional change and by which methods we have and have not experienced effective reform.

#### *(i) Constitution Act 1986*

The Constitution Act 1986 was born from the constitutional crisis of 1984<sup>32</sup> where the outgoing Prime Minister Robert Muldoon refused to devalue the currency on the advice of the incoming and newly elected government. Muldoon's repeated refusal to follow convention resulted in a constitutional crisis that exposed "major

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<sup>30</sup> Bruce V Harris "Towards a Written Constitution?" in Raymond Miller (ed) *New Zealand Government and Politics* (Oxford University Press, Melbourne, 2010) 91 at 93.

<sup>31</sup> Crimes (Substituted Section 59) Amendment Bill 2007 (271-3), which repealed s 59 of the Crimes Act 1961.

<sup>32</sup> Joseph, above n 25, at 5.3. See also F M Brookfield "The constitutional crisis of July '84" [1984] NZLJ 298.

uncertainties” in our constitutional law.<sup>33</sup> The crisis was a catalyst for a review of the rules by the Minister of Justice for the changeover of power following a general election. The terms of reference also included a review of New Zealand’s constitutional legislation which resulted in the recommendation to enact a new Constitution Act.<sup>34</sup> As a result, the Constitution Act 1986 was unanimously passed by Parliament albeit with minor changes from the Committee’s original recommendation. It is now a central feature of New Zealand’s constitutional skeleton. On its face the Act appears to contain “nothing radical”,<sup>35</sup> but it importantly affirms the framework of government and core constitutional institutions,<sup>36</sup> and parliamentary sovereignty.<sup>37</sup> The Act also revoked the operation of what remained of the New Zealand Constitution Act 1852 (UK) which had originally established New Zealand’s parliamentary system.

*(ii) New Zealand Bill of Rights Act 1990*

In 1985 Geoffrey Palmer, the then-Minister of Justice, introduced a White Paper proposing a Bill of Rights Act for New Zealand as supreme law.<sup>38</sup> Essentially, Palmer’s Bill of Rights was a reaction to the idea that “New Zealand’s system of government is in need of improvement”<sup>39</sup> because the potential for abuse of public power by the “zealous Executive” went relatively unchecked under the constitutional arrangements at the time.<sup>40</sup> Palmer’s concern was that executive power had no legal restraints, and compared this power with that of “the Stuart Kings before the revolution of the seventeenth century.”<sup>41</sup> To implement a supreme Bill of Rights would align New Zealand with its commonwealth counterparts and act as a pre-emptive strike against human rights infringements.

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<sup>33</sup> Palmer and Palmer, above n 1, at 7.

<sup>34</sup> Officials Committee on Constitutional Reform *Constitutional Reform: First and second reports released by the Minister of Justice* (1986, Wellington, Department of Justice). See also Joseph at 5.3.

<sup>35</sup> Palmer and Palmer, above n 1, at 7.

<sup>36</sup> Constitution Act 1986, ss 10-14.

<sup>37</sup> Section 15.

<sup>38</sup> Geoffrey Palmer *A Bill of Rights for New Zealand: A White Paper* [1985] I AJHR A6 at 5.

<sup>39</sup> At 5.

<sup>40</sup> At 27.

<sup>41</sup> At 27.

There were many opposing submissions to the draft Bill presented to the Justice and Law Reform Committee.<sup>42</sup> Submitters were primarily concerned about the giving unelected judges the power to strike down legislation without being democratically accountable to the public and also the Bill's proposal to entrench the Treaty of Waitangi as supreme law.<sup>43</sup> In 1988 the National party official declared its opposition to the White Paper Bill. The White Paper itself acknowledged that the adoption of such a significant constitutional measure requires cross-party consensus on the need for change and the content of the Bill.<sup>44</sup> The resulting New Zealand Bill of Rights Act 1990 (NZBORA) as recommended by the select committee is a watered-down version of Palmer's original vision – it is not supreme law<sup>45</sup> and is susceptible to amendment by the normal legislative process.

*(iii) MMP and the Electoral Act 1993*

For much the same reasons as a supreme Bill of Rights was proposed, New Zealand's First Past the Post (FPP) voting system also caused concerns about excessive executive power and representativeness. The Royal Commission on the Electoral System appointed to hold nation-wide hearings and consultation on the subject of whether New Zealand should retain its electoral system or move to an alternative system. The Royal Commission's 1986 report recommended that New Zealand should adopt a Mixed Member Proportional (MMP) system based on the West German model.<sup>46</sup> The Commission stated that representation is "the oldest of the principles in our constitutional history" but had fundamentally changed in nature due to the rise of party politics.<sup>47</sup> The New Zealand public's commitment to democracy, and the change in dynamic between "majority power and minority right"<sup>48</sup> resulted in the passing of

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<sup>42</sup> See Justice and Law Reform Committee *Inquiry into the White Paper: A Bill of Rights for New Zealand: Interim Report* [1986] AJHR I.8A.

<sup>43</sup> Clause 4.

<sup>44</sup> *A Bill of Rights for New Zealand*, above n 35, at [7.19].

<sup>45</sup> New Zealand Bill of Rights Act, s 4.

<sup>46</sup> Andrew Geddis *Electoral Law in New Zealand: Practice and Policy* (LexisNexis, Wellington, 2007) at 2.9.

<sup>47</sup> Royal Commission on the Electoral System *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (Government Printer, Wellington, 1986) at 7.

<sup>48</sup> At 8.

the Electoral Act 1993 via an indicative referendum.<sup>49</sup> Two questions were asked of the voting public: first whether they wished to retain the FPP system, and secondly if not, which of several alternative systems they would prefer.<sup>50</sup>

The most significant feature of the Electoral Act is that it is the only New Zealand piece of legislation used as a mechanism to entrench legislative provisions within the Act itself, and provisions in other legislation. Section 268(1) sets out five provisions of the Electoral Act and s 17(1) of the Constitution Act (relating to the term of Parliament) which are protected from amendment by s 268(2) which requires a 75 per cent majority in the House of Representatives or majority support in a national referendum. However, s 268 itself is not entrenched, signaling New Zealand's apprehension for permanent measures.

*(iv) Supreme Court Act 2003*

The Supreme Court Act 2003 achieved the abolition of appeals to the Privy Council and established the Supreme Court of New Zealand as the apex and final appellate court of our judicial system. The move did not appear to be a reaction to a particular constitutional event, rather a step in New Zealand's journey to independence from our colonial roots.<sup>51</sup> The proposal triggered heated debate – many considered the Law Lords to be far more talented, independent and objective than New Zealand judges could be and that the Attorney-General would play favourites in judicial appointments.<sup>52</sup> On the other hand, the supporters contended that specific New Zealand legal knowledge and experience outweighed any merit in retaining the Privy Council.

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<sup>49</sup> However, note that the Electoral Act did not reflect *all* of the Royal Commission's recommendations.

<sup>50</sup> John Parkinson "Decision-making by Referendum" in Raymond Miller (ed) *New Zealand Government and Politics* (Oxford University Press, Melbourne, 2010) 571 at 573.

<sup>51</sup> Silvia Cartwright "Our Constitutional Journey" (2006) NZ L Rev 291 at 300. See also Joseph, above n 25, at 20.5.5(1) for an account of earlier efforts to abolish appeals to the Privy Council.

<sup>52</sup> P A Joseph "Constitutional Law" [2003] NZ L Rev 387 at 400-408.

After the 2002 general election, the Labour-led government commissioned a report from a ministerial advisory group<sup>53</sup> upon which the Supreme Court Bill was based. The government also committed to a consultation effort with both Maori and pakeha in the development of the Bill, which was generally seen as unsatisfactory.<sup>54</sup> There was also much opposition to the Bill in the House,<sup>55</sup> and calls by academics and politicians that the issue should have been subject to a higher level of consensus. For example, James Allan believes that just because a change is within the *legal* powers of a democratically elected Parliament, change by a bare majority in Parliament is unconstitutional if it is not empirically true that most people in the jurisdiction support the measure.<sup>56</sup> As such, something more should be required of the government of the day, whether it be a referendum, a specific mandate in a general election, or a super-majority in the House signaling cross-party support.<sup>57</sup> This proposition was echoed by opposition from the National, Act and New Zealand First parties who were concerned that “substantial change should not be made by a bare majority vote of a coalition of minorities in Parliament”,<sup>58</sup> although this is essentially what transpired.<sup>59</sup> The move has arguably achieved its purpose, especially by increased access to justice for the increasing number of appeals.<sup>60</sup>

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<sup>53</sup> Ministerial Advisory Group (Terence Arnold QC chair) *Replacing the Privy Council – A New Supreme Court* (April 2002).

<sup>54</sup> Justice and Electoral Committee *Supreme Court Bill 2002* (September 2003) at 25.

<sup>55</sup> Richard Cornes “Appealing to History: The New Zealand Supreme Court Debate” (2004) 24 *Legal Stud* 210 at 213. Cornes says each of the five arguments (access to judicial ‘excellence’, concern for judicial activism, divergence between New Zealand and United Kingdom Law, that the Law Lords are necessary to protect the status of the Treaty of Waitangi and that the ‘modern relationship’ between NZ and the UK must be maintained) failed to appreciate inevitability of decolonization and the nature of a modern United Kingdom’s attitude towards former colonies.

<sup>56</sup> James Allan “Changing the Voting System or Creating a Brand New Highest Court – Is One More Constitutionally Fundamental than the Other in a Liberal Democracy?” (2005) 11 *Otago L Rev* 17 at 26. Allan says that if this condition is satisfied, the change would likely pass through Parliament with cross-party support as it did in Canada and Australia when appeals to the Privy Council were abolished.

<sup>57</sup> At 23.

<sup>58</sup> New Zealand Business Roundtable “Initiative on Privy Council Welcomed” (2003) *The New Zealand Initiative* <[www.nzinitiative.org.nz](http://www.nzinitiative.org.nz)>.

<sup>59</sup> Paul Rishworth “New Zealand” in Dawn Oliver and Carlo Fusaro (ed) *How Constitutions Change: A Comparative Study* (Hart Publishing Ltd, Oxford, 2011) 235 at 255.

<sup>60</sup> Margaret Wilson “Supreme Court Bill introduced to the House” (media release, 9 December 2002).



(v) *'Building the Constitution' (2000)*

The 'Building the Constitution' conference held at Parliament in 2000 was an initiative of the Institute of Policy Studies. It was New Zealand's first attempt at a wholesale constitutional dialogue, but failed to reach any general consensus on constitutional reform due to the division among participants – professional, academic, business and Maori. The conference was little more than a “well-intentioned dialogue.”<sup>61</sup>

(vi) *Constitutional Arrangements Committee (2005)*

The Constitutional Arrangements Committee (CAC) was a select committee initiated by the Labour-led government to review New Zealand's existing constitutional arrangements.<sup>62</sup> Its terms of reference required the committee to identify and describe:

- New Zealand's constitutional development since 1840
- the key elements in New Zealand's constitutional structure, and the relationships between those elements;
- the sources of New Zealand's constitution;
- the process other countries have followed in undertaking a range of constitutional reforms; and
- the processes which it would be appropriate for New Zealand to follow if significant constitutional reforms were considered in the future.<sup>63</sup>

The CAC consisted of members from Labour, the Greens, Act and United Future, with the National Party and New Zealand First choosing not to be represented during the process.

The committee's report contained three modest recommendations. The first set out four generic principles that should underpin future constitutional change in the absence of any prescribed process:

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<sup>61</sup> Joseph, *Constitutional and Administrative Law in New Zealand*, above n 25, at 5.6.3.

<sup>62</sup> Wendy McGuinness and Diane White *The State of the Constitutional Review, as at June 2012* (Working Paper 2012/01, McGuinness Institute, 2012) at 3.3.

<sup>63</sup> Constitutional Arrangements Committee, above n 11, at 6.

1. The first step must be to foster more widespread understanding of the practical implications of any change;
2. Specific effort must be made to provide accurate, neutral, and accessible public information on constitutional issues, along with non-partisan mechanisms to facilitate ongoing local and public discussion;
3. A generous amount of time should be allowed for consideration of any particular issue, to allow the community to absorb and debate the information, issue and options; and
4. There should be specific processes for facilitating discussion within Maori communities on constitutional issues.<sup>64</sup>

The second recommendation was to foster greater understanding of our constitutional arrangements in the long term, with an increased effort being made to improve civics and citizenship education in schools.<sup>65</sup> The third was that the government should consider whether an independent institute could foster better public understanding of, and informed debate, New Zealand's constitutional arrangements.<sup>66</sup>

The CAC stated:

“Looking at New Zealand’s constitution, we have concluded that the lack of consensus on what is wrong, and how or whether it could be improved, means that the costs and risks of attempting significant reform could outweigh those of persisting with current arrangements.”<sup>67</sup>

Ultimately the CAC determined that embarking on a fundamental constitutional discussion would run the risk of irretrievably unsettling the status quo,<sup>68</sup> and that stimulated debate may prompt division and disagreement in communities.<sup>69</sup> As such, none of the CAC’s recommendations were acted upon in any meaningful way as a direct result of their inquiry. However, their report provides some useful insight on

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<sup>64</sup> At 5.

<sup>65</sup> At 5.

<sup>66</sup> At 5.

<sup>67</sup> At 7.

<sup>68</sup> At 5.

<sup>69</sup> Harris “Towards a Written Constitution?”, above n 30, at 95.

the process of constitutional change that will be drawn upon further in this dissertation.

## **5. Conclusion**

It is demonstrably clear that unprovoked wholesale reform is not effective. New Zealand's two attempts have failed at the first hurdle to reach consensus over which issues require attention, making any form of concrete recommendations unlikely or lack credibility. 'Building the Constitution' was essentially a closed discussion between academics and prominent New Zealanders, while the CAC was comprised exclusively of MPs. In neither forum was there an effort to engage with or educate the public on the issues.

New Zealand's constitutional culture is celebrated for its common-sense approach, and is most commonly described as a "pragmatic evolution."<sup>70</sup> We tend to be responsive to specific situations and debate the merits of change and the status quo at length, which for the most part results in a considered solution that is at least tolerable for the majority citizens. We are then free to react to any residual discontent at general elections.

In conclusion, it cannot be said that New Zealand has a clear-cut process by which we effect constitutional change. However the significant constitutional events since the 1980s reveal what 'works' and what doesn't. These observations will cast light on the current review of constitutional arrangements.

### ***B. The Canadian Experience***

#### **1. The Constitution of Canada**

Like New Zealand's constitution, the Canadian constitution includes both written and unwritten elements.<sup>71</sup> In 1982 the written elements (including several Imperial statutes

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<sup>70</sup> Constitutional Arrangements Committee, above n 11, at 12.

<sup>71</sup> Tsvi Kahana "Canada" in Dawn Oliver and Carlo Fusaro (eds) *How Constitutions Change: A Comparative Study* (Hart Publishing Ltd, Oxford, 2011) 9 at 11.

from the United Kingdom) became supreme law via the Constitution Act 1982<sup>72</sup> and the phrase “Constitution of Canada” is defined in s 52(2) as follows:

“(2) The Constitution of Canada includes

- (a) the *Canada Act 1982*, including this Act;
- (b) the Acts and orders referred to in this schedule; and
- (c) any amendment to any Act or order referred to in paragraph (a) or (b).”

The Constitution of Canada is not completely codified – it also comprises the royal prerogative, the common law, and constitutional conventions.<sup>73</sup> Furthermore, the majority of the Supreme Court of Canada in *New Brunswick Broadcasting Co. v Nova Scotia* found that the definition in s 52(2) is non-exhaustive, and as such the Constitution of Canada has been held to include unwritten doctrines such as parliamentary privilege,<sup>74</sup> and the unwritten principles of democracy, federalism, constitutionalism and the protection of minorities.<sup>75</sup> The 1982 patriation also entrenched the Canadian Charter of Rights and Freedoms in Part I of the Constitution Act.

Notably, the Constitution Act also includes several amendment formulae. Most importantly the ‘general’ amendment procedure<sup>76</sup> requires the assent the federal Parliament and two-thirds of the provinces representing 50 per cent of the population for amendments relating to the federal Parliament, the Supreme Court and the powers and creation of provinces. There is also a ‘unanimity’ procedure<sup>77</sup> requiring the assent of the federal Parliament and all of the provinces for amendments relating to the office of the Queen and Governor-General, the number of seats a province is entitled to in the House of Commons and the Senate, the use of the English or French language and the composition of the Supreme Court. There are three other procedures

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<sup>72</sup> Constitution Act 1982 (Can), being Schedule B to the Canada Act 1982 (UK).

<sup>73</sup> Peter W Hogg “Patriation of the Canadian Constitution: Has It Been Achieved?” (1983) 8 Queen’s LJ 123 at 123.

<sup>74</sup> *New Brunswick Broadcasting Co. v Nova Scotia* [1993] 1 SCR 319 at 390.

<sup>75</sup> *Re Secession of Quebec* [1998] 2 SCR 217.

<sup>76</sup> Constitution Act 1982 (Can), s 38.

<sup>77</sup> Section 41.

for amendments that affect some but not all of the provinces,<sup>78</sup> the federal Parliament alone,<sup>79</sup> and each provincial legislature alone.<sup>80</sup>

## 2. Examples of constitutional reform in Canada

Since the adoption of the Constitution of Canada, the process for reforming and amending the constitution has taken on a new dimension. It is therefore necessary to analyse events both before and after the passing of the Constitution Act to fully appreciate Canada's varying approaches to constitutional reform, and to reveal how and why any particular approach has been successful or unsuccessful in Canada. The amendment procedures have given uniformity as to how the Constitution is legally amended, so the focus shifts to the stages that proposed reforms pass through leading up to the point of amendment. These stages have varied in the Canadian context and have ultimately lead to failure in most cases.

### *(i) The 'patriation' saga of 1982*

The process which culminated in the 1982 'patriation'<sup>81</sup> of Canada's constitution, and some years afterwards, provide an interesting case study of the process by which constitutional reform was achieved in Canada.

The 1982 patriation of Canada's constitution achieved a status for Canada legally independent of the United Kingdom.<sup>82</sup> Such an exercise was necessary given that the constitution up until that point was an untidy amalgam of British and Canadian statutes, principally the British North America Act 1867 (UK).<sup>83</sup> The British North America Act established Canada as a confederation and provided in the preamble that

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<sup>78</sup> Section 43.

<sup>79</sup> Section 44.

<sup>80</sup> Section 45.

<sup>81</sup> According to Hogg *Constitutional Law of Canada*, above n 9, at 3.5(a), the word 'patriation' is a Canadian invention derived from the word 'repatriate', meaning 'to restore to one's home country'. In this regard, the 'patriation' of the Constitution means bringing it home to Canada.

<sup>82</sup> Stephen A Scott "The Canadian Constitutional Amendment Process" (1982) 45 LCP 249 at 249.

<sup>83</sup> The British North America Act 1867 (UK) was renamed the Constitution Act 1867 (UK) during the patriation process.

Canada was to have “a Constitution similar in principle to that of the United Kingdom”. However, the Act contained no provision for its own amendment, thus any amendments proposed by the federal Parliament of Canada or any of its provincial legislatures required the consent of the United Kingdom Parliament.<sup>84</sup> In any case, it became a binding constitutional convention that the imperial Parliament would not enact any statute applying to a dominion unless that dominion made such a request.<sup>85</sup>

The Constitution Act 1982 was essentially the end product of a search for a domestic amendment procedure that started in 1927,<sup>86</sup> with as many as fourteen attempts undertaken before a solution was reached.<sup>87</sup> The process was prompted by the Balfour Report of 1926 which recognised the long-standing political reality that Great Britain’s six dominions<sup>88</sup> were factually independent, and provided the basis for the Statute of Westminster 1931, which eventually became the legal basis for the independence of the dominions.<sup>89</sup>

The first twelve attempts at patriation from 1927-1980 failed for a number of reasons:<sup>90</sup> the issues on the table were too complex, the level of consent required from the provinces was too high, Quebec’s demands usually meant it did not agree to any combination of amendment procedures and political opportunism played a part when both federal and governments changed hands several times during the time period. These factors lead to Prime Minister Trudeau’s decision (the thirteenth attempt) to break the stalemate by unilaterally moving towards implementation of a package of

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<sup>84</sup> Peter W Hogg “Formal Amendment of the Constitution of Canada” (1992) 55 LCP 253 at 253.

<sup>85</sup> At 253.

<sup>86</sup> Hogg *Constitutional Law of Canada*, above n 9, at 4.5(b).

<sup>87</sup> See James Ross Hurley *Amending Canada’s Constitution: History, Processes, Problems and Prospects* (Canada Communication Group, Ottawa, 1996) who identifies 14 separate occasions in which Canada attempted to resolve the ‘patriation debate.’

<sup>88</sup> Canada, Australia, South Africa, New Zealand, the Irish Free State and Newfoundland.

<sup>89</sup> Hurley, above n 87, at 24 – with the adoption of the Statute of Westminster in 1931 Canada became an independent state in all respects except that the British Parliament would retain legislative authority over the British North America Act 1867 and its amendments until the patriation issue was concluded in 1982. See also Geoffrey Marshall “Beyond the B.N.A: Amendment and Patriation” (1981) 19 *Alta L Rev* 363 at 366.

<sup>90</sup> A comprehensive explanation of the reasons for the failures is outside the scope of this paper, as each failure is unique to the period in which it was decided. However, it is widely conceded that procedural issues plagued each attempt: see Hurley, above n 87, at 64-65.

constitutional reforms which was almost universally unpopular with the provinces.<sup>91</sup> The lack of provincial consensus was appeased by the federal government's televising of parliamentary hearings,<sup>92</sup> in an attempt to gain the public's favour. The legal challenges from several provinces were eventually overcome by the landmark decision by the Supreme Court in the *Patriation Reference* case<sup>93</sup> where it was held that the consent of the proposed amendments were not required "as a matter of law" but that a "substantial degree" of provincial consent was required "as a matter of convention".<sup>94</sup> After this decision and various rounds of acrimonious negotiations,<sup>95</sup> all provinces except Quebec reached agreement on the package of reforms on 5 November 1981 reflected in the Constitution Act 1982. Although the Prime Minister made an effort to respect the Supreme Court's decision to obtain a substantial degree of consent from the provinces, this fourteenth and final attempt at patriation has been criticised as an exercise of multilateral executive federalism<sup>96</sup> worked out behind closed doors and exclusive of public input.<sup>97</sup> Furthermore, the question of Quebec's place in Canada's constitutional arrangements was left unanswered – Quebec was legally bound by the Constitution Act<sup>98</sup> but refused to recognise it domestically, leading to a sense of grievance and an effective diminution of its provincial powers.<sup>99</sup> To Quebec, the patriation of Canada's constitution was an act of alienation by the rest of Canada.

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<sup>91</sup> Christopher P Manfredi "On the Virtues of a Limited Constitutions: Why Canadians Were Right to Reject the Charlottetown Accord" in Anthony A Peacock (ed) *Rethinking the Constitution: Perspectives on Canadian Constitutional Reform, Interpretation and Theory* (Oxford University Press, Ontario, 1996) 40 at 43.

<sup>92</sup> Hurley, above n 87, at 64.

<sup>93</sup> *Re Resolution to Amend the Constitution* [1981] 1 SCR 753.

<sup>94</sup> At 826, 859 and 905.

<sup>95</sup> Manfredi, above n 91, at 43.

<sup>96</sup> Ronald L Watts "Executive Federalism: A Comparative Analysis" (research paper prepared for the Institute of Intergovernmental Relations, Queen's University, Kingston, Ontario, 1989) at 3; Watts defines 'executive federalism' as "the processes of intergovernmental negotiation that are dominated by the executives of different governments within the federal system."

<sup>97</sup> Hurley, above n 87, at 62 and 64.

<sup>98</sup> Because the Act had been adopted into law by the 'correct' constitutional procedures. The Quebec government refused to participate in any changes involved in Canada's new constitution.

<sup>99</sup> Hogg *Constitutional Law of Canada*, above n 9, at 4.1(c).

(ii) *The Meech Lake Accord of 1987*

Quebec's disenchantment was left unaddressed until a change of federal government in 1984 and Quebec in 1985<sup>100</sup> lead to renewed attempts at reconciliation. Quebec announced five conditions to be satisfied before it would 'agree' to the Constitution Act 1982. The conditions included recognition of Quebec as a distinct society, greater power for the province in immigration matters, a stake in selecting Quebec justices for the Supreme Court, the ability to opt out (with compensation) of federal spending programs in areas of provincial jurisdiction, and recovery of the veto power of constitutional amendment that Quebec had traditionally possessed.<sup>101</sup> Because of the Constitution Act and its amendment procedures, each remaining province would have to agree to any amendment to the Act demanded by Quebec.<sup>102</sup> The Meech Lake Accord of 1987 was the product of closed-door negotiations between the First Ministers of each province and the federal government – but the involvement of the provinces was essentially a 'smokescreen' for the federal government to achieve the reconciliation of Quebec with the rest of Canada, while the remaining provinces' demands were held back despite having to consent to Quebec's ultimatum.<sup>103</sup> Tupper considers that the federal government sought to resolve the question of Quebec with opposition parties quickly, and that this interparty consensus robbed the process of a compelling and probing Parliamentary debate into the rationale and substance of the proposed reforms.<sup>104</sup> The political goals of Meech Lake were perhaps too important to survive a rigorous democratic process, but would achieve a 'clear deck' for crucial discussions about how future constitutional negotiations would be conducted once Quebec was on an equal footing with the other provinces.<sup>105</sup> However, Tupper notes that at no point did governments (either federal or provincial) declare that the passage of Meech Lake was an undertaking of such importance that the normal process of

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<sup>100</sup> The controversial Prime Minister Trudeau was replaced by Brian Mulroney in the 1984 federal election, while a new Premier of Quebec was elected in 1985.

<sup>101</sup> Hogg *Constitutional Law of Canada*, above n 9, at 4.1(c).

<sup>102</sup> Constitution Act 1982 (Can), s 41.

<sup>103</sup> Alan C Cairns "Citizens and Their Charter: Democratizing the Process of Constitutional Reform" in Michael D Behiels (ed) *The Meech Lake Primer: Conflicting Views of the 1987 Constitutional Accord* (University of Ottawa Press, Canada, 1989) 109 at 112.

<sup>104</sup> Allan Tupper "Meech Lake and Democratic Politics: Some Observations" (1991) 2 *Constitution Forum* 26 at 28.

<sup>105</sup> At 28.



democratic politics must be sacrificed and that “a strong dose of unfettered elite negotiations” was essential if national unity was to be established and maintained.<sup>106</sup>

The Accord suffered from what Cairns has dubbed the ‘Meech Lake Syndrome’ whereby Canada was redefined by the federal government and the public process of examination and approval by the provincial legislatures was fragmented into eleven different and discrete legislatures.<sup>107</sup> In fact, five provinces ratified the Accord without holding public hearings.<sup>108</sup> Ultimately the Meech Lake Accord failed to meet the requirements of s 41 of the Constitution Act – only eight of the ten provinces ratified the Accord and it collapsed as an agreement thereafter.

*(iii) The ‘All-Canada Round’ of 1990-1992*

Apart from the lingering specter of the Meech Lake failure, the immediate catalyst for the third major round of constitutional reform proposals within a decade was the Quebec National Assembly’s resolution to hold a referendum on Quebec’s sovereignty no later than October 1992.<sup>109</sup> This spurred the government to announce an ambitious package that sought to cure the constitutional discontentment of *all* the Canadian provinces, not just Quebec exclusively.<sup>110</sup>

A vital lesson learned from Meech Lake was that the lack of public discussion before the Accord was negotiated contributed to its ultimate failure. The Charlottetown Agreement<sup>111</sup> was therefore “based on the most intensive, extensive, exhaustive and exhausting round of public negotiations on constitutional issues that has ever occurred in Canada.”<sup>112</sup> In an attempt to set a robust precedent for future constitutional reforms this was the first time that intergovernmental negotiations were preceded by extensive

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<sup>106</sup> At 28.

<sup>107</sup> Cairns, above n 103, at 113.

<sup>108</sup> Bryan Schwartz “Refashioning Meech Lake” (1989) 18 Man LJ 19 at 24.

<sup>109</sup> Constitutional Arrangements Committee, above n 11, at 94.

<sup>110</sup> Hogg *Constitutional Law of Canada*, above n 9, at 4.1(c).

<sup>111</sup> The Charlottetown Agreement was the final package of reforms put to the Canadian public and was subject to a referendum before it could be ratified.

<sup>112</sup> Ronald L Watts “Processes of Constitutional Restructuring: The Canadian Experience in Comparative Context” (working paper prepared for the Institute of Intergovernmental Relations, Queen’s University, Kingston, Ontario, January 1999) at 4.

and innovative forms of public consultation.<sup>113</sup> The federal government established the Citizens' Forum on the Future of Canada to ascertain the nature and extent of reform that the public would likely accept; the Cabinet Committee's report *Shaping Canada's Future Together* served to focus public discussion on particular issues and helped to change the political climate from one of accommodation to reconciliation; and the Report of the Joint Parliamentary Committee on a Renewed Canada (February 1992) generally represented an all-party agreement of the three national parties.<sup>114</sup>

The Constitution Act requires ratification by state legislatures, so closed-door executive negotiations were inevitable at some stage. The Ministerial Meeting on the Constitution comprised two ministers from each of the federal, provincial and territorial governments<sup>115</sup> with the purpose of preparing draft legal texts on specific constitutional aspects. The Meeting ended in a deadlock, meaning the eventual Charlottetown Agreement contained several proposals that had never been part of the original federal proposals nor had they been discussed and accepted by the public.<sup>116</sup> This compromise meant there was "a little something for everyone but hardly enough for anyone"<sup>117</sup> in the overall scheme of the reforms. It was also agreed during the Charlottetown negotiations that any agreement would be put to a nation-wide referendum to ensure the constitutional legitimacy of the reforms.<sup>118</sup> The referendum was also the preferred mechanism of public consultation because it was quick and looked less risky than a long-winded ratification process which would allow critics to analyse the Agreement in depth and attack the compromises that ultimately made any consensus possible.<sup>119</sup>

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<sup>113</sup> Constitutional Arrangements Committee, above n 11, at 95.

<sup>114</sup> At 95.

<sup>115</sup> Except Quebec, who abstained from the Meeting in an attempt to try and extract a satisfactory 'offer' from the federal government.

<sup>116</sup> Constitutional Arrangements Committee, above n 11, at 95.

<sup>117</sup> Peter H Russell "Can the Canadians Be a Sovereign People: The Question Revisited" in Stephen L Newman (ed) *Constitutional Politics in Canada and the United States* (State University of New York Press, Albany, 2004) 9 at 15.

<sup>118</sup> The provincial constitutions of British Columbia and Alberta required a referendum to be held before any constitutional amendments could be ratified; this contributed to the decision to hold a national referendum as it would be inconsistent if only two of the provinces held a referendum on the Charlottetown Agreement.

<sup>119</sup> Dominique Leydet "Compromise and Public Debate in Processes of Constitutional Reform: The Canadian Case" (2004) 43 *Social Science Information* 233 at 250.

The referendum question was posed on 26 October 1992 as a simple ‘yes’ or ‘no’ question:

*“Do you agree that the Constitution of Canada should be renewed on the basis of the Agreement reached on August 28, 1992?”<sup>120</sup>*

The referendum was rejected by 54.4 per cent of voters nationally and by six out of ten provinces, including Quebec. The referendum on sovereignty held in Quebec returned a similar result. Although the referendum was purely consultative, not legally binding, none of the legislatures chose to proceed with ratification of the Agreement. As such, Canadians were left exhausted by the ‘All of Canada Round’. Despite several minor constitutional amendments since 1992, Canadians are tired of attempting to work on their constitution and as such, large-scale reform—aside from that accomplished by the Supreme Court—remains at a standstill.<sup>121</sup>

### **3. Conclusion**

It is clear that the procedural shortcomings from both the 1982 patriation and the 1987 Meech Lake Accord informed how the All-Canada Round was undertaken. However, since that attempt once again came to no avail, the incidents can be looked at cumulatively alongside the experiences of the United Kingdom and New Zealand to inform the development of criteria for an effective process of constitutional reform.

#### *C. The United Kingdom Experience*

##### **1. The constitution of the United Kingdom**

The United Kingdom of Great Britain and Northern Ireland consists of four countries: England, Northern Ireland, Scotland and Wales. Legislative competence resides in the

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<sup>120</sup> Tim Mowrey and Allain Pelletier “Referendums in Canada: A Comparative Overview” (January 2001) Elections Canada: Electoral Insight < <http://www.elections.ca/>>.

<sup>121</sup> Kahana, above n 68, at 39.

Westminster Parliament, but there are three legal systems (England and Wales, Northern Ireland, and Scotland) with separate courts and legal professions.<sup>122</sup>

The United Kingdom is a constitutional monarchy with a bicameral Parliament composed of the House of Commons and the House of Lords. Formally, the executive power is vested in the Crown via the Sovereign, but in reality central government is carried out in the name of the Crown by ministers of state.<sup>123</sup>

The United Kingdom is unique among members of the European Union – and the rest of the world except for New Zealand and Israel – in that it does not have an entrenched written constitution. Instead, the United Kingdom’s constitution can be described as ‘unwritten’ in the sense its entire constitution is not contained in one document setting out the legal framework and functions of the organs of government and the rules by which it should operate. In the absence of such a document, the constitution of the United Kingdom is “a whole system of government with a collection of rules which establish and regulate or govern the government.”<sup>124</sup> The system is made up of ‘formal’ and ‘other’ sources of constitutional law. The ‘formal’ sources are legislation, the common law and the law and custom of Parliament (*lex et consuetudo Parliamenti*).<sup>125</sup> ‘Other’ sources of the constitution include constitutional conventions, and rules and principles such as the rule of law and the sovereignty of Parliament.<sup>126</sup>

The flexible nature of the United Kingdom’s constitution necessitates reliance on political and democratic principles rather than a rigid mechanism relying on legal rules and safeguards. This can be construed as a weakness, but for reform it has several important consequences – for example, there are no special procedures for proceeding with new constitutional arrangements, and all such acts must pass through Parliament and the normal legislative process.<sup>127</sup> Outside of a rigid process for reform,

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<sup>122</sup> Lesley Dingle and Bradley Miller “A Summary of Recent Constitutional Reform in the United Kingdom” (2005) IJLI 33 71 at 72.

<sup>123</sup> At 72.

<sup>124</sup> KC Wheare *Modern Constitutions* (2<sup>nd</sup> ed, Oxford University Press, London, 1967) at 3.

<sup>125</sup> AW Bradley and KD Ewing *Constitutional and Administrative Law* (15<sup>th</sup> ed, Pearson Education Ltd, Essex, 2011) at 12-13.

<sup>126</sup> At 19-20.

<sup>127</sup> Dingle and Miller, above n 119, at 73.

the flexibility has manifested itself as an advantage throughout British constitutional history. Jennings considered the unwritten constitution to allow a “constant process of experimentation” as institutions have been developed and modified to meet the needs of a changing civilisation.<sup>128</sup> It must also be considered that, despite the United Kingdom Parliament’s legislative supremacy, in practice both the government and Parliament are constrained by political forces.<sup>129</sup> In Griffith’s words, this “political constitution” means that the exercises of many legal powers is either legitimated or constrained by politics, its processes, its values, its conventions and the *de facto* relationships between politicians, political parties and the people.<sup>130</sup> Griffith’s political constitution operates normatively in deterring governments from abusing their powers and judges from acting politically. This adds yet another dimension to an already flexible constitution, and puts a caveat on the analysis of the United Kingdom’s process of constitutional reform: in the absence of a defined process for constitutional change, the political constitution will regulate the process of reform by compelling a prudent government to consult and justify its actions even though it is not legally required of them.<sup>131</sup>

It is therefore necessary to analyse the flexible constitution in the context of particular incidents of constitutional reform in the United Kingdom. A lack of definition as to what is meant by the term ‘constitutional’ means there is no definite line between what is constitutional law and other branches of law.<sup>132</sup> Usually, a formal entrenched document settles the matter – what is in the constitution is ‘constitutional’ and what is not in the constitution is not ‘constitutional’; but where there is no such document it is difficult to make a distinction which is not purely personal and subjective.<sup>133</sup> As such, seemingly mundane events can be accorded constitutional significance if they satisfy the wide definition of constitutional law as “that part of national law which governs the system of public administration and the relationships between the individual and

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<sup>128</sup> Jennings, above n 14, at 9.

<sup>129</sup> Dawn Oliver “The United Kingdom” in Dawn Oliver and Carlo Fusaro (eds) *How Constitutions Change: A Comparative Study* (Hart Publishing Ltd, Oxford, 2011) 329 at 332.

<sup>130</sup> See JAG Griffiths “The Political Constitution” (1979) 42 MLR 1.

<sup>131</sup> Oliver, above n 126, at 333.

<sup>132</sup> Bradley and Ewing, above n 125, at 9.

<sup>133</sup> Jennings, above n 14, at 38.

the state.”<sup>134</sup> However, for the purposes of this dissertation I will analyse incidents that almost certainly satisfy this definition.<sup>135</sup>

## 2. Examples of constitutional reform in the United Kingdom

### (i) *Election manifesto*

Firstly it is important to note that in general, major constitutional changes will normally be outlined and included in the election manifesto of the governing party.<sup>136</sup> A good example of this is the manifesto of Tony Blair’s New Labour party in 1997<sup>137</sup> which included an ambitious package of constitutional reforms including a Human Rights Act, devolution to Scotland and Wales, and freedom of information. Election manifestos should prevent any ‘shock tactics’ by the government especially where constitutional matters are concerned. This provides some certainty for voters in the United Kingdom as to the planned direction for constitutional reform in their country. The current coalition government in the United Kingdom left the status of manifestos uncertain since there was no majority party able to act upon their own manifesto. The Conservatives and the Liberal Democrats published a Coalition Agreement to set out how the coalition government expected to operate and “the basis upon which the Conservative and Liberal Democratic Parliamentary Parties will jointly maintain in office Her Majesty’s Government.”<sup>138</sup> This Agreement contained policies which had not been foreshadowed in the manifestos of the two parties, or which were in fact contrary to some of the coalition partners’ manifesto commitments.<sup>139</sup> However, compromise is clearly necessitated by the need to form a government and the negotiations and concessions involved in that process, as is the norm in New Zealand.

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<sup>134</sup> Bradley and Ewing, above n 125, at 9.

<sup>135</sup> The point of what constitutes the constitutional are considered in further depth in the New Zealand context at pages 4-8. For the purposes of the dissertation, ultimately concerned with New Zealand constitutional reform, an in-depth analysis of the question in the United Kingdom is not necessary.

<sup>136</sup> Oliver, above n 129, at 337.

<sup>137</sup> The Labour Party “New Labour Because Britain Deserves Better” (1997) <<http://www.labour-party.org.uk/>>.

<sup>138</sup> Conservative and Liberal Democratic Parties “Coalition Agreement for Stability and Reform” (May 1010) Government of the United Kingdom <[www.gov.uk](http://www.gov.uk)>.

<sup>139</sup> Oliver, above n 129, at 338.

(ii) *'Constitutional' Acts of Parliament*

Constitutional reforms will usually be changed via the normal legislative process resulting in an ordinary Act of Parliament that has no higher status in the law than any other Act.<sup>140</sup> However, are some Acts of Parliament that are regarded as having a higher constitutional significance such as the Magna Carta, the Petition of Right, the Bill of Rights, the Act of Settlement, the European Communities Act 1972, the Human Rights Act 1998 and the Constitutional Reform Act 2005. The legislative process is not itself governed by the law, but instead by parliamentary standing orders which are followed by governments as a matter of practice. Outside of these standing orders it is up to the government of the day to decide how they will proceed with a Bill. For example, the Human Rights Act 1998 was preceded by a White Paper<sup>141</sup> which set out the need for the Act and government's proposals for enforcing and protecting human rights. Governments may take the extra steps of publishing a Green Paper for consultation before the White paper stage and also a draft version of the bill for pre-legislative scrutiny by certain bodies outside of Parliament. This procedure was followed prior to the passing of the Constitutional Reform and Governance Act 2010.<sup>142</sup> In contrast, some of the most important constitutional changes in the United Kingdom in recent years were achieved by an ordinary Act of Parliament. The Constitutional Reform Act 2005 established a Supreme Court of the United Kingdom as the final appellate jurisdiction in place of the House of Lords; modified the positions of Lord Chancellor of Lord Chief Justice; and established a Judicial Appointments Commission. This Act was not preceded by Green or White Papers and has been widely criticised as "the day that the British Prime Minister tried to change the constitution by a press release"<sup>143</sup> as part of a Cabinet reshuffle. Such major constitutional reform called for full and open debate, instead the Prime Minister did not consult the Law Lords or the Lord Chancellor and did not perform his

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<sup>140</sup> Bradley and Ewing, above n 125, at 12.

<sup>141</sup> Secretary of State for the Home Department (UK) "Rights Bought Home: The Human Rights Bill" (24 October 1997) < [www.archive.official-documents.co.uk/](http://www.archive.official-documents.co.uk/)>.

<sup>142</sup> The Constitutional Reform and Governance Act 2010 made changes to the civil service, the process for ratifying treaties and Parliamentary standards.

<sup>143</sup> Lord Walker "The New Supreme Court and Other Changes in the Justice System" (2006) 6 LIM 292 at 292.

constitutional duty to inform the Queen of the measures.<sup>144</sup> The Act was nevertheless passed through Parliament, but the process by which it was introduced undoubtedly affected its constitutional legitimacy.

Another example is the Fixed-term Parliaments Act 2011 which requires that all Parliaments last for a full five-year term,<sup>145</sup> with early elections to be held before the completion of the full term if there is a motion of no confidence with no alternative government found,<sup>146</sup> or a motion for an early election is agreed to by at least two thirds of the House of Commons.<sup>147</sup> This reform package was announced as part of the Coalition's Programme for Government in May 2010 but the Bill was not preceded by a consultation period or a Green or White Paper and has been described as "extraordinarily rushed."<sup>148</sup> Hazell suggests that this Bill could have been introduced with cross-party support since the opposition parties also campaigned on a commitment to introduce fixed-term Parliaments.<sup>149</sup> This would have allowed for a more robust legislative process, and the resulting Act would command a higher level of constitutional legitimacy than it does currently (despite the Act being in force).

*(iii) The Constitution Committee of the House of Lords*<sup>150</sup>

The Constitution Committee of the House of Lords is a permanent select committee that "assesses the impact of a Public Bill and, where appropriate, publishes a report on the Bill to inform the House."<sup>151</sup> The Committee also has an investigative role to inquire into wider constitutional issues and publish reports with recommendations to the government. The Committee was formed upon recommendations from a 2000

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<sup>144</sup> William Rees-Morg "The Supreme Court: Isn't there some law against it" *The Times* (London, 4 August 2003).

<sup>145</sup> Fixed-term Parliaments Act 2011 (UK), s 1(3).

<sup>146</sup> Sections 2(3), 4.

<sup>147</sup> Section 2(1).

<sup>148</sup> Robert Hazell "Fixed Term Parliaments" (report prepared for the Constitution Unit, University College, London, August 2010) at 2.2.

<sup>149</sup> At 2.2.

<sup>150</sup> Canada has a similar Committee, the Standing Committee of Legal and Constitutional Affairs in the Senate, however the House of Lords Committee is more relevant to analyse given the unentrenched nature of the United Kingdom's constitution.

<sup>151</sup> Constitution Committee "Role of the Committee" UK Parliament <[www.parliament.uk](http://www.parliament.uk)>. A Public Bill alters the law as it applies to the general population, as opposed to a Private Bill which change the law only as it applies to specific individuals or organisations.



Royal Commission on Reform of the House of Lords to “establish and authoritative constitutional committee to act as a focus for [Parliament’s] interest in and concern for constitutional matters.”<sup>152</sup>

The Committee’s first report acknowledged the need to set some boundaries as to the scope of their work, and to examine the purpose and methodology by which they would undertake any scrutiny of legislation.<sup>153</sup> The Committee proposed what they considered as the “basic tenets” of the United Kingdom’s constitution that would provide a foundation upon which to base and guide their inquiries: sovereignty of the Crown in Parliament; the rule of law, encompassing the rights of the individual; the union state; representative government; and membership of the Commonwealth, the European Union and other international organisations.<sup>154</sup> The First Report established that the Committee would not act as a “constitutional sieve” for every constitutional matter whatsoever, but it would consider significant issues that concern a principal part of the constitutional framework and that raise important questions of principle.<sup>155</sup> It was also established in that the Committee would, in the case of Public Bills, aim to issue reports before the second reading for the bill in order to inform debate and on the principle of a proposed measure and to play a wider educational role.<sup>156</sup>

The Committee’s Fourteenth Report of 2004 addressed the controversial Constitutional Reform Bill discussed above.<sup>157</sup> The report sets out a number of minimum standards that the Committee expects from the government in its handling of Public Bills. In particular, it stated that “the government should move from deciding which bills should be published in draft each session to deciding which bills should *not* be published in draft. Where the decision is taken not to publish a bill in draft, then the reasons should appear in the Explanatory Notes to the Bill.”<sup>158</sup> Since this report, the Committee has maintained a significant interest in pre-legislative scrutiny

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<sup>152</sup> Royal Commission on Reform of the House of Lords *A House for the Future* (Cm 4534, January 2000) at 182.

<sup>153</sup> Constitution Committee of the House of Lords *Reviewing the Constitution: Terms of Reference and Method of Working* (first report, 19 July 2001, HL 11) at [14].

<sup>154</sup> At [21]-[22].

<sup>155</sup> At [22].

<sup>156</sup> At [55].

<sup>157</sup> Constitution Committee of the House of Lords *Parliament and the Legislative Process* (fourteenth report, 13 October 2004, HL 173).

<sup>158</sup> At [34].

of bills,<sup>159</sup> and has developed a body of “legisprudence”,<sup>160</sup> or normative standards, which can then be directly enforced through their bill scrutiny.

The most recent report into the United Kingdom’s general constitutional status quo<sup>161</sup> recommended that the government’s right to initiate constitutional change should be “tempered by a realization that constitutional legislation is qualitatively different from other legislation”<sup>162</sup> and as such “a clear and consistent process should apply to all significant constitutional change.”<sup>163</sup> These recommendations were based upon the following criticisms of the current practice of constitutional change: lack of constraints on the government; failure to have regard to wider constitutional arrangements; lack of consistency in the use of particular processes; rushed changes; lack of consultation; and lack of consensus.<sup>164</sup> The government’s response to this report was frank – it agreed that it is important that the process leading to constitutional change should be clear but that constitutional change is no different from any other policy.<sup>165</sup> It said all policy development, whether or not leading to legislation, should go through a process of rigorous analysis.<sup>166</sup> Its conclusion was that “the proper constitutional process is the *legislative* process – anything else which may precede or follow the enactment of the legislation may be desirable, but its absence cannot be taken as a failure to follow a proper process.”<sup>167</sup>

So, while the Committee’s reports may be influential, the government is not bound by any recommendations and retains its legislative sovereignty as the final measure of legitimacy, whether constitutional or otherwise.

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<sup>159</sup> Jack S Caird “Parliamentary Constitutional Review: Ten Years of the House of Lords Select Committee on the Constitution” (2012) 1 PL 4 at 6.

<sup>160</sup> Dawn Oliver “Improving the Scrutiny of Bills: The Case for Standards and Checklists” (2006) PL 219 at 243.

<sup>161</sup> Constitution Committee of the House of Lords *The Process of Constitutional Change* (18 July 2011, HL 177).

<sup>162</sup> At [26].

<sup>163</sup> At [115].

<sup>164</sup> At [12]-[18].

<sup>165</sup> *The Government Response to the House of Lords Constitution Committee Report ‘The Process of Constitutional Change’* (September 2011, Cm 8181) at [2].

<sup>166</sup> At [2].

<sup>167</sup> At [6].

### **3. Conclusion**

The United Kingdom experience provides a good comparison to New Zealand's process of constitutional reform due to the flexible nature of our constitutions and the absence of a formal process for change. Although Parliament's legislative supremacy is the status quo, the House of Lords Constitution Committee signifies a permanent and respected check on the government's constitutional activity – a measure which could be beneficial for New Zealand.

### **III. Lessons Learned: Formulation of Criteria for Effective Constitutional Change**

#### *A. The need for criteria – what makes constitutional reform ‘effective’?*

The comparative exercise undertaken in Part II reveals how and why constitutional reform in New Zealand, Canada and the United Kingdom has or has not been effective in the past, based on certain examples.

At this point it is important to note what is meant by saying an instance of constitutional reform is ‘effective’. I do not believe that the measure of effectiveness is based on the outcome it achieves. If this were to be the case, then the New Zealand government could by an Act of Parliament, for example, abolish the monarchy and deem New Zealand to be a republic. This would be effective constitutional reform purely by virtue of the fact that an outcome was achieved that reforms New Zealand’s constitution and constitutional arrangements.

On the other hand, according to Harris “[t]he quality and standing of a constitution is determined by the process by which it is put in place.”<sup>168</sup> Therefore, an outcome can be said to be effective if the process behind it measures up to the normative criteria for constitutional change proposed in this Part and based on and justified by the findings of the comparative analysis in Part II. In fact, there may not need to be an outcome at all – if a secure and robust process is adhered to, a legitimate conclusion may be to decide not to implement a proposal after all. This can also be said to be effective.

This claim does, however, call into question some constitutional reforms that have come about in a way that would not have met the criteria described in this Part. For example, the NZBORA 1990, the Electoral Act 1993 and the Supreme Court Act 2003 have each become ‘constitutional realities’ (in the sense they are a functioning part of New Zealand’s constitution) by a slim majority in Parliament. It is easy to extract a false sense of security from the fact that these Acts have become permanent operating parts of our constitution, but this would be to measure effectiveness based

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<sup>168</sup> Harris, “The Constitutional Future of New Zealand”, above n 14, at 283.

on the outcome achieved. According to Allan, this comes about when the concept of legality is equated with that of constitutionality.<sup>169</sup> On this assumption there can be no question that any actions done via a properly enacted statute could ever be said to be unconstitutional in New Zealand.<sup>170</sup> In his article, Allan dissects this concept and considers that the grounds for abolishing appeals to the Privy Council via the establishment of a new domestic highest court are “no less weighty” than the grounds for changing the voting system from FPP to MMP.<sup>171</sup> As such it was probably unconstitutional for the measures to be implemented by a bare majority in Parliament and nothing more, especially in the face of “fundamental dissensus”.<sup>172</sup> The same reasoning can also be applied to the adoption of the NZBORA 1990. Therefore, despite the fact that these Acts have become constitutional realities, they can be classed as constitutional reforms only in the literal sense that they changed New Zealand’s constitutional landscape. However, on the assumption that effectiveness is measured in a process-based manner, they were not effective reforms because of the process by which they were implemented as described in Part II.<sup>173</sup>

So, why are constitutional reforms adopted in accordance some normative criteria better or more effective than those that are not? The evidence from the domestic and overseas comparative exercise reveals that inconsistent and uncertain processes behind constitutional reforms produce results that are not accepted by the public, irrespective of whether they become permanent fixtures of constitutions or not. The question of *how* such measures came to be constitutional realities then becomes relevant. If constitutionalism is ultimately about “locking things in”<sup>174</sup> then changes to the constitution must be both legal *and* constitutional. It is my proposal that constitutional changes adopted in accordance with procedural criteria will achieve this level of constitutionality, and can then be said to be ‘effective’. The lack of such criteria in New Zealand means that measures affecting our constitutional arrangements can, and have been, achieved overnight without the knowledge of the

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<sup>169</sup> Allan, above n 56, at 20.

<sup>170</sup> At 20.

<sup>171</sup> At 30.

<sup>172</sup> At 26.

<sup>173</sup> I.e. these Acts were adopted on a pure party-line vote in the face of substantial disagreement both political and from the public.

<sup>174</sup> Allan, above n 56, at 30.

general public. For example, Palmer points out that s 21 of the Constitution Act 1986 (regarding the Crown financial initiative) was repealed by way of a Statutes Amendment Bill (No 4) 2005 introduced by way of a Supplementary Order Paper.<sup>175</sup>

In other words, there are better ways to create these constitutional realities that will achieve long-lasting and widely accepted changes to the constitution than those described in the comparative exercise.

While New Zealand enjoys freedom from rigid procedural restraints in the constitutional arena, this has arguably caused the detachment of New Zealanders with our constitution.<sup>176</sup> As mentioned in Part I, New Zealanders tend to neither know nor care about our constitution due to the lack of clarity as to when, how, and by whom it can be changed. According to Harris, our process of piecemeal development is in conflict with the general notion that constitutions should operate as integrated systems that provide the foundation organisational structure for a society.<sup>177</sup> This is not to say that New Zealand should not continue to develop the constitution incrementally, just that our constitution may be seen to provide the organisational structure for our society if its development satisfies the following procedural criteria.

### **1. A flexible definition of ‘constitutional’**

Thus far we have seen several definitions of what is considered to be constitutional. For example, Palmer says “a rule should be regarded as constitutional if it plays a significant role in influencing the generic exercise of public power – whether through structures, processes, rules, conventions or even culture.”<sup>178</sup> Bradley and Ewing say that something is constitutional if it “governs the system of public administration and

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<sup>175</sup> Palmer, “What is New Zealand’s constitution and who interprets it?”, above n 2, at 141. See also Hansard (10 May 2005) 625 NZPD 20386.

<sup>176</sup> Constitutional Advisory Panel *Engagement Strategy for Consideration of Constitutional Issues* (May 2012) at 6. The CAP acknowledges that there are a number of people who are not connected to groups that could provide information on the constitution, or who may not be interested in constitutional matters at all. The engagement strategy will be discussed in Part IV.

<sup>177</sup> Harris, “The Constitutional Future of New Zealand”, above n 13, at 272.

<sup>178</sup> Palmer, “What is New Zealand’s constitution and who interprets it?”, above n 2, at 137.

the relationships between the individual and the state,”<sup>179</sup> while Jennings put it simply that what is in the constitution is constitutional, and what is not in the constitution is not constitutional in nature.<sup>180</sup> On the other side of the constitutional coin, Allan claims that in jurisdictions with unwritten constitutions it is possible to say that “no actions are unconstitutional, provided they are done by passing a statute,”<sup>181</sup> as mentioned above. This claim is overly simplistic, but it does raise questions about how much deference is paid to Parliament on constitutional issues, especially by the general public whose knowledge of anything constitutional is limited at best.

While on the face of it the proposed definitions of constitutional seem satisfactory, the problem arises that there are many such rules that could be considered constitutional based on these definitions. In the New Zealand context, for example, both a change to s 90 of the Electoral Act 1993 (relating to voters’ change of address within districts) and a change to s 4 of the NZBORA 1990 (relating to the judiciary’s power to declare invalid any legislation inconsistent with the Act) would both qualify as ‘constitutional’ despite it being plain that the latter is probably more constitutional than the former. An amendment to the former would most likely be achieved via the normal legislative process with very little debate and public exposure, whereas if the NZBORA were amended in this way there would likely be public outcry (even though it is perfectly legal to do so in our current constitutional arrangements).

To alleviate these concerns, it is necessary to give different definitions to the types of rules and measures that usually would fall under the umbrella of being ‘constitutional.’ Although much depends on the how changes are presented and characterised,<sup>182</sup> in my opinion there are two sub-groups of rules that exist: those that are ‘fundamentally constitutional’ in the high-level sense that they affect the core

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<sup>179</sup> Bradley and Ewing, above n 125, at 9.

<sup>180</sup> Jennings, above n 14, at 38.

<sup>181</sup> Allan, above n 56, at 20.

<sup>182</sup> At 26. Here Allan says that there are competing ways to justify whether the changes made by the Supreme Court Act are constitutional or not: if the changes were presented in nationalistic terms then the Act did nothing more than create a domestic highest court which is uncontentious and only a slight change, whereas if the changes were presented in comparison with how Canada and Australia achieved the abolishment of appeals to the Privy Council (i.e. by replacing the Privy Council with a *pre-existing* court) then the change represents a government that creates a new highest court and appoints all the judges in it on the basis of a pure party-line vote.

operation of our constitutional arrangements, and those that are essentially ‘constitutional mechanics’ that are still constitutionally significant but relate mainly to the low-level operation of the constitution. There is no clear-cut line between these two sub-groups and what kind of changes fall into each, although a measure of common sense should be used when the government asks itself whether something is fundamental or mechanical. If there is doubt, then the government should assume a measure is fundamentally constitutional.

Separating the two types of constitutional rules in this way would have important procedural consequences for any proposed constitutional reforms. Firstly, the recognition that something fundamentally constitutional is to be changed would create the expectation that the proposal should go through a more rigorous process of analysis and debate before it is passed into law by the House and ultimately implemented. In the United Kingdom, the government has stated that the lack of definition of what is ‘constitutional’ by the Constitution Committee of the House of Lords is a “significant problem” in the Committee’s proposal to introduce a special process to deal ‘constitutional’ legislation.<sup>183</sup>

Furthermore, defining what is fundamentally constitutional as opposed to mechanically constitutional would not hinder Parliament’s legislative supremacy. Even if fundamentally constitutional measures were subject to a higher amount of scrutiny and debate than mechanical ones, Parliament would still retain the ability to veto the reform if it wasn’t supported by the a majority of Members of Parliament in the House after a bill’s third reading.

Another benefit of adopting a flexible definition of ‘constitutional’ is that the level of public engagement and debate can be tailored appropriately. Again using the example from above, a proposal to amend to the NZBORA should necessarily be followed by open public education and debate about the merits and shortfalls of such a fundamental change to our constitution. On the other hand, existing legislative tools such as the Legislative Advisory Committee and the select committee process are well-equipped to deal with mechanical amendments which are likely to be technical

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<sup>183</sup> *The Government Response to the House of Lords Constitution Committee Report ‘The Process of Constitutional Change’*, above n 162, at [2].



and, quite frankly, too boring to put to public debate. This would strike a balance between the role of elected representatives to debate, discuss and resolve technical and complex issues where the ordinary voter cannot devote their time and resources,<sup>184</sup> and the prerogative of the citizenry to be involved in deciding important constitutional issues.

Overall, a composite definition of what is considered ‘constitutional’ would lead to more enlightened reform process (where such a process is necessary) and probably a more legitimate outcome likely to be accepted by New Zealanders as a lasting constitutional decision (whether or not a measure is ultimately implemented). To echo Allan again, it would avoid the situation where we say “this course of action is within the legal powers of the democratically elected parliament and therefore for that reason alone it must be constitutionally proper.”<sup>185</sup>

## **2. Cross-party support**

This criterion begs little explanation – if something that is fundamental to our constitutional arrangements is being reformed, then any proposal to do so must receive broad cross-party support in Parliament. I hesitate to suggest a threshold, though it appears that a 75 per cent majority would be acceptable in the New Zealand context, considering this is what is required by s 268(2) of the Electoral Act to amend several singly entrenched provisions. This is not to propose a general (and arbitrary) requirement for a supermajority of 75 per cent, but to acknowledge that support more or less in the vicinity of 75 per cent would be a suitable guideline for governments to follow. In any case, the object of this criterion is to avoid constitutional changes happening by a bare majority in Parliament.

This criterion is not without a caveat, however. In the Canadian experience, the inter-governmental solidarity that should usually precede constitutional reform contributed to the failure of the Meech Lake Accord in a number of ways. Cairns considers that by muting the adversarial process in parliament, the flow of information and analysis

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<sup>184</sup> Geddis, above n 46, at 1.2.1.

<sup>185</sup> Allan, above n 56, at 21.

to the public is restricted.<sup>186</sup> In this regard, he believes that competing visions of Canada were deprived of official spokespeople in parliament and it was left to politicians to break ranks and reveal the “secretive processes and unquestioned orthodoxies.”<sup>187</sup> Electorates are unable to either reward or punish cross-party unity, so even if the party that initiated and implemented a reform proposal was defeated at the following general election, a new government would not provide a solution to the public’s discontent if it too had supported the measure.

However, given Canada’s federal system of government it is a distinct possibility that these concerns are distinct to Federal systems where there is an extra layer of government to contend with. In New Zealand, MMP has achieved proportional representation in Parliament to the end that we can confidently say that Parliament is, more or less, a good and representative reflection of the New Zealand public. In fact, by requiring the support of more than one party in Parliament, the advent of coalition and minority governments in New Zealand has seen the development of greater consensus over policy decisions, and has slowed the passage of some legislation through Parliament because of a new complex policy environment.<sup>188</sup> A recent example of this is the current government’s uncertain position as to whether it will have enough support in Parliament to pass the Government Communications Security Bureau and Related Legislation Amendment Bill 2013. It was originally criticised for not seeking to formulate legislation that would achieve cross-party support,<sup>189</sup> and has been forced to make concessions to achieve a higher consensus.<sup>190</sup>

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<sup>186</sup> Cairns, above n 103, at 111.

<sup>187</sup> At 111.

<sup>188</sup> Charles Chauvel “A Better Democracy, Thanks to MMP” in Caroline Morris, Jonathan Boston and Petra Butler (eds) *Reconstituting the Constitution* (Springer-Verlag, Berlin, 2011) 199 at 200.

<sup>189</sup> Hansard (8 May 2013) 689 NZPD 9657. For example, Winston Peters stated: “We consider that the Government should seek as wide a degree of cross-party support for this bill as possible. In short, this legislation surely has to be supported by enough of Parliament to ensure that it survives the next election, the one after that, and the one after that, if it is going to have any serious meaning in terms of the security of this country.”

<sup>190</sup> One News “Key signals GCSB bill changes” (8 July 2013) TVNZ <[www.tvnz.co.nz/politics-news/](http://www.tvnz.co.nz/politics-news/)>.

Therefore, cross-party support is a necessary prerequisite for fundamental constitutional reforms. Mechanical and technical constitutional measures should receive cross-party support as well, given that they are unlikely to be controversial.

### **3. Consultation, education and participation**

It is an important consequence of any constitutional reform that both those who reformed it and those who are affected by the reform have confidence in the outcome. An important quality of the constitution to achieve this confidence is the ease with which it can be understood, accessed and, most importantly, *owned* by the society that is governed by the constitution.<sup>191</sup> This confidence can be achieved by facilitating public consultation, education and participation in proposed constitutional reforms.

The most appropriate example driving the formulation of this criterion is the Meech Lake Accord in Canada where closed-door negotiations altered the subject matter of the Accord dramatically beyond what the public had expected based on public consultation. These opaque negotiations were a major contributing factor towards the rejection of the reform package at the subsequent referendum. The negotiations which lead to the adoption of the Constitution Act 1982 were also secretive. However, in Canada these acts of unilateral executive action are constrained by the very legislation they produced – the Constitution Act’s amendment procedures require various levels of consent both federally and provincially, meaning that any constitutional reforms require efforts to build consensus in a quorum of provinces. Despite the Constitution Act, it simply cannot be envisaged that closed-door negotiations would be removed from the constitutional reform process in Canada.<sup>192</sup>

Although New Zealand does not have an amendment process like Canada, the same can be said of executive actions here too. It simply must be recognised that the process of constitutional reform is necessarily a mixture of broad public debates and restricted governmental talks and negotiations.<sup>193</sup> It is a matter of achieving the correct balance.

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<sup>191</sup> Harris, “The Constitutional Future of New Zealand”, above n 13, at 282.

<sup>192</sup> Leydet, above n 119, at 234.

<sup>193</sup> Leydet, above n 119, at 235.

Oliver considers that consultation and education are “informal soft law rules and expectations about the pre-parliamentary process” that should be followed before a measure reaches Parliament as bill or a draft bill.<sup>194</sup> In the United Kingdom this is sometimes achieved by a Green or White Paper, but not in every case. It has become an expectation in the United Kingdom as to how particularly important constitutional legislation should be processed. A consultation process alone will not suffice to legitimate a constitutional measure;<sup>195</sup> executive negotiations and a continuing dialogue with the public must accompany it. In this way, whatever outcome is reached, whether it is ultimately implemented or not, both the government and the public can be confident that the process has produced a measure that reflects what each party is happy, or at least not intolerably unhappy with. Of course, it is difficult to reach an outcome that commands the confidence of every group in society, but being able to air opinions, alternatives and compromises *during* the reform process (as opposed to after) is, or at least should be, a hallmark of democratic engagement. If this criterion is adhered to then it is likely that the expectation of consultation will become a matter of convention in the constitutional reform process.

Any consultation process must also be thorough. It is not enough for a government to consult with a select few people and claim that they have satisfied the consultation criterion. In other words, even if the content of a reform proposal is complex, it must be presented to the public in a plain and comprehensible manner. This can be achieved in a number of ways: media advertisements; public lectures and debates; social media; or discussions on national radio or news stations. A prerequisite of this approach is that constitutional issues should be dealt with one at a time as they arise in order for the consultation process to be truly educational and participatory. After all, a government cannot claim to have consulted with a general public that is either oblivious to the issues raised by a proposed reform, or one that is so overwhelmed with constitutional reform proposals that it is unrealistic to expect anyone form an informed opinion on each issue. Examples of the latter are evident in both Canada and New Zealand.

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<sup>194</sup> Oliver, “United Kingdom”, above n 126, at 340.

<sup>195</sup> At 340.

Having said that (and without wanting to delve too far into the question of subject matter), the subject matter of proposed reforms should not be underestimated as a determinant in the outcome. When questions of national identity are raised, discourse becomes too emotionally charged to be able to reach a compromise.<sup>196</sup> This is the problem of ‘mega constitutional politics.’ Politics become ‘mega constitutional’ when it moves beyond questioning the merits or otherwise of specific constitutional proposals and addresses the very nature and principles of the political community on which the constitution is based – in other words, mega constitutional politics is emotional and intense.<sup>197</sup> When mega constitutional politics are at play it is hard to reach a solution. On the other hand, the example of Canada’s segregation of the ‘Quebec issue’ at Meech Lake isolated the rest of Canada, causing each province to go into the All-Canada Round with a specific agenda to get the best deal possible rather than focusing on a united vision for Canada. It is not difficult to foresee a similar situation materialising in New Zealand over the position of the Treaty of Waitangi. Therefore, when reforms are proposed the government must strike a balance between questions of mega constitutional politics and those that over-compensate and over-isolate a particular issue or group of people. This is not to say the government can’t ask the hard questions, just that it should be aware that a compromise is difficult to be reach.

These observations observation lend themselves towards the conclusion that an incremental, or “bits and pieces”,<sup>198</sup> approach to constitutional reform is likely to be more effective. This conclusion has experienced some success in New Zealand and the United Kingdom, as demonstrated in the comparative exercise. In Canada, the only formal constitutional amendments since 1992 have been made bilaterally between the federal government and a particular province in addressing specific issues.<sup>199</sup> In each of these countries the efforts to consult and educate can be improved so that effective consultation and engagement becomes a matter of practice in constitutional reform.

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<sup>196</sup> Leydet, above n 119, at 135.

<sup>197</sup> Peter H Russell “The End of Mega Constitutional Politics in Canada?” (1993) 26 Political Science and Politics 33 at 33.

<sup>198</sup> Russell, “Can the Canadians Be a Sovereign People: The Question Revisited”, above n 117, at 16-17.

<sup>199</sup> At 16.

#### 4. Approval – the question of referenda

After a government has proposed a reform to something that is fundamentally constitutional with cross-party support, has undergone and an effective consultation campaign with the public, and has balanced this consultation with necessary inter-governmental negotiations, the final Bill might look different to what was originally expected by both the government and the general public. The question then arises: should the reform measure be subject to final approval via a referendum of the general voting public, even if it has satisfied the preceding criteria?

There is much debate about whether the final step in the process of constitutional reform should be a referendum.<sup>200</sup> Referenda are a form of direct democracy, allowing those who participate to directly take part in resolving a contested issue of public policy (in this case, constitutional reform).<sup>201</sup> There are no states in the world that operate entirely on the practice of direct democracy, but many countries use direct democracy, referenda in particular, sparingly when an appropriately significant issue arises.

Arguments in favour of referenda generally echo the same message: that they are the epitome of democracy. There is evidence that a direct appeal to the voters in a referendum is now an established part of the process of constitutional reform.<sup>202</sup> In fact, only six democracies – the Netherlands, the United States, Japan, India, Israel and Germany – have never held a nationwide referendum.<sup>203</sup>

The Constitution Advisory Committee in 2005 offered a balanced summary of reasons for and against choosing a referendum as a way of deciding constitutional issues. The arguments for included:

- Using referenda to consult citizens directly on constitutional issues is beneficial because it acknowledges the fact that a nation's democracy and its constitution ultimately rest on support from the people

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<sup>200</sup> In this context I will be discussing government-initiated referenda, which are binding on the government if they receive majority support, as opposed to citizens-initiated referenda.

<sup>201</sup> Geddis, above n 46, at 1.2.3.

<sup>202</sup> Constitutional Arrangements Committee, above n 11, at 92.

<sup>203</sup> "The People's Voice" *The Economist* (US, 12 August 1999, vol 353, issue 8132) at 45.

- Referenda put the stamp of legitimacy on the important political and constitutional questions of the day
- Referenda encourage participation by citizens in the governing of their own societies, promote education and understanding about important constitutional issues, and can help build consensus
- They are an accepted, if not mandatory requirement for achieving constitutional reform.
- People are much more literate, educated, and can access much more unmediated and authoritative information than was possible previously.<sup>204</sup>

The arguments against included:

- Because referenda usually require a yes/no answer, complex and inter-related constitutional questions tend to be framed as simple, and seemingly isolated propositions
- Deciding such issues is a limitation on the role of representative government – a role that allows decision-makers to weigh conflicting priorities and negotiate compromises on behalf of the people
- Referenda cede undue power to the popular majority of the moment and can override the rights and aspirations of minority groups
- Referenda can be divisive if they lead to extreme views setting the terms of the constitutional debate or frame issues in terms of ‘winners and losers’
- Referenda campaigns can be expensive and the outcomes may be unduly determined by those that have those that have the most money to spend on advertising
- Referenda are not an effective means of achieving constitutional change. In Australia, for example, 34 out of 42 proposals to amend the constitution have been rejected by voters.<sup>205</sup>

If these pros and cons are viewed in isolation of the criteria proposed in this dissertation, my conclusion would be that each side presents equally legitimate arguments about the use of referenda and ultimately it is up to the government to decide whether or not to initiate a referendum. If they are viewed in light of the first three criteria, then my conclusion is that even if a Bill at its third reading looks

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<sup>204</sup> Constitutional Arrangements Committee, above n 11, at 92.

<sup>205</sup> At 93.

different from the original proposal, this is probably because the reform process has made it so, if that process has conformed to the first three criteria. The final Bill will not then require a referendum for it to pass into law, because it already reflects a consensus produced by a robust process in which the participants can have confidence. Therefore, the fourth criterion of approval is *prima facie* satisfied if the first three criteria are adhered to.

### ***B. Implementing the criteria***

In formulating these criteria, I am not proposing a strict formula to which the government must adhere. Instead, the government should retain the flexibility it enjoys over the constitutional reform process. The government should use these criteria as a guide to best practice, as it does with the Legislative Advisory Committee Guidelines, the Cabinet Manual and, to an extent, the Standing Orders that govern the legislative process. If the criteria are followed consistently in matters of constitutional reform then they will become an extra-legal restraint on the government's legislative power and may crystallise into a constitutional convention.

It is desirable for the criteria to become convention as opposed to being codified in legislation even though the nature, scope and subject matter of constitutional conventions can be uncertain.<sup>206</sup> This is because legislation is easily amended, whereas conventions, once formed, are recognised as forms of behavior that are regarded as obligatory.<sup>207</sup> In fact, conventions are widely regarded as more important than the laws of the constitution.<sup>208</sup> The normative characteristics of conventions align will with the goals of the criteria.

### ***C. Conclusion***

These criteria have been formulated using the lessons learned from the comparative exercise between New Zealand, Canada, and the United Kingdom. The main concern has been to use unsuccessful examples to avoid setting a bad precedent for future

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<sup>206</sup> Joseph, above n 25, at 8.2.2.

<sup>207</sup> At 8.2.1.

<sup>208</sup> At 8.2.1.



constitutional law reform. Constitutional reform should proceed in a manner that is deliberate, open and democratic.<sup>209</sup> To achieve this, governments should initially follow the criteria as a guide to best practice in order for them to develop into a constitutional convention. In Part IV, the process of the current constitutional review will be briefly described and will be evaluated against these criteria in Part V.

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<sup>209</sup> Bryan Schwartz “Fathoming Meech Lake” (1988) 17 Man LJ 1 at 5.

## IV. The Current Constitutional Review

### A. *Origins of the Review*

#### 1. 2008 General Election

As a result of the 2008 general election in New Zealand, the National Party entered into confidence and supply agreements with the Act, United Future and Maori parties to form a majority government. As part of the agreement between the National and Maori parties, a framework was proposed to establish a group charged with considering New Zealand's constitutional arrangements. It was agreed that the Deputy Prime Minister and Minister of Maori Affairs (the responsible Ministers) would jointly lead the development of a programme to inform and engage with New Zealanders on constitutional issues, in consultation with a cross-party reference group of members of Parliament<sup>210</sup> and an appointed Constitutional Advisory Panel (CAP) headed by a Maori and pakeha co-chair.<sup>211</sup> The Responsible Ministers agreed to report to the Cabinet Domestic Policy Committee at six monthly intervals, and submit a report to this Committee by the end of 2013.<sup>212</sup>

#### 2. Announcement of the review

When announcing the Consideration process in December 2010, the Deputy Prime Minister Bill English described the review as a “wide-ranging” and “considered process” aimed at seeking the views of New Zealanders to identify whether any issues warrant further consideration or action.<sup>213</sup> He added that the broad nature of the terms of reference reflect the government's open-mindedness in approaching the review, and concluded that any enduring change to New Zealand's constitutional arrangements would require a broad base of community support and agreement.<sup>214</sup> Perhaps in noting the shortfalls of the ‘Building the Constitution’ conference and the

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<sup>210</sup> Cabinet Minute “Consideration of Constitutional Issues” (6 December 2010) CAB Min (10) 44/3 at [5]-[6].

<sup>211</sup> At [15].

<sup>212</sup> At [18], [20].

<sup>213</sup> Bill English and Pita Sharples “Announcement of cross-party constitutional review” (press release, 8 December 2010)

<sup>214</sup> Above.

Constitutional Arrangements Committee, English reassured the nation that “constitutions belong to the people, not to the politicians or the experts.”<sup>215</sup> He said that the worst possible result of such a review would be a perception by the public that politicians were sitting behind closed doors “cooking up changes to our country” which the public did not ask for nor understand.

The Minister of Maori Affairs Pita Sharples confirmed that Maori specifically sought such a review because of the interest in constitutional matters among Maori people. The particular focus of the Maori party would be the Treaty of Waitangi as a basis for unity and among all peoples of New Zealand. He commented that the principles of the Treaty of Waitangi (mutual recognition, respect, co-operation and the utmost good faith) would be a good guide for those conducting the review. Sharples verified that the Maori party would be advancing the goals and aspirations of Maori, but that there were no pre-determined outcomes from either party and that even though some terms of reference were more specific than others, no issue would be excluded from the discussion.<sup>216</sup>

### ***B. The Constitutional Advisory Panel***

In April 2011 Cabinet agreed that the specific responsibilities of the Constitution Advisory Panel (CAP) would be to:<sup>217</sup>

1. develop a strategy for implementing the initial stage of the Consideration of Constitutional issues;
2. establish a forum for developing and sharing information and ideas on the constitutional topics by seeking opinion pieces and establishing a website;
3. report to the responsible Ministers with advice on the constitutional topics, including any points of broad consensus where further work is recommended;
4. provide regular updates to the responsible Ministers and the Cross-Party Reference Group of MPs throughout the consideration period.

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<sup>215</sup> Above.

<sup>216</sup> This comment was in response to several questions by the media as to why the possibility of a Republic of New Zealand was not a specific term of reference.

<sup>217</sup> Cabinet Minute “Consideration of Constitutional Issues: Constitutional Advisory Panel” (18 April 2011) CAB Min (11) 16/17 at [7].

In particular, the CAP's proposed strategy would need to "ensure that the views of all New Zealanders (individuals, groups and organisations) including those of Maori (iwi, hapu, whanau), will be sought in a manner that is reflective of the Treaty of Waitangi relationship and responsive to Maori consultation preferences."<sup>218</sup> The CAP will submit a report to the responsible Ministers by September 2013 with advice on topics where further work is required.<sup>219</sup>

### **1. The CAP itself**

In August 2011 the responsible Ministers announced the members appointed to the Constitutional Advisory Panel (CAP), a group of constitutional and other experts independent from the government charged with leading the public discussion on constitutional issues.<sup>220</sup> The group is led by the co-chairs Emeritus Professor John Burrows QC and Sir Tipene O'Regan (Ngai Tahu). The remaining panel members are:<sup>221</sup>

- Peter Chin
- Deborah Coddington
- Hon Dr. Michael Cullen
- Hon Jon Luxton
- Bernice Mene
- Dr. Leonie Pihama
- Hinurewa Poutu
- Prof Linda Tuhiwai Smith
- Peter Tennent
- Emeritus Professor Dr. Ranginui Walker

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<sup>218</sup> At [8].

<sup>219</sup> At [9].

<sup>220</sup> Bill English and Pita Sharples "Constitutional Advisory Panel named" (press release, 4 August 2011).

<sup>221</sup> "Consideration of Constitutional Issues" (2011) Ministry of Justice  
<<http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/consideration-of-constitutional-issues-1/consideration-of-constitutional-issues>>

The CAP is supported by and must report regularly to a Cross-Party Reference Group of Members of Parliament consisting of:

- Simon Bridges (National Party)
- Peter Dunne (United Future)
- Te Ururoa Flavell (Maori Party)
- Kennedy Graham (Green Party)
- Hone Harawira (Mana Party)
- David Parker (Labour Party)

New Zealand First has opted not to be part of the review and ACT is not represented.<sup>222</sup>

## **2. Terms of reference**

The Consideration of Constitutional Issues will include the following terms of reference:<sup>223</sup>

1. *Electoral matters*: size of Parliament; the length of the term of Parliament and whether or not the term should be fixed; size and number of electorates, including changing the method for calculating size; electoral integrity legislation
2. *Crown-Maori relationship matters*: Maori representation, including Maori Electoral Option, Maori electoral participation, Maori seats in Parliament and local government
3. *Other constitutional matters*: Bill of rights issues (for example, property rights, entrenchment); written constitution.

The CAP acknowledged that other issues of a constitutional nature are likely to arise during the conversation. The responsible Ministers will report to Cabinet on these

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<sup>222</sup> McGuinness and White, above n 62, at [4.5].

<sup>223</sup> Constitutional Advisory Panel *New Zealand's constitution: The conversation so far* (September 2012) at 81.

matters should there be widespread interest and the issues require further consideration.<sup>224</sup>

### 3. Engagement strategy

In May 2012 the CAP released a paper detailing the Engagement Strategy for Consideration of Constitutional Issues.<sup>225</sup> For the purposes of this dissertation it will suffice to give a brief summary of the CAP's strategy. I do not intend to assess to merits of individual components of the strategy, though it is necessary to establish the CAP's general approach. The Engagement Strategy is presented as five key sections.

1. *Principles and goals*: the CAP aims to ascertain the views of a wide range of New Zealanders and Maori groups guided by the principles of whakamaramatanga, whakawhanaungatanga, and whakamana i te tangata. The CAP plans to draw on the wide experience and expertise of its members and to “give justice the full flavor of New Zealanders’ views.”<sup>226</sup>
2. *Engagement focus*: the CAP will establish a website as its main medium for sharing information and ideas on constitutional issues, which it will update frequently with the views of New Zealanders’ throughout the engagement process. The CAP has broadly identified three main groups of people that each require different strategies for engagement: (a) people who are passionately interested; (b) people who are connected to active networks, any may or may not be interested; and (c) people who may not be connected to active networks, and may nor may not be interested.
3. *Engagement with Maori*: the CAP will ensure that iwi and Maori are key participants and that views are ascertained through a number of forums such as hui, meetings (including face-to-face meetings with senior kaumatua), social media and Maori media.
4. *Engagement phases*: there are engagement phases from March 2012 to December 2013 starting from preparing resources, building understanding of

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<sup>224</sup> At 81.

<sup>225</sup> Constitutional Advisory Panel *Engagement Strategy for Consideration of Constitutional Issues* (May 2012).

<sup>226</sup> At [7].

current constitutional arrangements, securing engagement of communities, consider information provided by New Zealanders and ultimately presenting a final report to the responsible Ministers.

5. *Communication strategies*: the CAP's communication strategies focus on four key: (i) inviting New Zealanders to engage; (ii) collection, compilation, analysis and reporting of feedback; (iii) managing the risks and (iv) budget. Overall the CAP aims to start simple and build participation and relationships, create a buzz to build conversations and make it easy to participate by removing barriers to engagement.

### ***C. The Outcome of the Process***

As comprehensive as the CAP's Engagement strategy sounds, the most important thing to note is that at the conclusion of the process (i.e. once the CAP has presented its final report to the responsible Ministers) the government is under no obligation to act on any advice given to it, even if there is overwhelming community consensus for change. The CAP, therefore, is not a decision-making body, as opposed to the Electoral Commission in 1986 which carried out a similar process but was able to make its own concrete recommendation to the government.<sup>227</sup> Its task is merely to facilitate a constitutional conversation with New Zealanders and gather information on any broad areas of agreement.

### ***D. Conclusion***

The merits and shortfalls of the procedural aspects of the current review will be can be summarised into three main points.

Firstly, there is no question that the current review was born of a political compromise between the National and Maori parties after the 2008 general election. The Maori party's agenda is to highlight and advance the position of Maori and the Treaty of Waitangi in New Zealand's current constitutional arrangements.

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<sup>227</sup> Though the recommendation wasn't acted upon until 10 years later.

Secondly, the CAP is a group appointed by the responsible Ministers but who operate independent of the government. Their role is to facilitate a nation-wide conversation about the broad terms of reference, governed by the Engagement Strategy described above. The CAP has a distinct strategy for engagement with the Maori community who are identified as having a significant stake in the outcome of the review.

Finally, the CAP's final report to the responsible Ministers is not binding on the government, and the government has committed only to responding to the report within six months.



## **V. Conclusion: the Future of Constitutional Change in New Zealand**

The intent of these concluding marks is to ask whether the current constitutional review described in Part IV is ‘up to scratch’ in terms on the criteria formulated on the basis of domestic and overseas experiences with constitutional change discussed in Part II, and proposed in Part III.

In terms of the flexible definition of what is ‘constitutional’ given in the first criterion, the CAP has presented its review as a full package of constitutional subject matter that may or may not require reforming, without any effort to concede that some of the terms of reference are undoubtedly more fundamentally constitutional than others and should be treated as such. It simply cannot be anticipated that matters such as calculating and changing the size of electorates will generate the same kind of debate, discussion and understanding as whether or not the NZBORA should be entrenched, or whether New Zealand ought to adopt a written constitution. This should not surprise the CAP, since the same error of trying to turn a ‘constitutional conversation’ into a concrete proposal to government has been made before in New Zealand at the ‘Building the Constitution’ conference in 2000.

As for the second criterion of cross-party support, it is clear that the review itself and any recommendations stemming from it do not and will not receive any kind of respectable level of support in the House of Representatives. In fact, Claudia Geiringer stated that the Maori Party’s aspirations for better recognition of the Treaty of Waitangi were undoubtedly at the heart of the process, and that the non-committal government is “simply putting its finger in the air to get the feeling of the wind.”<sup>228</sup> When the CAP presents its final report to the government, the commitment to consider it will be honoured, though the adoption of any further recommendations is highly unlikely unless it is in the government’s best interests to do so. However, with the next general election approaching in 2014 it is unlikely that the government would

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<sup>228</sup> Panel discussion with Claudia Geiringer, Director of the New Zealand Centre of Public Law (Debating the Constitution series, National Radio, 14 April 2013).

embark on any potentially divisive constitutional change in the immediate aftermath of the CAP's report.

The third criterion of consultation, education and participation, the CAP has conducted a broad, thorough and diverse campaign aimed and encouraging all New Zealanders to become involved in the 'Constitution Conversation'. However, this criterion can only be satisfied if consultation is undertaken by the government itself. Although procedurally the CAP's consultation efforts looks effective, the CAP does not and cannot speak on behalf of the government or act as its representative, therefore non-governmental consultations can only be informative to the government as opposed to decisive and authoritative on any point of constitutional change. The CAP has shown a genuine commitment to gauging popular opinion, but it can only be seen as a good start as opposed to an impetus for change. Furthermore, in similar fashion to the first criterion the CAP has confronted a largely uneducated public and asked for their opinion on a broad range of complex constitutional issues, and has expected a coherent response. Based on experience, the incremental approach to constitutional change has become accepted and conventional in New Zealand, and, in my opinion, this third criterion will only be satisfied if constitutional issues are addressed one at a time.

Overall, the short answer as to whether the current constitutional review meets the proposed criteria is a resounding 'no', but where does this leave the future of constitutional law reform in New Zealand? Harris has mentioned that "arriving at an acceptable process for constitutional change ... will not be easy",<sup>229</sup> however I question the need to arrive at a defined process at all. The Constitutional Arrangements Committee commented that New Zealand has the "rare luxury of being able to tailor its process to the nature of the issues being debated in any process of constitutional reform"<sup>230</sup>. In this regard, the government can retain its characteristic flexibility as long as it embarks on any reform process in a manner that satisfies the proposed criteria. Should the government be consistent in its approach to reform, the criteria will crystallise into constitutional conventions that will become hallmarks of democratic engagement. The criteria are not drastic proposals that require a complete

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<sup>229</sup> Harris, above n 13, at 271.

<sup>230</sup> Constitutional Arrangements Committee, above n 11, at 161.

upheaval of the status quo. In fact, they are minor behavioural adjustments formulated from what has and has not been successful constitutional reforms in New Zealand and overseas.

So, the future of constitutional change in New Zealand remains as it is now – in the hands of the government, the democratically elected body representing the popular opinion of New Zealanders. On its face, this conclusion is another example of the ‘if it ain’t broke don’t fix it attitude’ that lies at the heart of New Zealand constitutional culture, though it should not be mistaken as complacency. Instead, the conclusion is that the government, New Zealand and our constitution will achieve successful reform if it is approached with the idea that a little goes a long way.

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