



---

**Inquiry to  
existing co  
arrangements**

**As at date of publication  
Nov 2012 (Archive)**

Report of the Constitutional Arrangements  
Committee

---

Forty-seventh Parliament  
(Hon Peter Dunne, Chairperson)  
August 2005

---

*Presented to the House of Representatives*

**Contents**

Recommendation to the House of Representatives	5
Recommendations to the Government	5
Terms of reference	6
<b>1 Overview comments</b>	<b>7</b>
The importance of social acceptance to constitutional stability	7
What is constitutional?	7
New Zealand's constitution is not in crisis	7
The need for public understanding of current arrangements a prerequisite to any discussion of constitutional change	8
The need for systematic attention to constitutional issues	9
<b>2 Term of reference 1: New Zealand's constitutional development since 1840</b>	<b>11</b>
Describing New Zealand's constitutional history	11
Pragmatic evolution: the New Zealand approach to constitutional development	12
Keeping an eye on the constitution: a new select committee?	12
Summary	14
Recommendation	14
<b>3 Term of reference 2: The key elements in New Zealand's constitutional structure and the relationship between those elements</b>	<b>15</b>
Developing a list of constitutional issues	15
Prioritising the issues	15
A cautionary note: the pros and cons of beginning discussions on change	17
Conclusion	18
<b>4 Term of reference 3: The sources of New Zealand's constitution</b>	<b>19</b>
<b>5 Term of reference 4: The processes other countries have followed in undertaking a range of constitutional reforms</b>	<b>20</b>
<b>6 Term of reference 5: The processes which it would be appropriate for New Zealand to follow if significant constitutional reforms were considered in the future</b>	<b>21</b>
Past practice in New Zealand	21
International comparisons	22
The Treaty of Waitangi	23
What did people say to us about process?	23
Conclusion on process	24

Recommendation on process	25
A new Constitution Institute to foster public understanding?	26
Recommendations on fostering public understanding	26

## Appendices

A	Committee approach to the inquiry	28
B	New Zealand's Constitutional Milestones since 1835	30
C	The processes other countries have followed in undertaking a range of constitutional reforms	82
D	Individuals and groups who contributed	120
E	Summary of submissions	122
F	Parliamentary sovereignty	146
G	Menu of possible constitutional issues	153
H	Possible options for processes for constitutional change in New Zealand	157
I	Bibliography	167



## **Inquiry to review New Zealand's existing constitutional arrangements**

### **Recommendation to the House of Representatives**

We recommend to the House of Representatives that it considers developing its capacity, through the select committee system, to ensure that changes with constitutional implications be specifically identified and dealt with as they arise in the course of Parliament's work, as outlined in Chapter 2 of this report.

### **Recommendations to the Government**

We make the following recommendations to the Government.

- 1 Some generic principles should underpin all discussions of constitutional change in the absence of any prescribed process.
  - (a) The first step must be to foster more widespread understanding of the practical implications of New Zealand's current constitutional arrangements and the implications of any change.
  - (b) Specific effort must be made to provide accurate, neutral, and accessible public information on constitutional issues, along with non-partisan mechanisms to facilitate ongoing local and public discussion. (By majority\*)
  - (c) A generous amount of time should be allowed for consideration of any particular issue, to allow the community to absorb and debate the information, issues and options.
  - (d) There should be specific processes for facilitating discussion within Māori communities on constitutional issues. (By majority\*)
- 2 To foster greater understanding of our constitutional arrangements in the long term, increased effort should be made to improve civics and citizenship education in schools to provide young people with the knowledge needed to become responsible and engaged citizens.
- 3 The Government might consider whether an independent institute could foster better public understanding of, and informed debate on, New Zealand's constitutional arrangements, as proposed in this report. (By majority\*)

---

\* The ACT New Zealand member dissents from public education proposals he considers susceptible to partisan promotion, as explained in the report.



## Terms of reference

On Tuesday 14 December 2004 the House of Representatives

*Resolved*, That a committee be established to undertake a review of New Zealand's existing constitutional arrangements by identifying and describing—

- 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;

the committee to consist of seven members to be nominated to the Speaker as follows: New Zealand Labour 4, Green Party 1, ACT New Zealand 1, and United Future 1.

## 1 Overview comments

1 A constitution governs the exercise of public power. It sets out the rules under which the various branches of government operate. It affects, and is affected by, our economy, society, and culture. We consider that the nature and operation of New Zealand's constitution should be of interest to all those who are interested in the exercise of public power in New Zealand.

### **The importance of social acceptance to constitutional stability**

2 A key lesson that we have taken from our consideration of New Zealand's constitution, and of overseas examples and reform processes, is that the enforcement and stability of a constitution depends on the extent to which it is accepted and supported by all branches of government and, most importantly, by the various groupings within that society. This is so whatever the form of a constitution. It does not matter whether the country has a formal document called "The Constitution" (known as a "written" constitution, as in the United States and Australia) or whether the country's constitutional rules are contained in a mixture of statutes, court decisions and practices (known as an "unwritten" constitution, as in New Zealand and the United Kingdom). The most elegant written constitution will not endure if there is no "buy-in" by the society it regulates. Conversely, the untidiest unwritten constitution will operate effectively if the people and those holding formal offices share its norms and values.

### **What is constitutional?**

3 A constitution can also embed some of the core values of a society in the machinery of government. In Belgium, for example, the constitution protects the right of choice of education, including moral or religious education, with public funding. And in Fiji, the laws governing the status of tribal land are given special protection in the constitution, as is the recognition of customary law and customary rights. The effect of giving constitutional protection to such matters is to put them out of reach of ordinary political debate and contest. Therefore, substantive values should not receive constitutional protection without broad and enduring social agreement.

4 In New Zealand, in the absence of a written and entrenched constitution, there is room for much debate whether key values or policy settings are so embedded that they have become "constitutional" in this way.

### **New Zealand's constitution is not in crisis**

5 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. We suspect that this is the conclusion most societies reach about such fundamental issues in "normal" times.



6 Although there are problems with the way our constitution operates at present, none are so apparent or urgent that they compel change now or attract the consensus required for significant reform. We think that public dissatisfaction with our current arrangements is generally more chronic than acute.

7 The view that “it isn’t broke” was put forward by a number of submitters, including Lord Cooke of Thorndon, who wrote:

In any democracy there will be from time to time some grey areas of overlapping or competing powers. And wherever rights or interests are not implemented, protected or furthered, some citizens or interest groups will feel frustrated, be they a majority or a minority. Frustration is part of the price to be paid for having democracy rather than totalitarianism. Given acknowledgement that checks and balances are always necessary to rule out absolute power, it would seem that by and large the present New Zealand constitutional arrangements work reasonably well. On a comparison with those of other countries for which I have served judicially ... I see nothing disadvantageous to New Zealand in these respects. (Submission from Lord Cooke of Thorndon, p. 6.)

8 This view was not universally shared. Some Māori submitters, in particular, thought change was necessary, and necessary now. For example, the Treaty Tribes Coalition maintained “that the greatest shortcoming of New Zealand’s current constitutional arrangements is their failure to fully recognise the fundamental significance of the Treaty of Waitangi”. It recommended “that the review should consider, as a key issue, *how*—not *whether*—the guarantees enshrined in the Treaty can be given greater legal and constitutional protection” (submission from Treaty Tribes Coalition, paras 3.1, 6.1.1). And Te Rūnanga o Ngāi Tahu wrote:

Constitutional reform is needed to answer the clarion call from both Māori and non-Māori to settle the Treaty in the constitutional order, and to ensure that the constitution provides for a structure and functioning of government in which all New Zealanders have confidence. (Submission from Te Rūnanga o Ngāi Tahu, p. 4.)

9 There are undoubtedly various topical questions to be debated and many suggestions on large and small ways in which our constitutional arrangements might be amended. But there is nothing to suggest that a constitutional crisis is just around the corner.

10 Moreover, we note that the process of embarking on a discussion of possible constitutional change may itself irretrievably unsettle the status quo without any widely agreed resolution being achievable. This point was also made by a number of submitters.

### **The need for public understanding of current arrangements a prerequisite to any discussion of constitutional change**

11 We appreciated the expression, by the Chief Justice and other judges we met with, of support for our committee’s role in the examination of New Zealand’s constitutional arrangements through this inquiry. Yet they, like us, are acutely aware of the need for public understanding and discussion of constitutional issues and wide public participation in the process of any constitutional change. We agree with one of our most eminent historians, J C Beaglehole, who wrote more than fifty years ago that the constitution should not be “some silk-wrapped mystery, laid in an Ark of the Covenant round which alone the



sleepless priests of the Crown Law Office tread with superstitious awe". (*New Zealand and the Statute of Westminster*, Wellington, Victoria University College, 1944, p. 50.)

12 We are also mindful of significant ongoing discussion within Māoridom on constitutional matters. The demand for constitutional change to give effect to the Treaty of Waitangi has been persistent and from a variety of sources, as reflected in the constitutional milestones document in Appendix B. It was most recently given expression in submissions to the House of Representatives on the Supreme Court Bill and the Foreshore and Seabed Bill.

13 We are therefore of the view that a valuable next step would be to consider establishing processes to enable wider public understanding of New Zealand's constitution. This is important, even if no specific changes are contemplated. All New Zealanders need to be able to access information that will enable them to understand the basis on which government operates, and the way in which public power is organised. We wish to add our voice to the many calls for improved civics and citizenship education in schools to provide young people with the knowledge needed to become responsible and engaged citizens.

14 Some areas are more topical or potentially controversial than others. While this report identifies these areas of controversy, we emphasise that we are not recommending for or against any particular change. Rather, we have worked within our terms of reference to create a picture of New Zealand's current constitutional arrangements, how our arrangements developed, and how New Zealand might approach changes in the future should such change be desired. It has been a scene-setting or stocktaking exercise, designed to provide a platform of information and the beginnings of a roadmap, if New Zealand does want to pursue these questions.

15 It was not our task to form a view on the merits of particular constitutional changes. The issues are not clear-cut. We see little merit in debate in isolation by experts commissioned to come up with a grand overall design. Constitutional issues are subtle and interlinked, and New Zealand's strong tradition has been to deal with them piece by piece, through a process of pragmatic evolution over time.

### **The need for systematic attention to constitutional issues**

16 We have concluded that New Zealand may be better served if it developed its capacity for paying systematic attention to constitutional issues as they arise. There is a risk at present that individual changes are sometimes made without sufficient appreciation, by Parliament and the public, that they have constitutional ramifications. We can do no better than to endorse the much-quoted words of the late Professor Quentin-Baxter:

A constitution is a human habitation. Like a city, it may preserve its life and beauty through centuries of change. It may, on the other hand, become either a glorious ruin from which life has departed, or a dilapidated slum that no longer knows the great tradition of its builders. Constitutions, like ancient buildings, need the care and protection of an Historic Places Trust, to draw attention to weaknesses in the fabric, and to suggest how present needs can be met without sacrificing the inspiration of the past. They also need an enlightened and interested general public, with a strong collective feeling about the difference between a folly and a landmark of enduring

significance. ("The Governor-General's constitutional discretions: an Essay towards a Redefinition" (1980) 10 *Victoria University of Wellington Law Review* p. 290.)

17 We have developed three recommendations for consideration to address this need. The first is a select committee to give specific consideration to constitutional issues as they arise in the course of Parliament's regular activity, which is discussed in Chapter 2. The second relates to fostering public understanding of New Zealand's constitution. The third, discussed in Chapter 6, is to suggest that consideration be given to improving civics and citizenship education in schools.

18 We have also developed a recommendation on the generic principles that we believe should underpin all discussion of constitutional change. The discussion leading to our view and the recommendation is in Chapter 6.



## 2 Term of reference 1: New Zealand's constitutional development since 1840

### Describing New Zealand's constitutional history

19 The first term of reference instructed us to describe New Zealand's constitutional development since 1840. As a first step we had a draft document prepared outlining what could be considered the "milestones" of New Zealand's constitutional development since 1835.

20 Compiling this description proved to be challenging. The primary difficulty was deciding what was and was not a significant event in New Zealand's *constitutional* development. There were many events that were clearly socially and politically significant and undoubtedly had had a major impact on the evolution of the role of the state in New Zealand. But were these events constitutional?

21 In the context of a constitutional framework made up of written and unwritten sources this is an especially difficult question. The assertion and exercise of power and authority by and within Māori society, for example, could be viewed as a constitutional issue although it is an aspect often omitted in "orthodox" accounts.

22 Views differed within the committee, and our expectation was that the debates we were having would be mirrored in any wider public discussion on the topic. We therefore adopted a relatively inclusive approach to compiling our timeline, and published the paper on our website as a draft with further comment invited. The milestones paper, amended to reflect the comments received, is Appendix B of this report.

23 Settled views of comparatively recent history are rare, amongst either academics or the public. Our history is actively debated, like that of most countries, as a source of lessons and authority for contested views. There is potential to add depth, colour and contrast to existing views of history, as historians delve into detail and search for differing perspectives and personal experiences, and citizens seek to interpret that work influenced by their own world view. For example, the Waitangi Tribunal documents parts of our history that have not been accessibly recorded until now. Similarly, it is only in recent years that detailed histories have been produced describing the lives of the early Chinese settlers in New Zealand. There are many more examples.

24 Attempting to achieve some sort of consensus on the key events that have formed our current constitution is not warranted. It would likely be temporary, and it is unlikely to be considered authoritative in any event. Even an extensive and organised consultation process, not just amongst the academic elite, but also amongst those who possess the living memory or oral traditions of this history, and other interested members of the public, would be unlikely to achieve consensus. The ACT New Zealand member of the committee believes that there is an argument that New Zealand is already too engrossed in its past for its own good.



25 In our view, the settling of a description of our constitutional development, and the sifting out of “constitutional” matters (as we have considered them in this report) from major social and political events, will not cease until they become too remote to be relevant to current arguments.

### **Pragmatic evolution: the New Zealand approach to constitutional development**

26 Although the characterisation of New Zealand’s constitutional history did not come easily to us, we rapidly agreed on the characteristic qualities of New Zealand’s approach to constitutional change throughout its modern history. We adopted the tag of “pragmatic evolution”. By this we mean New Zealanders’ instinct to fix things when they need fixing, when they can fix them, without necessarily relating them to any grand philosophical scheme. Occasionally, there will be a push to reform a more fundamental or comprehensive part of our constitutional arrangements—the move to MMP is one such example. But in general, New Zealand’s approach to constitutional change has been cautious. Some submitters see this approach as reflecting a history of colonialism and having the effect of constraining the indigenous people within a colonially based framework. Other submitters simply see the approach as pragmatic.

### **Keeping an eye on the constitution: a new select committee?**

27 Sometimes, however, this traditional approach of fixing things as and when they arise means that we inadvertently alter some part of the “big picture”. Minor repairs here and there may alter the overall balance between the branches of government in a way that is not necessarily foreseen or intended. We are concerned that this has happened recently. Committee members offer different examples. Among them are

- the conferring of powers of general competence on local government
- the postulation of “principles of the Treaty of Waitangi” in legislation and the judges’ role in elucidating them in the course of interpreting the phrase in the context of the particular statute
- the question whether state education is required to be secular.

28 We believe that Parliament may be better served in the future if it had specific systems in place to ensure that changes with constitutional implications receive active attention as they arise in the course of Parliament’s work. We note that the House of Lords has established a standing committee to address constitutional issues.

29 We suggest that it may be worth considering the introduction of a specific system to draw Parliament’s attention to constitutional issues. We offer some suggestions as to how that might be achieved, but can see that the options have both advantages and disadvantages. We considered recommending that the House of Representatives gives consideration to the creation of a select committee that would meet as necessary to examine constitutional issues.

30 It might be desirable for this committee to follow the model of the Regulations Review Committee, and carry out its work in a non-partisan fashion. The aim is to enable constitutional issues to be isolated from the day-to-day politics of the context in which they arise. In particular, the new committee could adopt a convention that it is chaired by an



Opposition member of Parliament, and consideration could be given to providing for all parties in Parliament to be represented, in addition to the usual allocation of select committee places to political parties. Such a move would emphasise the non-partisan, watchdog role that the committee would perform.

31 Consideration can be given to whether the function of a constitutional watchdog could be grafted onto the existing work of the Regulations Review Committee. We are not sure if this is the best approach, primarily because we see a risk in tampering with a committee that is already working well.

32 An alternative option for creating this committee, which would not increase the overall numbers of select committees, could be to combine the current Law and Order Committee with the justice part of the Justice and Electoral Committee (thereby creating a single committee to consider justice, law, and order matters) and establishing a new non-partisan committee to consider constitutional and electoral matters.

33 Another alternative might be to look for a non-structural way of ensuring that the attention of the House is drawn to constitutional issues. In this regard, we considered the work of the Legislation Advisory Committee, which for many years has provided careful and valuable advice to select committees on public law issues raised by proposed legislation. The Legislation Advisory Committee's terms of reference already include the following functions:

- to scrutinise and make submissions to the appropriate body or person on aspects of bills introduced into Parliament that affect public law or raise public law issues
- to help improve the quality of law-making by attempting to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform with the Legislation Advisory Committee Guidelines, and discouraging the promotion of unnecessary legislation
- to monitor the content of new legislation for compliance with the Official Information Act 1982 and the purposes and principles of that Act.

34 It would be possible for the Government to amend these functions to give greater prominence to the need for submissions on the constitutional implications of individual reforms. However, as an advisory committee established by Cabinet, the Legislation Advisory Committee is ultimately a creature of executive government. Further, it would still be making submissions to a general select committee operating on party lines. It would not guarantee that the House took the time it needed to consider the points made, however learned the submission itself might be.

35 However such a committee is established, it should have, as a primary responsibility, the role of Parliament's constitutional watchdog. We would hope that bodies such as the Legislation Advisory Committee would work with this select committee, and provide it with advice and support.

**Summary**

36 There are no urgent problems with New Zealand's constitutional arrangements. Dissatisfaction with current constitutional arrangements is chronic rather than acute and any significant constitutional change must proceed with great care.

37 However, there are constitutional issues that will need to be addressed in the future. There are also some constitutional issues, large and small, that merit more public understanding and discussion. Many arise incidentally in the course of other reforms and can be overlooked.

38 Therefore, Parliament should enhance its ability to recognise matters of constitutional significance and to deal with them in a principled way.

**Recommendation**

39 That the House of Representatives considers developing its capacity, through the select committee system, to ensure that changes with constitutional implications be specifically identified and dealt with as they arise in the course of Parliament's work, as outlined in this chapter.



### **3 Term of reference 2: The key elements in New Zealand's constitutional structure and the relationship between those elements**

#### **Developing a list of constitutional issues**

40 Having worked to describe the constitution under the first term of reference, we interpreted this term of reference as calling for an identification of issues arising from the way in which key elements of New Zealand's constitutional structure related to one another.

41 We approached this task in two ways: by calling for public submissions on this term of reference, and by asking our advisers to prepare a menu of constitutional issues that might be considered topical or "live" at present in New Zealand. We then expanded and modified that initial broad "trawl" across the issues by discussion within the committee, drawing on our own experience, and by reference to issues raised in submissions to the committee. The resulting list of issues is set out in Appendix G.

42 The menu of issues was constructed by

- focusing on topical issues
- focusing on broad issues (though specific questions were identified in order to crystallise certain significant areas)
- leaving out less significant issues, issues that are consequential on others, and issues which have been addressed by recent reforms that do not appear to have been controversial (for example Crown entity reform)
- including a broad range of issues that may be considered by politicians, commentators, and the public to be topical.
- including issues even where committee members views on their significance differed, on the grounds that such questions were better recorded even if most of us did not think them to be pressing.

#### **Prioritising the issues**

43 In prioritising the many issues identified, we have blended three strands of thinking. First, from our own discussions as we grappled with the various issues before us, it became clear to us that a core issue at the heart of New Zealand's constitution was the balance of authority between the judicial and legislative branches of government and the authority of Parliament in relation to the Treaty of Waitangi. We do not take any view on these matters; rather we simply conclude that improved public understanding of, and debate around, this set of issues should be at the heart of any future constitutional discussions.

44 Second, we noted the thrust of the many thoughtful public submissions received. The issue that attracted the most comment from submitters was the relationship of the



Treaty of Waitangi to the constitutional arrangements of modern New Zealand. Following from this were questions about the respective roles of Parliament and the judiciary, and whether it might be desirable to move to a written constitution. The question of becoming a republic also arose frequently.

45 Third, we adopted a systematic matrix to assess the list of issues before us. We rated each issue in terms of the following factors:

- the *importance* of the issue
- the *urgency* of the need to deal with the issue
- the *feasibility* of dealing with the issue
- the *risk* of unintended consequences from dealing with the issue and in particular the risk of stalling fruitlessly without a sufficiently compelling solution after having raised the public temperature.

46 Few if any of the issues required *urgent* attention. Many of them are *important* questions, but that is not the same as there being an urgent problem.

47 Additionally, many of the issues that are *important* are also the ones where the *feasibility* of tackling the questions is low: the broad questions about the fundamental structures and relationships in our constitution tend to be less tractable than the more focused and mechanistic questions. Considering the *risks* involved in opening up discussion on particular questions resulted in a similar pattern to the assessment of feasibility. The hard questions are also the most polarised: they are the questions about overarching relationships, rather than technical implementation.

48 We concluded that the important questions for New Zealand at present are those that go to the sources of political legitimacy, including the import of the Treaty of Waitangi; the basic relationship between the different branches of government, including the way in which each branch of government calls the other to account, or acts as a check on power; and those that relate to the values that are or might be considered basic to the identity of New Zealand society. The main topical issues that have those characteristics are

- the relationships between Parliament, the executive and the courts, including the question of whether any principles or rights should be considered so fundamental to our constitutional system that the courts could rely upon them to override an Act of Parliament that breached them
- the relationship between the constitution and the Treaty of Waitangi including whether it should, or how it might, form superior law
- the functions and nature of the most appropriate head of state for New Zealand including the effect of any change to the balance of power.
- the relationship between New Zealand institutions of government and international law-making bodies, including questions about the way in which the government can enter into international commitments; and whether international laws can become part of New Zealand domestic law directly, without parliamentary involvement

- whether, in the absence of deliberate decision, inevitable evolution (particularly the pressures of unplanned events or jockeying between institutions and powerful individuals) will change the constitution in ways that the people would not choose if given the choice.

49 By and large, these are issues that go to the broad construction of our constitution, and our social contract. They are not simple questions amenable to concrete and mechanistic change. Our broad conclusion therefore is that on the important issues dominating political debate at present we will initially benefit from ongoing debate and consideration, rather than from hastily developed reform proposals. They are questions about our national identity and the way in which we want power to be organised in our country. They are questions that need to be mulled over slowly and carefully by all New Zealanders.

### **A cautionary note: the pros and cons of beginning discussions on change**

50 We consider it appropriate to sound a note of caution. There is a natural tendency to want to open up reform discussions—change is always more interesting for the policy community and politicians than the status quo. But embarking on a discussion of possible constitutional change may itself unsettle the status quo and undermine established understandings of our current constitution, and there may be disagreement about whether this is a good or a bad thing. In this regard, the following comments made by Lord Cooke in his submission are worth noting.

Nevertheless, there is an arguable case on different grounds for constitutional change in two major respects. ... First, New Zealand does lag behind international standards and suffers by comparison with other developed democracies in the absence of a fully enforceable bill of human rights. As against this, it may be said that the present partially enforceable Bill of Rights works tolerably well, and that in practice human rights are not in the main in serious jeopardy. Secondly, the principles of the founding document, the Treaty of Waitangi, are not incorporated and entrenched as part of a formal constitution. Against this it may be said that in about the last quarter of a century much greater public sensitivity to the importance of the Treaty has developed and that an attempt to constitutionalise it further would create (exploitable) discord and confusion. So, in both these two major respects, the status quo may be the wiser option at the present time. (Submission from Lord Cooke of Thorndon, p. 7.)

51 The committee notes that significant constitutional changes have been made in New Zealand in the past, without a great deal of public debate. Our current arrangements in fact give considerable latitude for transforming rights and powers relatively imperceptibly. Views differ on whether this degree of latitude is a good or bad thing.

52 Pushing a constitutional agenda can raise the national temperature and generate resentment. This would be unfortunate, especially in relation to inherently intractable issues that may not yield a quick resolution. Any move towards significant constitutional change needs to be approached with great care and a genuine commitment to full and informed public debate. A “top-down” attempt to force constitutional change without debate is more likely to have an adverse effect. We believe it has happened at times, whether or not



the intent has been deliberate. It contributes to the fears of many, and it creates a risk that the courts and other agencies involved will lose legitimacy.

### **Conclusion**

53 It is important for us as a nation to think and talk about constitutional matters. But most of us consider that there is no need to develop generic processes to promote change. That is the role of political parties, movements, and pressure groups.

54 It is important to continue to work to engage people in greater discussion on constitutional issues that go to the heart of how we want our nation to function. This conclusion from our stocktake of the state of constitutional debate in New Zealand has informed our approach to what needs to happen next, as outlined in Chapter 6.

## 4 Term of reference 3: The sources of New Zealand's constitution

55 There are a few academic treatments of this topic by constitutional lawyers but not as many as might be expected. A notable feature of these treatments is that they do not pretend to be exhaustive or definitive. Some of those who made submissions provided additional and useful views.

56 The most authoritative current treatment of the sources of New Zealand's constitution is Sir Kenneth Keith's six-page introduction to a succession of versions of the *Cabinet Manual* since 1990, including the current one. It has been agreed to by Cabinets of different political persuasions. It states that New Zealand's constitution is "to be found in formal legal documents, in decisions of the courts, and in practices (some of which are described as conventions)". It identifies the Constitution Act 1986 as the principal formal statement of the Constitution and identifies that the "other major sources of the Constitution" include:

- the prerogative powers of the Queen
- other relevant New Zealand statutes
- relevant English and United Kingdom statutes
- relevant decisions of the courts
- the Treaty of Waitangi
- the conventions of the constitution.

57 Of course, not all sources of an unwritten constitution are equal. For example, New Zealand statutes can override other constitutional sources. And, in general, the Treaty of Waitangi has a legally enforceable effect only when referred to in legislation. Over time, the Treaty has had an effect on the way in which Parliament and the executive carry out their functions, particularly in terms of the overarching norms or conventions that govern processes, as well as day-to-day procedure. It is much less clear, however, what the effect has been of vague and general references to the Treaty or its principles, in legislation or elsewhere. We note that the more recent tendency of Parliament to describe the specific implications of the Treaty for a particular policy area seems preferable to the previous practice of making generic references to the principles of the Treaty in legislation.

58 It is recognised that the nature of an unwritten constitution is that it lacks precise definition. While categorising the sources of New Zealand's constitution is undoubtedly important we regard it as rather abstract. Our approach has been to focus on what we regard as the important practical milestones of our constitutional arrangements under our first term of reference.



## **5 Term of reference 4: The processes other countries have followed in undertaking a range of constitutional reforms**

59 We tackled this term of reference by having a paper prepared on overseas processes of constitutional reform. That paper was published in the committee's interim report and posted on the website. It is also included as Appendix C of this report to ensure that it remains available as a resource to those interested in the topic. The paper comments in detail on the experience of reform in Canada, Australia, the United Kingdom, Ireland and Israel, and also draws on activities in many other countries to make some general observations on the key elements of constitutional reform processes.

60 Many well-informed members of the public took the time to provide us with information and comment on constitutions elsewhere, often on the basis of considerable personal experience of those constitutions and their reform processes. The summary of submissions, Appendix E of this report, identifies those that included comment on this term of reference. The submissions are available on the committee website or can be accessed from the Parliamentary Library's information service.

61 We commend this information to all those who are interested in the topic. The key lessons we took from it were the importance of public engagement, and the difficulty of creating sufficient public engagement on constitutional issues when a society is relatively settled. Our recommendation in the next chapter to foster greater public understanding of constitutional issues is designed to respond to the difficulty of achieving public interest in constitutional matters.