

February 2013

Report 14

2058

EmpowerNZ

Drafting a constitution  
for the 21st century

MCGUINNESS INSTITUTE



**Project 2058: Report 14**

**February 2013**

## **EmpowerNZ**

Drafting a constitution  
for the 21st century

This report forms part of *Project 2058*,  
the Institute's flagship project.

<b>Report name</b>	<i>EmpowerNZ: Drafting a Constitution for the 21st Century</i>
<b>Published</b>	Copyright © McGuinness Institute Limited, February 2013 ISBN 978-1-972193-04-4 (paperback) ISBN 978-1-972193-05-1 (PDF) This document is available at <a href="http://www.mcguinnessinstitute.org">www.mcguinnessinstitute.org</a> and may be reproduced or cited provided the source is acknowledged.
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<b>About the Institute</b>	The McGuinness Institute is an independently funded non-partisan think tank. The main work programme of the Institute is <i>Project 2058</i> . The strategic aim of this project is to promote integrated long-term thinking, leadership and capacity-building so that New Zealand can effectively seek and create opportunities and explore and manage risks over the next 50 years. It is hoped that <i>Project 2058</i> will help develop dialogue among government ministers, policy analysts and members of the public about alternative strategies for the future of New Zealand.
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# Preface

Dame Dr Claudia Orange

The *EmpowerNZ* event began with a hollow glass baton which was passed on to the 50 young people assembled at Parliament. With it came a challenge: to fill it with thoughts and ideas for New Zealand's constitutional future. Two intense days later, those young participants passed that baton on to me, now filled with the *Draft Constitution*. I took the baton with excitement and a keen awareness of the huge task of helping to contribute to the national conversation at this pivotal time in our constitutional history.

Those 50 young leaders, ranging from 16 to 28 years of age, had mulled over a very broad range of constitutional matters. They were urged to be ambitious. They became fluent in terms such as 'entrenchment', and 'supreme law'. They considered the values that should be expressed, the structure and the processes, and the changing demographics of our New Zealand. The need for flexibility was acknowledged but also the need to guard against abuse of power by Parliament. The need to give certainty to the Treaty was recognised, and, finally, they reflected on the need to give legitimacy to any constitution, and how best to do that.

The participants rose to the challenge magnificently. The more the talk went on over the two days, the higher the level of sophistication. There were differences of opinion, but no tempers, no angst. They were not daunted by the wealth of writing about the constitution, nor diverted by the words of the experts with them. Instead they have bravely dared to propose new ways for the future.

*EmpowerNZ* was designed to provide a space for putting minds and energies into addressing the constitutional issues signalled by government in the Constitutional Review. What these participants came up with is more than has been asked for in the Constitutional Review – they have pointed the way forward for New Zealand.

These young leaders will be among those who engage in and lead Constitutional Review discussions. In the next decades, we will be looking to them for leadership to navigate for New Zealand in the 21st century, and indeed towards another new century. Well before then, we will enjoy a New Zealand identity that we celebrate in our cultural diversity, one that is securely expressed in our constitutional structures and processes.

But the workshop is not the end of the road. These participants are our ambassadors – our kaiwhakahaere. Each of them has committed to ten hours of voluntary work. They have taken the time to become informed about the pathways of constitutional change. Now they have a tool kit to draw from. They can encourage people to grasp the unique opportunity the Constitutional Review provides to contribute to a better future for our national family of New Zealanders.

I am pleased that Te Papa is committed to playing its part and is well set up to do so as the national marae. It can be neutral ground for these forums of national significance and can assist others in mounting discussions.

As the baton was passed to me during the finale I implored the participants to go from Parliament and let their voices be heard in the four corners of our nation! To continue to define and express a vision for our 21st-century New Zealand. Let's grasp that dream, build its foundations, take it where you will, run with it!

E hoa ma nga rangatahi:

Kia kaha, kia maia, kia Manawa nui

Be strong, be steadfast, go for it!





### Dame Dr Claudia Orange

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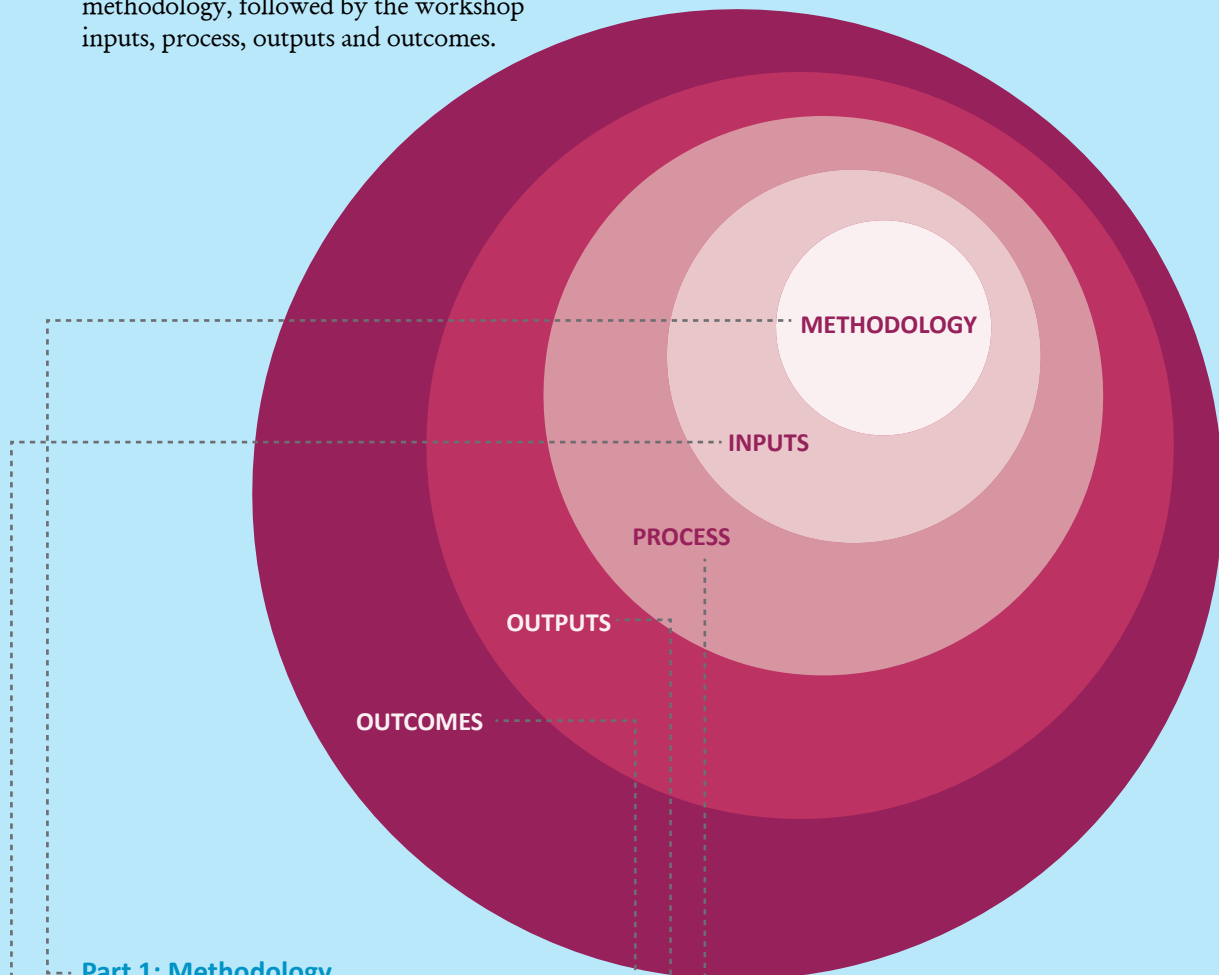
Dame Dr Claudia Orange is the Collections and Research Group Director at the Museum of New Zealand Te Papa Tongarewa, a position she took up in July 2009. Prior to this she was Te Papa's Director of History and Pacific Cultures for five years, and she was the General Editor of the multi-volume government project *Dictionary of New Zealand Biography* between 1990 and 2003. She also served as the Chief Historian at the Department of Internal Affairs between 1997 and 2000.

Dr Orange is the recipient of a number of significant honours and awards – in 1993 she was made an Officer of the OBE, and in 2009 she was awarded the DCNZM for services to historical research. She has published widely on New Zealand history, race relations, and the Treaty of Waitangi. Her first book, *The Treaty of Waitangi* (1987) (a second edition was released in 2011), won the Goodman Fielder Wattie Book of the Year Award. Dr Orange also curated the Te Papa exhibition Treaty 2 U, which tells the story of New Zealand's founding document. The exhibition toured Auckland secondary schools, twice toured New Zealand and is still exhibited.

# Part 1 | Methodology

## Overview

This report is divided into five parts: the methodology, followed by the workshop inputs, process, outputs and outcomes.



### Part 1: Methodology

The methodology section introduces the purpose and the origin of the *EmpowerNZ* workshop. It also explains the pre-workshop preparation, provides background on the participants, and an explanation of the thinking behind the workshop generally. Dean Knight, the lead facilitator, describes the method used in the workshop in Part 3 of this report.

### Part 2: Inputs

This section contains a full account of Jim McLay's keynote speech and summaries of all the other speeches over the two days. It also explains other inputs including the working dinner and the cross-party reference group panel.

### Part 3: Process

The workshop method is explained by Dean Knight, who gives an overview of the process steps, illustrating how each builds toward the goals of producing a draft constitution. This section also explains other elements created and delivered, including the use of social media and design.

### Part 4: Outputs

The Finale provided an opportunity for participants to present their *Draft Constitution* and to explain the process and thinking that had gone into it.

### Part 5: Outcomes

This section contains key reflections and concludes with the next steps.

## Introduction

Wendy McGuinness

The purpose of the workshop was to create a space for young New Zealanders to explore the nation's future constitution, to sharpen their constitutional literacy, and to inspire them to be engaged in future constitutional conversations in their communities. *EmpowerNZ* brought together 50 young people, mostly in their twenties, to work on what a constitution for the 21st century might look like. The workshop was specifically aimed at law and history students and young people engaged in youth networks.

This report records and shares the experience of the two-day *EmpowerNZ* workshop hosted by the McGuinness Institute in August 2012. It provides participants and other interested people with a resource that they can use to revisit the inputs, process, outputs and outcomes, in order to share the lessons we learnt.

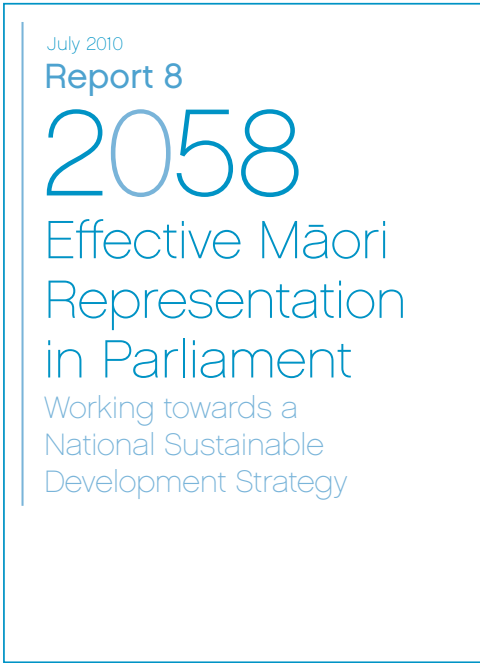
My hope for *EmpowerNZ* was that it would contribute toward a wider and deeper discussion of constitutional issues that would permeate through youth networks, universities, wider communities, and those involved with the constitutional review.

### The origin of EmpowerNZ

The Institute's first major foray into constitutional issues began with research for Report 7: *Exploring the Shared Goals of Māori: Working towards a National Sustainable Development Strategy*. Our research on Māori representation was initially intended to fit within a section of this report. However, as this work progressed, we found the terrain increasingly complex and unclear. This ultimately resulted in a further six months of work and a complete rewrite, the outcome being two major reports, Report 7 (above), and Report 8: *Effective Māori Representation in Parliament: Working towards a National Sustainable Development Strategy*. These reports formed the basis for a package of ten further background reports and working papers, which was finished in mid-2010. For the Institute this work highlighted the central importance of constitutional issues for New Zealand's future and the many ways, both subtle and overt, in which these issues can manifest themselves.



Wendy McGuinness holds the symbolic 'blank canvas' inside the *EmpowerNZ* glass baton on which participants were asked to prepare the *Draft Constitution*



Report 8, July 2010

In December 2010, Deputy Prime Minister Bill English and Māori Affairs Minister Pita Sharples announced that the government would conduct a wide-ranging review of New Zealand’s constitutional arrangements. The terms of reference range from electoral issues to the relationship between Māori and the Crown, as well as a host of other constitutional concerns such as whether New Zealand should have a written constitution. This is the first time in our nation’s history that the public have been invited to engage fully in a discussion about New Zealand’s constitutional arrangements.

In March 2011, the Institute hosted its first major event, a workshop called *StrategyNZ: Mapping Our Future*, which aimed to explore how New Zealanders might develop a strategy map for our nation. The workshop was a fusion of the Harvard Business School strategy-mapping model and foresight theory. Key themes that resonated with over 100 participants were the importance of attracting talent to New Zealand and retaining it, and the desire to move to a much more entrepreneurial, high-income society. The forthcoming constitutional review, and in particular concern over the length of the three-year electoral cycle, was a constant theme. There was also a clear appetite among the participants to develop youth forums and find ways in which they can become part of the solution, and a realisation that while we need to act nationally, we must think globally.

Youth will share in the largest part of our nation’s future and therefore must be involved in the constitutional conversations currently taking place. *EmpowerNZ* was a response to *StrategyNZ*,

combining two main themes – youth and the constitutional review. This inspired the Institute to establish *Project Constitutional Review* in May 2011. This project would have two main objectives.

- 1) The first objective would be a research-based programme to follow the progress of the Constitutional Advisory Panel, to report on or research key elements and issues, and to make a submission when the opportunity arose.
- 2) The second objective would specifically involve fostering youth engagement with the constitutional review and other civic issues. This would focus on dialogue, discussion, knowledge, and providing young people with an opportunity to share their thoughts on the issues facing New Zealand and ideally preparing a youth submission.

Shortly after this, the Institute was asked to prepare a paper to coincide with the release of the website [PostTreatySettlements.org.nz](http://PostTreatySettlements.org.nz), a collaborative project between the Institute of Policy Studies and Māori Studies (Te Kawa a Maui) at Victoria University. In response, *Think Piece 14: Constructing a House Fit for the Future* was published in June 2011.

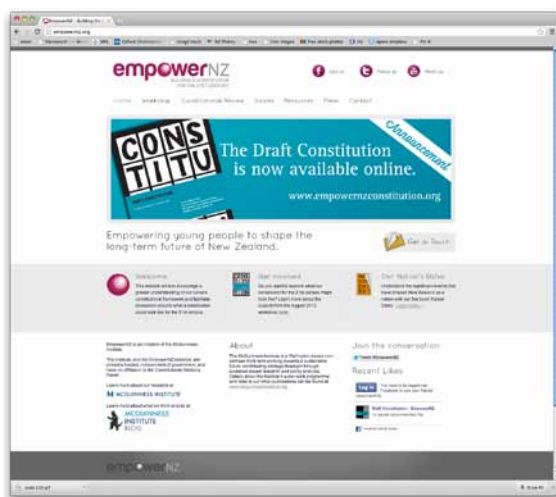
The think piece put forward two ideas: firstly that although two frameworks exist (a representational framework and a constitutional framework), they are not complementary, but instead reflective of each other – much like two sides of one coin. Taken further, this means that the *rights* of all New Zealanders can be equal within the representational framework provided the *responsibilities* to protect and support our first nation people are integrated into our constitutional framework.



Thinkpiece 14, June 2011

The second idea is about aligning the linkages between the frameworks so that they remain flexible – to allow breathing room – and robust, providing all New Zealanders with a shared vision for the future.

In November 2011, two key pieces of work for *Project Constitutional Review* were completed. The Institute published Working Paper 2011/19, *The State of the Constitutional Review*. This paper encapsulated all the information about the review that was publicly available at that point in time. It listed the members of the Constitutional Advisory Panel and the Cross-Party Review Panel, as well as outlining the boundaries and subject of the review and broader aspects such as current constitutional arrangements as described in the 2008 *Cabinet Manual*. This working paper was further updated in June 2012 in preparation for the *EmpowerNZ* workshop.



#### EmpowerNZ website, launched November 2011

The other work stream involved the launch of the website *EmpowerNZ: Building a constitution for the 21st century*. The website was launched exactly three years after the *Relationship and Confidence and Supply Agreement between the National Party and the Māori Party* agreed to establish a group to consider constitutional issues, including Māori representation (16 November 2008). The aim of the website was to create awareness and spark discussion around the current constitutional review so that all New Zealanders, and in particular those aged between 18 and 25, could engage with the Constitutional Advisory Panel in an informed and considered manner. The website would firstly be used to support the *EmpowerNZ* workshop, and then become a further public resource once the Constitutional Advisory Panel became more active.

#### Pre-workshop preparation

From the outset, this workshop was set up as an experiment; we aimed to provide a blank canvas on which participants could write their conclusions. The workshop was built on the premise that participants should be free to discuss any issues that they considered important, hence the focus of the workshop would be open-minded, outside-the-box thinking. They would be encouraged to consider what challenges New Zealand will face in the coming century, and what they will need in their constitutional toolbox to address these challenges.

The only limit on this freedom was that I wanted the participants to produce a written draft constitution within the two days and present their conclusions to an audience of interested New Zealanders. This was not to imply that a 21st-century constitution for New Zealand should necessarily be a written one. New Zealand's constitution is currently uncodified, meaning that unlike most nations that have a single written document, our constitutional arrangements are contained in several sources, both written and unwritten. Rather, this requirement was one of necessity; without a written document participants would have no way of bringing their thoughts together and then presenting them to the public.

#### The venue

I also knew that a workshop discussing the future of New Zealand's constitutional arrangements needed to be held at Parliament. This meant that the participants would be brought not only to the geographical centre of the country, but to the political, legal and constitutional heart of New Zealand. It was great to hear some of the speakers at the workshop referring to the significance of holding such conversations metres away from where core decisions are made that will affect the lives of New Zealanders now and in the future. This added the extra challenge of securing a venue at Parliament for two days, which I have learnt is no simple undertaking. This would require the full support of a Member of Parliament.

It was suggested to me that National MP Paul Goldsmith might be prepared to take on such a challenge. Paul had studied history, and published *We Won, You Lost. Eat That!*, a history of tax in New Zealand since 1840. While Paul believes the current constitutional arrangements are more than adequate for New Zealand, he was enthusiastic about our efforts to bring young people together to discuss complex issues that affect New Zealand's long-term future. Paul worked hard to secure the venue for us, and assisted us throughout our stay in Parliament.



**Wendy McGuinness with the workshop's host, Paul Goldsmith, at Parliament with the *EmpowerNZ* mural in the background**

### Seeking Wise Council

From a very early stage the workshop was developed in collaboration with the Museum of New Zealand Te Papa Tongarewa, and in particular with Dame Dr Claudia Orange, the museum's Director of Collections and Research. Dr Orange has been passionate about bringing this debate to the New Zealand public, and is well aware of the role that Te Papa could play in doing this. For me she was an invaluable source of inspiration and advice, and she was able to put me in contact with New Zealanders who were deeply involved in constitutional matters.

Professor Philip Joseph, who has written the leading text *Constitutional and Administrative Law in New Zealand* (2nd ed.) and has published widely in his field, added considerable gravitas to the workshop. Professor Joseph has provided his reflections on the workshop, which can be found in Part 5 of this report, page 75.



**Dr Claudia Orange and Professor Philip Joseph**

### Selecting the speakers

In order for the participants to prepare a considered product, it was absolutely critical to draw on the thinking and insights of New Zealanders who have reflected on constitutional issues over a long period of time.

In addition, the opportunity to have someone who has been directly challenged by our constitution, and succeeded in not only understanding the constitution but rectifying a constitutional crisis, was a wonderful way to open up the conversation. Jim McLay's insights made the practical implications of our constitution very real for the participants.



**Carwyn Jones, Jim McLay and Denis McLay**

Secondly, Peter Dunne's experience as chair of the Constitutional Arrangements Select Committee 2004–2005 was critically important, as it had given him a very clear understanding of our constitutional history and how that history has developed in terms of political implications, and further, he understood the gaps and could recommend potential solutions.

We also felt it was important to engage the very people who will be writing the report on the constitutional review. To this end, we were very fortunate to have both the co-chairs of the Constitutional Advisory Panel, Sir Tipene O'Regan and Professor John Burrows, speak at the workshop.

Lastly, it was a real privilege to have the Cross-Party Reference Group represented at the workshop. Although not all members could attend, they recommended colleagues from their parties to take their place. Charles Chauvel (Labour), Paul Goldsmith (National), Hone Harawira (Mana) and Metiria Turei (Green). It was tremendous to have the co-chair of the Cross-Party Reference Group, Te Ururoa Flavell from the Māori Party, chair our panel of MPs and speak at the working dinner.



**Peter Dunne and Sir Tipene O'Regan**

### The role of the facilitators

Producing a constitution in two days was a challenging prospect, not just because developing consensus among 50 diverse people and producing a shared output would be difficult. I knew that we would need a team of talented and passionate young facilitators to guide the process, while ensuring that the ideas and outputs were driven by the participants so that the discussion remained broad and diverse. The role of the facilitators would also be to assist the participants in achieving consensus, synthesising ideas and resolving points of contention.

Alongside this, the workshop would require a principal facilitator who could be a visible point of contact for the participants throughout the event, communicating the process and expectations for each stage. Because navigating such a demanding subject requires a detailed understanding of New Zealand's constitutional landscape, I knew that the workshop would need a lead facilitator with a sophisticated knowledge of the constitution, who was passionate about civics and constitutional issues.

With Dr Orange's help I canvassed the opinion of a number of lawyers, looking for someone young and engaging, but with great constitutional knowledge who could take on the role of lead facilitator. Dean Knight, a Senior Lecturer at the Victoria University School of Law, was highly regarded by everyone I talked to and was a perfect fit for this role. Dean generously agreed to act as lead facilitator and in the months leading up to the workshop Dean and I, with help from Carwyn Jones, were able to develop a method that could cover the breadth and span of the constitutional discussion and lead to the creation of a single document after only two days. Between the three of us we were able to put together a team of young lawyers who cared deeply about civics in New Zealand and were prepared to be facilitators, leading participants through a process to deliver a working draft of a constitution fit for the future.



**Natalie Coates, Wendy McGuinness,  
Jess Birdsall-Day, Diane White, and Dean Knight**

### The fifty participants

Initially the plan was a maximum of 40 participants, but this was later expanded to 50 due to the demand and quality of applicants. I knew that 50 was about the maximum to ensure that there was a level of critical mass but not so many that group consensus would become impossible. This was supported by the Harvard Business School where none of the lecture theatres seat more than 75, as past this point individuals can no longer work as a group. To meet the purpose of the workshop we needed talented young people from throughout New Zealand with diverse backgrounds. I began by approaching people within the law and history faculties of every university in the country, asking them to put forward the names of students who they felt were inquiring, intelligent, good communicators and passionate New Zealanders. We also invited the young people who had been involved with *StrategyNZ*, and went looking for people in other networks we had developed.



**Higano Perez, Edward Willis, Helen O'Leary and  
Christian Silver**

It was important to me that we had young people who were passionate about the future of New Zealand. We were planning to put these 50 young people through an intense two days in which they would be challenged individually and together to address major issues and achieve common ground. Because of this, we needed people who were already motivated, who could appreciate the significance of these challenges and who were prepared to work hard to confront them. As soon as I started looking through the bios of people who were registering for the event, I knew we would be fine. Seeing the quality of the people who were keen to participate in the workshop reassured me that there is an incredibly talented and passionate pool of young people who are already working to shape the future of New Zealand.

An important part of the process of developing the *Draft Constitution* was integrating the design team and use of social media from the beginning of the workshop to the end. This helped to ensure that the

designers could best understand the values and ideas the document needed to communicate visually.

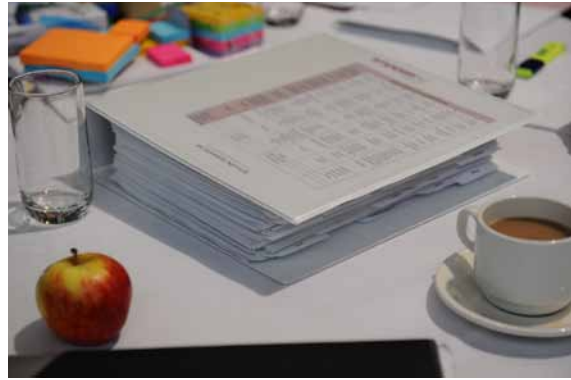
We were joined at the finale by participants and speakers from the *StrategyNZ* workshop, university staff and students, international diplomats, Wellington city councillors, Members of Parliament, public servants, and the families and friends of the *EmpowerNZ* workshop participants.



### The support team

The Institute team worked hard to organise the logistics of flying participants in from around the country and providing accommodation and meals. It was important that they should all feel looked after and be able to focus on the task at hand. The participants were all invited to attend the workshop free of charge but had to agree to ‘pay it forward’ through 10 hours of voluntary service in the 18 months following the workshop. The idea behind this was to create what were effectively constitutional ambassadors, with 500 voluntary hours between them, to contribute to the public awareness and dialogue surrounding the constitutional review.

We also put together resources to help participants both prior to and during the event. This involved collecting videos, publications and websites of interest and putting them on the *EmpowerNZ* website. These resources were intended to enable the participants to start developing a common language and terminology, and to provide a solid base understanding of constitutional issues for those not versed in constitutional law. We also collected 140 constitutions from around the world and collated them into seven folders that could be distributed around the groups during the workshop to provide inspiration and ideas from other countries. We set out questions for the participants to research and reflect on prior to the workshop, and put together a small library of useful materials for them to draw upon. Finally we prepared folders for the participants that contained resources such as a glossary of key terms and concepts, information on New Zealand’s existing constitutional arrangements, information about the constitutional review, and Institute think pieces.



### One of the seven folders containing the 140 constitutions

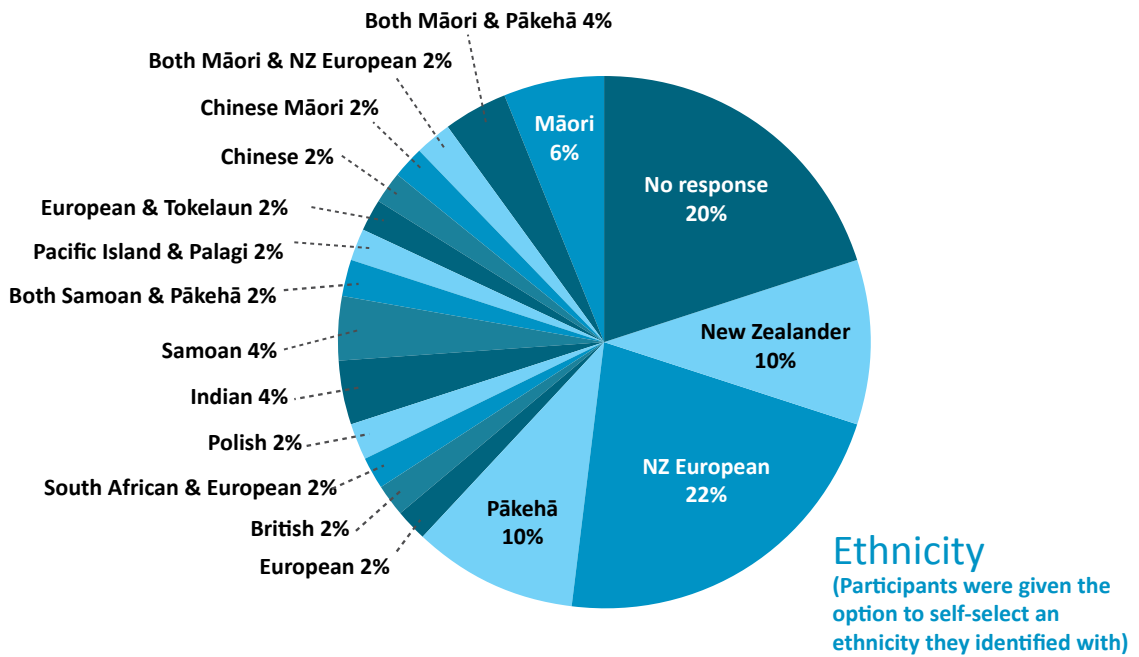
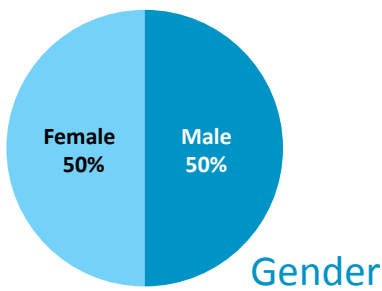
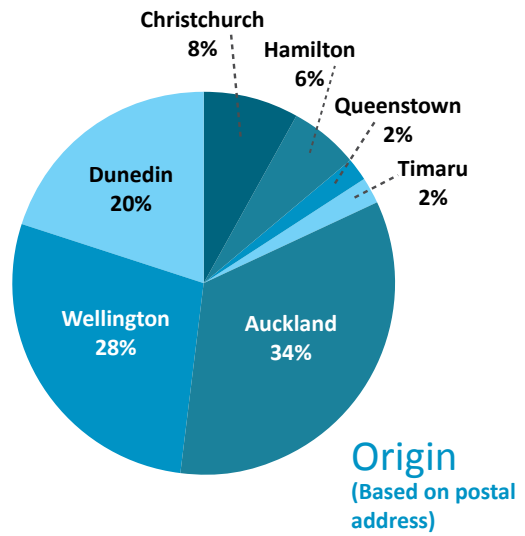
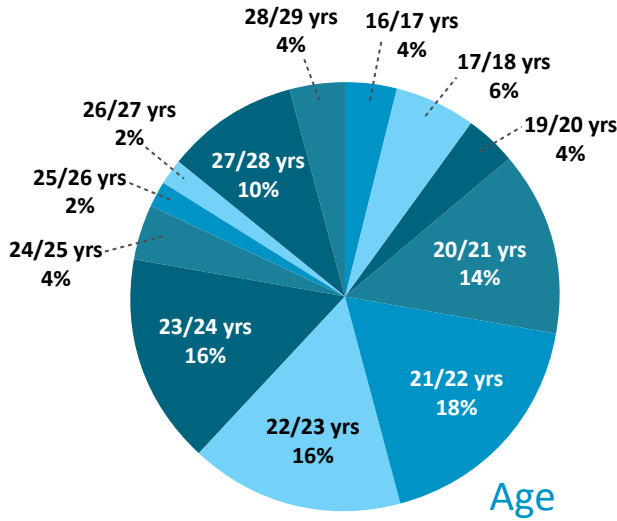
#### The way forward

My reflections on the way forward can be found at the end of this report, but suffice to say that the significance of the discussion, thinking and learning that occurred over the two days went far beyond the 50 participants in the room. It was crucial that the written *Draft Constitution* resonated widely. I was prepared for the document to be contentious or even divisive, and in some ways that was the point. Most importantly it must be remembered that this workshop was an experiment; constitutional issues are hard and complex. Participants were repeatedly asked to be bold and to trust each other. I knew this was an ambitious experiment but the participants surpassed my expectations and delivered a very useful document for further discussion and reflection.

#### Wendy McGuinness

Wendy McGuinness is the founder and chief executive of the McGuinness Institute (formerly the Sustainable Future Institute), which she established in 2004 as a way of contributing to New Zealand’s long-term future. Originally from the King Country, Wendy trained as an accountant, gaining a BCom from the University of Auckland and an MBA from Otago University. She has worked in both the public and private sectors as a Fellow Chartered Accountant (FCA), specialising in risk management. In her role with the Institute she is a regular contributor to international conferences on future thinking, attending the International Conference on Strategic Foresight in National Government in South Korea in December 2011 and the World Innovation Summit for Education in Doha in November 2012. She has also been instrumental in bringing respected future thinkers such as Professor Peter Bishop to New Zealand to share their knowledge. In recent years Wendy has focused on creating a place in which young New Zealanders can become engaged in the future, through initiatives such as *StrategyNZ: Mapping Our Future* (2011), *EmpowerNZ: Drafting a Constitution for the 21st Century* (2012) and *LongTermNZ: Drafting a Youth Statement on the Long-term Fiscal Position* (2012). This has meant bringing together many wise and generous New Zealanders to share their insights with the new generation.

## Participant demographics



## Workshop programme

Tuesday, 28 August 2012		
8.30am	Pōwhiri, Banquet Hall Parliament	Kura Moeahu and Carwyn Jones lead the pōwhiri
8.45am	Welcome	Wendy McGuinness Paul Goldsmith MP (Host)
9.00am	Keynote address	The Hon. Jim McLay: <i>1984 and All That: New Zealand's Last Constitutional Crisis</i> (see page 13)
10.00am	Context-setting speakers	Sir Tipene O'Regan: <i>The Importance of the Review</i> (see page 25)  The Hon. Peter Dunne: <i>The Lessons from the Inquiry</i> (see page 27)  Professor Philip Joseph: <i>The Key Elements of a Constitution</i> (see page 29)  Dame Dr Claudia Orange: <i>Why a Constitutional Conversation is Important</i> (see page 33)
12.00pm	Group work	Step 1: <i>Framing the Mission: The Purpose of our Constitution and its Audience</i> (see page 51)
1.00pm	Group work	Step 2: <i>Expressing the Vision: The Imagery and Values of our Constitution</i> (see page 51)
3.15pm	Group work	Step 3: <i>Identifying the Elements: The Chapters and Themes of our Constitution</i> (see page 51)
4.10pm	Designers present concepts	Gillian McCarthy (lead designer); Machiko Niimi; Katy Miller (see page 67)
4.20pm	Group work	Step 3 (cont.) (see page 51)
6.00pm	Working dinner, Grand Hall Parliament	(See page 35)
6.30pm	Context-setting speakers	Emeritus Professor John Burrows: <i>Building a Constitution for the Future</i> (see page 37)  Te Ururoa Flavell MP: <i>The Importance of the Cross-Party Reference Group</i> (see page 39)
8.00pm	Facilitators' presentations	Facilitators answer <i>Eight Challenging Questions</i> posed by the Hon. Justice Joseph Williams (see page 41)
Wednesday, 29 August 2012		
8.30am	Group work	Step 4: <i>Shaping the Elements: The Text and Body of our Constitution</i> (see page 51)
11.30am	Cross-party reference group panel	Te Ururoa Flavell – Māori Party MP (Chair) (see page 48) Charles Chauvel – Labour Party MP Paul Goldsmith – National Party MP Hone Harawira – Mana Party MP Metiria Turei – Green Party MP
1.00pm	Group work	Step 4 (cont.) (see page 51)
2.45pm	Designers present final concept	
3.15pm	Group work	Step 5: <i>Showcasing the Product: Our Constitution, our Journey, our Reflections</i> (see page 70)
6.00pm	Finale	Participants' presentation of the <i>Draft Constitution</i> (see page 71)

## Part 2 | Inputs

### Overview

Over the course of *EmpowerNZ* many legal, historical and political experts shared their time and knowledge with the participants. Their presentations helped frame the challenge of evaluating New Zealand's constitution and laid out a range of paths for imagining future possibilities. The full text of Jim McLay's keynote speech and summaries of all other contributions follow.



Clockwise from top: Kapa haka group Nga uri o Tamarau led by Kura Moeahu; Paul Goldsmith, Natalie Coates, Denis McLay, Tiaki Hana Grant-Mackie, Dr Claudia Orange, Jim McLay and Carwyn Jones; Jim McLay, Professor John Burrows and Carwyn Jones; Kura Moeahu and Natalie Coates; Kura Moeahu and Carwyn Jones; Professor John Burrows, Paul Goldsmith and Dean Knight.

## 1984 and All That: New Zealand's Last Constitutional Crisis

The Hon. Jim McLay

### Introduction

After that warm introduction from Paul Goldsmith, I should immediately set the record straight and confess that I'm not a professional diplomat. I started out as a lawyer, but I found that wasn't very popular; so I became a politician, and found that wasn't very popular; so I became an investment banker (and we know how popular bankers are!).

It's 25 years – almost to the day – since I walked out of this place to discover if there is a life after politics; eventually, to emerge as New Zealand's Ambassador to the United Nations, a diplomatic assignment which basically requires me to do two things:

(i) First, to lead a team of experts – and, when I say 'experts', I really mean experts – real specialists in international peace and security, disarmament (nuclear and conventional), human rights, development, environment, funding, legal, oceans, fisheries, and many other fields; experts who, every day, represent you in complex negotiations critically important to New Zealand's wider interests.

(ii) And, secondly, to lead the New York end of our campaign for election to a nonpermanent seat for a two-year term on the United Nations Security Council – a Council on which we've served only three times since the UN was established in 1945.

### Our domestic constitution – and its relevance to the United Nations

Why do we engage so actively at the UN? Why do we seek a seat at its 'high table', the Security Council? And why are today's discussions about our domestic constitution so relevant to both those objectives?

New Zealand was a founding member of the UN; we helped draft its Charter,<sup>1</sup> its commitments are at the heart of our commitment to multilateralism – that is, countries working together to resolve issues.

That Charter is the UN's 'constitution'. It even begins with words of constitutional moment – words that might have been drafted by Thomas Jefferson: 'We the peoples of the United Nations determined ... to save succeeding generations from the scourge of war, ... [and] to reaffirm faith in fundamental human rights ...'; and so it goes on.

<sup>1</sup> New Zealand chaired the committee that wrote the Charter's Trusteeship chapter; and later (but less successfully) led the opposition to the veto given to the five permanent members of the Security Council.

But, since that Charter was agreed, not only have the problems 'We the peoples' wanted to address remained with us, they are now amplified. As flows of technology, information, media and people render national borders ever more porous, as interstate conflicts become more intra-state, as atrocities such as Rwanda, Srebrenica and, most recently, Syria still occur, as issues become ever more complex and global, it makes sense to participate in and extract benefit from multilateral institutions.

For a small country at the edge of the world, an international system based on the Rule of Law is vitally important; it reduces (but doesn't eliminate) opportunities for the strong to impose on the weak; it helps protect our sovereignty; it establishes norms which facilitate our trade and prosperity; it enables the free passage of goods by sea and air. In short: it allows us to participate in global discussions directly relevant to our interests – and the experience of the past 67 years confirms that New Zealand is more likely to advance its national interests by multilateral participation than by pursuing narrow self-interests.

For example, under the UN Convention on the Law of the Sea (UNCLOS), we have a four million square kilometre Exclusive Economic Zone (EEZ), the world's fourth largest. And, under the UN's extended continental shelf regime, our extended continental shelf covers 1.7 million square kilometres beyond the EEZ – six times the size of New Zealand; an outcome that could never have been achieved through bilateral negotiations.

The UN isn't the only multilateral forum; there are as many others as there are problems – the WHO, the IMF, the ILO, the FAO, to name just a few.<sup>2</sup> All are important; all make a global contribution; but there's only one that's universal in membership and general in scope – the United Nations.

That universality gives the UN a legitimacy like no other organisation; indeed, at no other time in history have we had a body of such scope. Only the UN can assemble 193 States to debate almost any issue: under its constitution, it's the world's principal peacekeeping body; it legitimises the use

<sup>2</sup> As well as the UN and its organs, multilateral institutions (some related to the UN, others not) deal with many global problems: the World Health Organization (WHO); the International Monetary Fund (IMF); the International Labour Organization (ILO); the Food and Agriculture Organization (FAO). We've also seen the establishment of regional and other groups such as the European Union (EU), the African Union (AU) – and, importantly for New Zealand, APEC, ASEAN and the Commonwealth.



of force when international peace and security are threatened; and it's a forum through which conflicts can be ended.

If Winston Churchill was right when he said that 'jaw-jaw is always better than war-war', then the UN is the place for that.

In this 21st century, many economic, security and environmental issues are so global that they can only be dealt with at the multilateral level; issues that pay no heed to nation-state borders – fisheries management, ozone depletion, rising sea levels and stopping the spread of weapons.<sup>3</sup> More and more, it's multilateral bodies that write the rules that open up trade, govern shipping and protect wildlife. All are crucially important to New Zealand; and, if we want to influence those rules and treaties, we must be at the table when they are made; the world is simply too big, too interconnected, for us not to be there. Even if we can't ourselves control many of the security, economic or environmental trends that will determine our future, we can still be part of the answer.

And it's in that context that New Zealanders can be proud of the way they are represented by our experts at the United Nations; and I say that, not to boast about what they do, but because the media takes so little interest in their vital work that someone has to say it.

Since 1945, we've established at the UN a record for fair-minded and principled action on peace and security, disarmament, environment, development, decolonisation, the Rule of Law and many other fields; we are held in high regard at the UN – and, again, I say that, not to boast, but simply because it's too often ignored. Wendy McGuinness was spot on when she said that, 'internationally, we have mana'.

I'm not going to recount everything New Zealand does at the UN; suffice to say that our UN reputation results from 67 years of dedicated effort; and, as we campaign for a Security Council seat, that reputation, built by past generations of diplomats, will be our greatest asset.

### Three key values

That UN record reflects three key values which New Zealand would also bring to the Council; values that are equally relevant to today's discussions, because they also form part of our constitutional culture and underpin much of what we do, domestically and internationally:

(i) First, is our commitment to fairness and independence.

In a recently published book,<sup>4</sup> Pulitzer Prize winner David Hackett Fischer compared New

<sup>3</sup> Some of those have had to play out in other fora.

<sup>4</sup> David Hackett Fischer, *Fairness and Freedom: A History of Two Open Societies: New Zealand and the United States*, Brandeis University.

Zealand and the United States – two societies with much in common, but also many differences.

Founded as English-speaking colonies, both are long-standing democracies, with mixed-enterprise economies, pluralist cultures, and concern for human rights and the Rule of Law. But, despite those basic similarities, they went different ways.

They were founded at different times, one in the so-called ‘First British Empire’, the other in a very differently motivated ‘Second Empire’. America developed on its frontier; New Zealand in its bush; and Fischer compared our ‘parallel [but different] processes of nation-building and immigration, women’s rights and racial wrongs, reform causes and conservative responses, war-fighting and peacemaking’, and our respective global engagements. He described the dream of living free as ‘America’s Polaris’; whereas ‘fairness and natural justice are New Zealand’s Southern Cross’.

And that’s how we are and how we are seen at the UN; we listen to and respect the views of others – our ‘Southern Cross ... [of] fairness and natural justice’. He concluded that New Zealand’s culture is focused on fairness; it’s part of our national character.

We are not bound by political alliances, which might pre-determine our positions; and, as a result, New Zealand is regarded as independent, consistent, fair-minded, practical and constructive. And we have a consistent, bipartisan foreign policy which isn’t subject to sudden swings.

(ii) Secondly, New Zealand is known, at the UN, as a constructive partner. We work to solve problems, not to entrench them; we tackle difficult issues;<sup>5</sup> and we’re regarded as ‘bridge-builders’.

(iii) And thirdly, New Zealand seeks practical solutions. Like the majority of UN members we are a small state;<sup>6</sup> so we know, at first hand, the problems of size, distance, limited resources, post-colonialism, and the need to right past wrongs. All are challenges for us, for our region and for other states; and, because we understand those challenges, we seek workable solutions (if there was a place for No. 8 Fencing Wire at the UN, we’d be it).

### Is it worth the effort?

In our UN electoral group, in October 2014, two non-permanent seats for 2015–2016 will be contested

by three candidates. Spain<sup>7</sup> and Turkey<sup>8</sup> are our opponents, they are also our friends; both are strong contenders. Succeeding against such formidable opponents will require much effort (every morning, as I take our Kiwi dog for a New York walk, I find myself thinking of ‘new ways to win’).

But is even a successful outcome – a Council seat – worth all that effort? The answer is an unequivocal ‘Yes’; and that’s because:

(i) New Zealand has a long record of a principled, fair-minded, practical, consistent and constructive approach to the UN and its agenda; and

(ii) UN Security Council membership will continue that engagement – listening, working and adding value, wherever we can.

And something else will stand us in good stead: our reputation as one of the world’s oldest constitutional democracies; our reputation for fair, democratic representation of all interests; and our reputation for political and constitutional stability in an often unstable world.

### Our constitutional attributes

Those constitutional attributes are recognised on a wider, multilateral basis; recently highlighted when Standard & Poor’s re-affirmed our AA long-term foreign currency rating, citing not only our resilient economy, but also our ‘strong political and economic institutions ...’.

Next year marks the 160th anniversary of our first Parliament;<sup>9</sup> the 160th anniversary of the constitutional democracy that, despite our size, has enabled us to speak to the rest of the world with a firm, clear, representative voice, from the authority of a firm, clear, representative base. What Paul Goldsmith described as ‘our constitutional inheritance’ – the history of how we came to govern ourselves, and the manner in which we do govern ourselves – is part of New Zealand’s narrative; a narrative we should share among ourselves (particularly on occasions such as this); and a narrative we should also share with the world.

So, I compliment the McGuinness Institute on this initiative to ‘explore the future of New Zealand’s constitution and contribute to the current Constitutional Review’, and to ‘consider ... what New Zealanders need, constitutionally, for the coming century and beyond ...’.

5 In many respects, New Zealand subscribes to Dag Hammarskjöld’s belief that we should ‘Never, for the sake of peace and quiet’, deny [our] own experience or convictions’.

6 103 UN member states have populations less than 10 million – the World Bank’s commonly accepted benchmark for ‘small state’ status.

7 Spain announced its candidature in 2005.

8 Turkey announced its candidature in 2011.

9 The first New Zealand Parliament met in Auckland in 1853.

## Getting some background

To provide some background to this address, I went to what's described as 'the official website of the New Zealand Government',<sup>10</sup> expecting to find a comprehensive timeline of our constitutional developments. It begins with the Treaty of Waitangi and British sovereignty, followed, twelve years later, by a Westminster-style Parliament – making it the world's eighth oldest national parliament, pre-dating Canada and Australia;<sup>11</sup> in fact, ours is one of the world's oldest continuous democracies.

But, then, I was disappointed. The sixteen listed constitutional milestones include such obvious events as Dominion status in 1907, adoption of the Statute of Westminster in 1947, and the introduction of MMP in 1996.

But not the establishment of Māori seats in 1867 – giving voting rights to all indigenous males (long before other colonies – and twelve years before all Pakehā men got the same right) – one of the world's first modern extensions of voting rights without any property qualification.<sup>12</sup> And no reference to women getting the vote in 1893 – the first country in the world to do that; something of real international importance, all the more so because it was achieved without major social disruption.

There's no reference to establishing the Ombudsman in 1962 – the first outside Scandinavia – a constitutional precedent now widely followed. Nothing about establishing the Human Rights Commission in 1976. And, no reference to the Official Information Act 1982, which fundamentally changed the relationship between a previously secretive government and those it governed; legislation that's been copied (sometimes, almost word-for-word) in other countries. Its guiding principle is that official information must be made available unless good reason exists under the Act for withholding it (a direct reversal of the old Official Secrets Act 1951, which made it an offence to release any official information). The Law Commission has described it as 'central to New Zealand's constitutional arrangements'.<sup>13</sup> So why wasn't it listed? But, then, as the Minister responsible for that legislation, I probably would ask that, wouldn't I.

10 <http://www.beehive.govt.nz>.

11 Canada's national parliament was established in 1867; Australia's national parliament was established in 1901.

12 The ancient Athenian constitution gave voting rights to all adult male citizens.

13 'The Public's Right to Know: Review of the Official Information Legislation': New Zealand Law Commission; NZLC R125; published 25 July 2012. The OIA was also described by the *New Zealand Herald* (Editorial; 30 July 2012) as having 'played an important part in creating a more open society'.

In short: no acknowledgement that, within 53 years of formal European settlement – a single lifetime – New Zealand had established responsible parliamentary government, given the vote to all Māori males, and then to all other males without any property qualification, and then enfranchised all women; arguably making it the world's first true democracy, with an unrestricted, non-discriminatory adult franchise.

And nothing to highlight our world-leading, precedent-establishing role in the 20th century, creating open, transparent and accountable government. By comparison, a McGuinness Institute publication, *Nation Dates*,<sup>14</sup> has a much more comprehensive timeline; as does the *Cabinet Manual*.

## Why are we here?

Wendy McGuinness has told us why you are here: fifty-or-so young people, brought together to debate our constitutional future. But, why am I here? Why are you being addressed by someone who retired from Parliament fully a quarter of a century ago and, since he left, has only re-entered this building about a dozen or so times? It's because the McGuinness Institute remembered I was directly involved in what it describes as 'New Zealand's last constitutional crisis', and, believing that experience might be relevant to your discussions, wants me to recount my version of those events.

You've seen a documentary clip about that on the Institute's website; but I'm here to tell you what really happened – with apologies for the fact that this very personal account means far too many perpendicular pronouns! If you Google 'New Zealand constitutional crisis', even without '1984', then, with varying degrees of accuracy, this is what you'll get.

## 1984 and all that

Let me briefly set the scene.<sup>15</sup> It's 1984 – George Orwell's year of reckoning. Sir Robert Muldoon's National government had governed for nearly nine years; for six years, I'd been Attorney General and Minister of Justice, and, in March 1984, had been elected Deputy Prime Minister (but not, I should add, with Sir Robert's support!).

On the night of Thursday 14 June 1984, in quite extraordinary circumstances, Muldoon called an early election. That had an immediate impact on financial markets, which anticipated a Labour

14 Published September 2011; revised edition December 2012.

15 For the purposes of this account, I have, inevitably, had to summarise what was a very complex and detailed series of events. A fuller account of these will have to await another occasion.

victory and, with it, a devaluation of the New Zealand dollar.<sup>16</sup> Reserve Bank and Treasury officials advised Sir Robert to respond with an immediate devaluation, but he declined.<sup>17</sup> Then, over the four weeks of the campaign, the dollar came under more pressure and officials again unsuccessfully advised Muldoon to devalue.

That's a very, very brief background to the events that followed.

### What happened next?

Saturday 14 July, Election Day, was also Bastille Day (a coincidence not lost on the media); and the results quickly showed that Labour, led by David Lange, had won the election. The following Monday, Muldoon told his Cabinet colleagues that the officials had again recommended devaluation, but he still did not agree.

In my view, that was as far as the matter needed to be taken. The National Cabinet would remain in office for about ten days (until final results were declared), but future policy was out of our hands; we were caretakers for a new administration, and if they wanted to take urgent steps, so long as we remained technically in charge, we'd have to do it.

That evening's TVNZ news carried Lange's claim that Muldoon was refusing his advice to sort out the currency problem. Later, at 9.30 pm, TVNZ broadcast an interview with Muldoon who said he'd spoken to Lange, giving 'some advice, which would have solved this problem', and then said, in quite unequivocal terms, 'I am not going to devalue so long as I am Minister of Finance'.

I was astonished; in my view, even if it disagreed, an outgoing government had to act on the advice of the incoming administration. Others reacted similarly; and, within minutes, three senior ministers came to my office – one of them, Hugh Templeton, later wrote that, 'in anger ... [he] raced over to the Beehive'.<sup>18</sup>

Obviously, we had to get to Muldoon, and get to him quickly; but first we had to be clear about the legal and constitutional position.

None of these colleagues were lawyers, but all accepted my view that, during the transition, we were caretakers, and should, if necessary, implement the wishes of the incoming government. But my quick research revealed no direct precedent for the problem we now

faced; which meant we had to decide what to do without the benefit of precedent or any previous constitutional rule or convention. We all knew, however, that, if Sir Robert meant what he'd said,<sup>19</sup> and if he really was refusing to act, then we faced a very serious situation.

There was a further problem. The election outcome was clear; Labour had won decisively, and it was possible the Governor General, Sir David Beattie, might take his own action – in favour of the newly elected Labour government.

After a brief discussion, I could see only one possible way forward – Muldoon either had to comply with Lange's request or be replaced.

So we agreed we'd immediately contact him to clarify his stance, and to make clear our view that he had to respond to any Labour request; and that if he refused, we'd immediately force the issue with the Cabinet. If he still refused, then, as his deputy, I would advise the Governor General that Muldoon no longer had the confidence of Cabinet, that he should be dismissed, that I should be appointed as Prime Minister for the few remaining days of the National administration; and that we'd undertake no new policies and would implement any wishes of the incoming government.

Think about it: here were four senior ministers, prepared to seek the removal of the Prime Minister who'd led their party for ten years – but to do so for constitutional rather than the more usual political reasons. It was a chilling moment: it would split the National Party – Muldoon's many loyalists would decry it as a 'constitutional coup d'état'. Certainly, my own political career would be at an end; recalling the venom heaped on the Australian Governor General, Sir John Kerr, after his 1975 dismissal of the Whitlam Labour government, I knew that those Muldoon loyalists would be unrelenting in their attacks.

Later, it was incorrectly reported that, had Muldoon persisted, we planned to resign en masse, either leaving him on his own or creating Executive Council vacancies to be filled by senior Labour MPs. But that was never an option. No Labour MP could be appointed until final results declared them elected to Parliament; so a mass resignation would leave Muldoon as the only Minister – able to do (or refuse to do) as he wished – and that certainly would have given us a constitutional crisis.

Having decided on our course of action, I then tried to call Muldoon at his official residence; but, for many reasons (some of them amusing), couldn't

16 These were, of course, the days of fixed rather than floating exchange rates.

17 Sir Robert did not tell his Cabinet colleagues about that advice.

18 Hugh Templeton, *All Honourable Men: Inside the Muldoon Cabinet 1975-84*, Auckland University Press, 1995.

19 Sir Robert took pride in his careful use of language.

make contact. Having failed in that, we then tried to contact the Secretary of Treasury and the Governor of the Reserve Bank. We tracked them down at the annual dinner of the New Zealand Bankers Association (other attendees included the Governor General and the Head of the Prime Minister's Department).

They'd heard of Muldoon's statement, and were deeply concerned at its implications; and they stressed the seriousness of the economic situation if it wasn't immediately resolved. They'd had to retreat to the restaurant bathroom to discuss their concerns in private; and had reached a similar conclusion – Muldoon either had to comply with Lange's request or be replaced. From these comings and goings, the other guests knew something was amiss (and were offering not always helpful advice).

The group in my office finally broke up about 2 am; by which time, as Hugh Templeton later wrote, 'The tumbrels were already rolling'; and I certainly didn't sleep much for what little remained of the night.<sup>20</sup>

Among many other things, I was concerned that the Governor General might act; so, early that morning, I phoned his Official Secretary, asking him to tell Sir David that Muldoon's colleagues were 'prepared to act to ensure that the wishes of the incoming government are respected'. Contrary to some accounts, I didn't speak directly with Sir David – it was only later he told me he would have acted on my advice.<sup>21</sup>

### A very unpleasant meeting

I got to see Muldoon at 8 am. I won't recount the detailed discussion; it lasted about 15 minutes and, needless to say, was very unpleasant.

In summary, however, I told him of my deep concern about his statement that he would not devalue if requested by Lange; and that, having lost the election, he could not reject Labour's request to devalue.

There followed a testy exchange in which we argued that view. Lange was wrong, he insisted; that, I responded, was no longer relevant; Labour

had won the election and, with it, the right to make decisions. I cited – but with no great confidence – an Australian precedent of the previous year, where an outgoing government had devalued on the wishes of the new administration; and told him that, once defeated, there was a 'constitutional convention' that we were only 'caretakers', and that he must act as requested by the new government.

And I told him that, if he didn't respond, we'd have to force the issue.<sup>22</sup>

Finally, he said that Lange's refusal to make a joint statement against devaluation meant it was now inevitable – a convenient way, I thought, of finally acknowledging he had to act, but without conceding any of the constitutional arguments.

When the Cabinet met shortly thereafter, Muldoon presented it as his own decision to act on Lange's advice, but later told the media that I'd explained the 'constitutional position'. As Templeton put it: 'Only a few knew that his hand had been forced.'<sup>23</sup>

### The 'Caretaker Convention'

I quickly issued a press statement outlining what became known as the 'Caretaker Convention': that, having been defeated in an election, and during the transition period, an outgoing government should:

- (i) undertake no new policy initiatives; and
- (ii) [should] act on the advice of the incoming government on any matter of such great constitutional, economic or other significance that cannot be delayed until the new government formally takes office – even if the outgoing government disagrees with that course of action.

These events have been described as both an 'economic crisis' and a 'constitutional crisis'. There was certainly a serious economic problem; and Muldoon's statement that he was 'not going to devalue so long as [he was] Minister of Finance' had equally serious potential constitutional implications.

But, was there really a full-blown 'constitutional crisis'?

Had Muldoon persisted, we would certainly have faced a constitutional crisis; but the problem

20 I had no illusions about the implications of our planned action; and my wife, Marcy, and I determined that, if I became a very temporary prime minister, I'd immediately resign my party's deputy leadership and would not contest or accept a leadership position in any ballot; for me, it would be the end. Two other ministers who learned of that intention the following morning tried to dissuade me – but I saw no alternative.

21 I also warned one senior public servant of the planned action; his response 'that sounds to me like the only thing that can happen' gave some added confidence. Later, he told another senior official (who was acutely aware of the dangers of a public servant advocating the removal of a prime minister), 'You're too late, the Attorney General is going to act.'

22 Muldoon did not respond to that 'threat', although he certainly returned to it in an equally unpleasant discussion later that day.

23 Templeton also wrote that, 'Muldoon never forgave McLay for his role in this final crisis, engineered so typically in defiance of accepted norms, where we had to save him from himself.' My relationship with Muldoon had never been good (he hadn't supported me for the deputy leadership), but these events made it toxic – but that's something to be recounted at some other time.

could be – and was – resolved within existing constitutional structures. Sir Robert’s colleagues were prepared to act and, if we hadn’t, the Governor General might have intervened. And so the matter never became a full-blown crisis. Geoffrey Palmer (Lange’s deputy) later wrote that this had ‘all the ingredients of a first class constitutional crisis’,<sup>24</sup> but that ‘the apparent constitutional impasse was resolved’ by my statement of constitutional principle. ‘All the ingredients’? Certainly; but, luckily, those ingredients were never finally mixed together.

And I must now confess that we did not play entirely ‘by the book’. The senior public servants to whom I spoke that night were all Muldoon’s advisers; we probably had no right to go to them, behind his back – but we also had no alternative. And, even as Deputy Prime Minister, it was probably improper for me to communicate (even indirectly) with the Governor General; but, again, I had no alternative.<sup>25</sup>

And finally, was there really, as I had advised Muldoon and then the Cabinet (and subsequently declared in a press statement), a constitutional convention – a ‘Caretaker Convention’ – that an outgoing government should ‘act on the advice of the incoming government on any matter ... that cannot be delayed’?

Frankly, no; none of my research disclosed any such authority. In July 1984, there was, it’s been said, ‘no clear rule’; almost certainly – and quite simply – because the issue had never previously arisen in precisely the terms we faced.

My ‘constitutional advice’ was based on common sense and propriety; but I must now confess that, in July 1984, there was no established convention to that effect (and the Australian action of the previous year, while a useful, historical example, arose in a very different constitutional setting and wasn’t a precedent for New Zealand). Geoffrey Palmer, researching the same issues at the same time, reached the same conclusion; and later wrote that, ‘It can be argued that a constitutional convention was either restated or *emerged*<sup>26</sup> in the context of the events of 16 and 17 July ... [and] thus [he said] the apparent constitutional impasse was resolved’.<sup>27</sup>

24 Geoffrey Palmer, *Unbridled Power*, Oxford University Press, second edition, 1984.

25 At the beginning of his vice-regal term, Sir David Beattie wanted to meet with individual ministers (over dinner, he suggested) to talk about their portfolios, but Muldoon blocked this, insisting the Governor General could only deal with the government through the prime minister.

26 My emphasis.

27 Geoffrey Palmer, *Unbridled Power*.

And so, as Palmer and others have said, before July 1984, there was no such constitutional convention.

### Invented in the dark hours

If a convention did ‘emerge’, then I can only adopt the original ‘Streaker’s Defence’: it seemed like a good idea at the time.<sup>28</sup> If a new constitutional convention was (to put it more colloquially) ‘invented’, it was necessary in order to force Muldoon to do the right thing (to ‘force his hand’); and, even though I now acknowledge stretching things to achieve that outcome, I make no apology for that – it certainly seemed like a good idea at the time.

Later the law was changed,<sup>29</sup> introducing procedures for quickly swearing in a new government; but the ‘caretaker’ issue was not resolved by that legislation – and continues to be covered by an unwritten constitutional convention, still known as the ‘Caretaker Convention’. Invented in the dark hours of Monday 16 July 1984, it remains as I told Muldoon that following morning, and is now an accepted part of our Constitution – formally set out in Paragraph 6.24 of the *Cabinet Manual*, in almost identical language to the press statement of 17 July 1984.<sup>30</sup>

### An unwritten constitution

New Zealand is one of only three countries in the world that relies on a so-called ‘unwritten constitution’.<sup>31</sup> We do have a ‘constitution’ but, rather than a single, supreme document, formally described as such, it is made up of various Acts of Parliament (including some entrenched provisions), treaties, Letters Patent, Orders-in-Council, court decisions and a number of non-legislative conventions.

The long-standing success of our constitutional democracy relies, at least in part, on the willingness of those ‘at the top’ to abide by certain understandings and conventions – doing the right thing at the right time – and, I suppose, an

28 The story goes that, when one of the first streakers was prosecuted in Sydney, Australia, in the 1960s, and was asked by the magistrate why he had done it, the young man mumbled that ‘it seemed like a good idea at the time’.

29 The Constitution Act 1986.

30 Paragraph 6.24 of the *New Zealand Cabinet Manual* provides that ‘Where it is clear which party or parties will form the next government but Ministers have not yet been sworn in, the outgoing government should: a. undertake no new policy initiatives; and b. act on the advice of the incoming government on any matter of such constitutional, economic or other significance that it cannot be delayed until the new government formally takes office – even if the outgoing government disagrees with the course of action proposed.’ Paragraph 6.25 notes, however, that, ‘Situations of this kind are likely to be relatively short-lived, as the Constitution Act 1986 enables a swift transition between administrations once the composition of the new government has been confirmed.’ It should be noted that, even today, New Zealand’s ‘Caretaker Convention’ provisions are much less comprehensive than, say, those of Australia.

31 The other two are the United Kingdom and Israel.

occasional willingness to invent new conventions to meet new and unexpected situations. Muldoon's intransigence briefly upset that balance; as Templeton wrote, he'd gone 'far beyond constitutional reality, let alone grace, in defeat'.

New Zealand is, as I said earlier, one of the world's longest standing, continuous and most successful democracies. Never before had its constitutional underpinnings been so challenged, even if only briefly; and, I hope, never again.

But, those events never became a full-blown 'constitutional crisis'; unlike Australia in 1975, a serious problem was averted.

### Knowing the key players

The reasons for that are many and various; but one was an interesting convergence of people who all 'knew one another'; very much a consequence of our small and intimate democracy.

Although we were political opponents, I 'knew' Geoffrey Palmer, and how he thought on constitutional issues, and I understood the solutions he'd be seeking, and the sort of advice he'd be giving his leader, David Lange. And I 'knew' the Governor General, Sir David Beattie. He was a friend; I'd instructed him as a lawyer, and appeared before him as a Judge – and I had a good idea of what he was likely to do. I 'knew' how both would respond if I advised in a particular way; and, likewise, they both 'knew' me. Later, both confirmed that thinking; but, at the time, and even without their

explicit confirmation, it was really valuable to 'know' the thinking of those who might also be key decision-makers.

### A product of Victorian Britain

As I said, we do have a constitution. It was very much the product of Victorian Britain, and its own reforms of that time; but also of the preceding 600 or so years of constitutional evolution, at least as far back as Magna Carta in 1215, through the Model Parliament of 1295, on to the struggle between King and Parliament, partly resolved by regicide in 1649 and then by the Glorious Revolution in 1688, and the same year's Bill of Rights (which established Parliament's lawmaking and taxation role and provided for free and regular elections), and then to the struggle to expand the voting franchise and make Parliament truly representative – the Reform Acts of the 1800s.

It was as that last struggle was in its final stages that Britain acquired sovereignty over and then 'gave' New Zealand its parliamentary government; and much of our constitutional structure reflects that timing.

Having lost the American colonies as a convenient place to send criminals and Irish and Scottish 'troublemakers', and having then, in 1788, 'acquired' Australia for that same purpose, Britain had little interest in extending its reach to New Zealand; it was a reluctant coloniser, even in 1840.

Captain Hobson had received his instructions from Lord Normanby, British Secretary of



State for War and Colonies, who wrote that the British government had no pretension to seize or govern New Zealand;<sup>32</sup> and wanted to avoid injury to Māori, ‘whose title to the soil and to the sovereignty of New Zealand [was] indisputable ...’; and that, therefore, Britain ‘disclaim[ed] ... every pretension to seize ... New Zealand or to govern [it] ... unless the free and intelligent consent of the Natives, expressed according to their established usages shall first be obtained’.<sup>33</sup> If Normanby’s sentiments were genuine, then Hobson had been sent on a mission set to fail; but, as we know, he had other ideas.

And, once the Treaty was signed, Britain was an equally reluctant colonial administrator – so much so that, in 1852, only twelve years after the Treaty, Westminster enacted a New Zealand Constitution Act, passing responsibility for parliamentary government to the colony itself.<sup>34</sup>

### Two types of constitution?

I’m not a constitutional theorist; but I have had to make our constitution work in practice (and not just with the events of July 1984); and, from that practical standpoint, I take the view that there are basically two types of constitution:

(i) There are those, such as the American Constitution, which I’d describe as ‘Constitutions of Solutions’ – those in which (so their proponents believe) can be found solutions to all issues relating to governmental powers and functions – a truly supreme law. These Constitutions of Solutions remain central to governmental thinking and action, and can determine the constitutional validity – the rights and wrongs – of policies, even those enacted by an elected and accountable majority of political leaders and, perhaps, supported by a clear majority of citizens.

(ii) And then, there are ‘Constitutions of Presence’; those that remain as a presence, but essentially in the background, always there to guide the principal actors, but not to dictate outcomes; particularly, not to dictate the rights and wrongs of policies that should, more properly, be decided by elected and accountable political leaders. Colloquially, these might be likened to a Shareholders’ or Partnership Agreement; the sort of document (or unwritten constitution) that is only brought out and consulted in times of trouble – times of trouble like July 1984.

32 Instructions from the Secretary of State for War and Colonies, Lord Normanby; 14 August 1839. In W.D. McIntyre & W.J. Gardener (Eds), *Speeches and Documents on New Zealand History*, Oxford 1971.

33 Normanby added, with remarkable foresight, ‘I am not unaware of the difficulty by which a treaty may be encountered. The motives by which it is recommended are of course open to suspicion ...’

34 It had made an earlier attempt at this in 1846.

### No constitution is perfect

Let’s be under no illusions: no constitution is perfect. Some Americans ascribe an almost God-given quality to their Constitution, some even seeing it as divinely inspired (and ascribing Old Testament prophet-like qualities to its Founding Father drafters).

But there are still differing views about its effectiveness: the late Gore Vidal cynically observed that, ‘Congress no longer declares war or makes budgets; so that’s the end of the constitution as a working machine.’ And a less cynical commentator recently wrote that, constitutionally, ‘The American presidency is designed to disappoint’, and, ‘from the founding fathers’ point of view, [that] protects the republic’, because ‘they distrusted government in general and the office of the president in particular’.<sup>35</sup>

Although changes to constitutions should be rare, most are expected to adapt to their circumstances and times – to be ‘living and breathing’. And those times and those circumstances can change.

### A very old idea

We tend to regard constitutions as a consequence of the development of the Westphalian nation-state,<sup>36</sup> and possibly, also, a product of the Enlightenment, as both evolved over the past 400-or-so years; but the idea of constitutions is much, much older.

Sparta’s constitution (possibly the world’s first) is sometimes attributed to the lawgiver Lycurgus in the 7th century BC. And, in the 3rd century BC, Aristotle studied about 158 ancient world constitutions; and, unlike my two, unsophisticated classifications of Constitutions of Solutions or Presence, he put them into six categories.<sup>37</sup> For him, a constitution wasn’t a single, organised document (as with the US and most others); it was a collection of customs, rules and laws for the governance of the city-state (more like our ‘unwritten constitution’).

All Greeks believed man must live in freedom, ruled by laws made by the political community, not by the arbitrary fiat of some man or god; and they understood that, when elevating someone to a ruling position, it was also necessary to urge restraint and self-control; they warned against the great folly of hubris – so much so that inscriptions

35 George Friedman, *The Election, the Presidency and Foreign Policy*, 31 July 2012.

36 We might tend to date all this from the 1648 Peace of Westphalia, which established the notion of territoriality. The Westphalian system is based on the idea that the national interests and goals of states and nation-states still go beyond those of any citizen or any ruler. However, long before that, states and nation-states structured their domestic affairs around some sort of ‘constitution’.

37 Aristotle’s major writings on constitutions are found in *The Nicomachean Ethics and Politics*.

on temples reminded citizens, ‘Nothing in excess’. And, contrary to our commonly held view of Athenian democracy, Aristotle thought democracy – rule by the many – could be bad (he regarded Athenian democracy as demagogic); and, instead, urged combining aspects of democracy with strict laws about how rule should be exercised.

In Athens’ Golden Age, while Pericles was alive, every male citizen was a member of the Athenian assembly, which agreed laws that established a constitution, and was the most democratic organ the world had yet seen. It had ultimate power and made all decisions by a simple, majority vote. Few offices were directly elected; terms were usually very short (often just one year, sometimes just one day). Athenians would not necessarily have seen elected representatives, appointments to important offices, unelected bureaucrats, or judicial life tenure as democratic; indeed, they might regard what we’ve created as the clear and deadly enemy of democracy.<sup>38</sup>

Elected officials were limited to generals (who, if skilful, could be re-elected),<sup>39</sup> naval architects, some treasurers and the city water supply superintendent (even then, they understood the importance of water!). They filled most other offices by lot (or at random) and for a limited tenure of one term per man in each office;<sup>40</sup> all very much in accord with the Athenian belief in the democratic principle of equality (which held that any citizen who was capable could perform civil responsibilities), and its corollary which feared giving power, even to the able or experienced few.

Imagine going out to Riccarton Mall, Lambton Quay or Queen Street and choosing someone at random – a taxi driver, maybe, or a shopkeeper, or a doctor – and appointing him or her as prime minister for a year? Would we want to return to such an Athenian democracy? Probably not.

38 The legislative arm was the Athenian assembly or the *ecclesia*, in which all male citizens could participate; and, in the 450s, and during the life of Pericles, this would have amounted to between 40,000 and 50,000 men. Because much of what came before the assembly required a quorum, it is likely that at least 5000 to 6000 attended the sessions. The *ecclesia* had four fixed meetings a year as well as special meetings; and it met on a hill overlooking the agora not far from the Acropolis called the *Pnyx*. The *ecclesia* dealt with serious topics: approval or disapproval of treaties, declarations of war, assigning generals to campaigns, deciding what forces and resources they should command, confirming officials or removing them from office, deciding whether or not to hold an ostracism, questions concerning religion, questions of inheritance; in fact anything that anyone wanted to bring up in the assembly. Votes were by a simple majority after a full debate, determined by a show of hands. To help the assembly conduct its business a Council of Five Hundred was chosen by lot from all Athenian citizens. Its responsibility was to prepare legislation for consideration. The assembly could vote down a bill drafted by the council, change it, send it back with instructions or replace it.

39 Generals were elected to one-year terms; but, ten times a year, the assembly voted whether their military conduct was satisfactory.

40 The exception being the Council of Five Hundred, where a man could serve twice in his life.

## Some questions for the task ahead

Given this workshop’s mandate, the organisers have been wise to suggest that you might draft a possible New Zealand Constitution; but with the important caveat that this doesn’t ‘suggest that [our] Constitution ... must take written form’ – rather, it allows ‘for a tangible, workable output’ at the end of your deliberations.

Not unnaturally, having been exposed to the real-time working of our present constitutional arrangements, I have my views on this; but, given that it’s your task (not mine) to deliberate on these matters, it would be inappropriate for me to suggest the direction of your discussions. I do, however, offer some thoughts, which you might keep in mind:

(i) First, long before you put pen to the drafting paper, you should ask where the problems lie. Indeed, are any problems so pressing that they require constitutional change; or is it more a case of ‘if it ain’t broke, don’t fix it’? There are always those who’ll argue that we face constitutional crises; for example, that ‘New Zealand’s constitution suffers a profound crisis of democratic legitimacy ... [because it] rests on rules and conventions that were not adopted by the people and ... cannot be altered through democratic procedures’;<sup>41</sup> or that controversy over ownership of the foreshore and seabed, or of water, amounts to a ‘constitutional crisis’. It’s easy to use the word ‘crisis’ to highlight a pet issue; so you’ve got to ask whether these matters really are of such great moment as to require constitutional change.

(ii) Secondly, you will inevitably have to consider the constitutional role of the Treaty of Waitangi; and one of the problems with that will be that there is no national consensus regarding that role. On that, you could have no better adviser than Dr Orange.

(iii) Next, even if our constitution remains ‘unwritten’, should more of it be ‘entrenched’ – only changeable by a Parliamentary super-majority (three quarters of all MPs) or by referendum? We already entrench requirements such as the three-year Parliament and MMP; but are other aspects also worthy of that protection? For example, Sir Geoffrey Palmer has argued that for his New Zealand Bill of Rights Act 1990. And, if the Official Information Act really is ‘central to New Zealand’s constitutional arrangements’, should we, at the very least, entrench its guiding principle – that official information must be made available unless good reason exists under the Act for withholding it? Are there other provisions that might be considered for entrenchment?

41 Joel I Colón-Ríos, ‘New Zealand’s Constitutional Crisis’, *New Zealand Universities Law Review*, Vol. 24, No. 3, 2011.

(iv) Next, the current Constitutional Review begs the question whether we should formalise how we reconsider our constitutional arrangements.

Hawaii, the American state that's closest to us, both geographically and culturally, undertakes periodic reviews of its State Constitution. Voters elect a Constitutional Convention, often choosing those who aren't politicians or members of political parties. Important changes can result: the 1978 Convention established term limits for elected officials, required a balanced State Budget and even established the basis for righting wrongs done to native Hawaiians following the overthrow of the Hawaiian monarchy in 1893.

But, even if no major changes emerge, that doesn't detract from the process; rather, it confirms that, after intensive review, most existing arrangements were found to be satisfactory – if it ain't broke, they're not going to fix it – and an open, transparent review process provides all the more confidence in that view.

Might we benefit from similar, regular reviews; or is the fact that over (say) the past 30 years, we've made government information more available, enacted a Bill of Rights, and changed the way we elect our legislators (and reconfirmed that in a later referendum) – does all that show that, without any great formality, we already regularly review and (if necessary) update our constitutional arrangements?

(v) And should we look again at the parliamentary term – an issue we last seriously considered in 1967?<sup>42</sup> Might it be extended to four years; or was Sir Keith Holyoake on the button when he said that 'four years is far too short for a good government, and three years is far too long for a bad one'?

## Conclusion

In addressing all these and other issues you might have regard to the Scottish jurist and statesman, Lord Brougham,<sup>43</sup> who put the task of writing new laws in the most noble of terms:

'It was the boast of Augustus [he wrote] that he found Rome brick and left it of marble. A praise not unworthy of a great prince. But how much nobler would be our sovereign's boast when he shall [say] ... that he found law dear and left it cheap; found it a sealed book, left it a living letter; found it the patrimony of the rich, left it the inheritance of the poor; found it

the two-edged sword of craft and oppression, left it the staff of honesty and the shield of innocence.'

That, surely, is similar to your challenge. Our constitution has served us remarkably well over nearly 160 years; whatever you do, or try to do to it, make sure that it's accessible to all (that's finding it 'a sealed book' and leaving it 'a living letter'), that it belongs to all the people (making it the 'inheritance of the poor', not 'the patrimony of the rich'), that it provides genuine protections for ordinary citizens ('the staff of honesty and the shield of innocence').

But, just in case you get too carried away by Brougham's wonderful words, you might also reflect on those of Lord Eldon,<sup>44</sup> who said that, like the Spartan lawgiver, anyone who proposes new laws 'should come publicly with a halter round his neck and adventure a hanging if he failed in his undertaking'.

For those who might wish to 'rewrite' our constitution, in whatever form, or those who would confirm our existing constitutional arrangements, the challenge must always be to achieve Brougham's noble, Augustinian objectives – but, above all, to avoid Eldon's Spartan, hanging fate.

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Disclaimer: The opinions expressed in this address are mine alone and do not represent the views of the New Zealand Government or the Ministry of Foreign Affairs and Trade. I gratefully acknowledge the assistance of a number of friends and colleagues who either scrutinised and commented on early drafts of this address and/or offered specific comments for inclusion; notably, Marcy McLay, Denis McLay and Sir Geoffrey Palmer. All added greatly to the substance of this text. Any errors and omissions, however, remain solely my responsibility.

## The Hon. Jim McLay

The Honourable Jim McLay is currently the New Zealand Permanent Representative to the United Nations in New York.

Jim practised as a barrister before being elected as a Member of the New Zealand Parliament in 1975. Until his retirement from politics in 1987 he held, at various times, the positions of Deputy Prime Minister, Leader of the Opposition, Attorney General and Minister of Justice. He received the Queen's Service Order (QSO) for public services (1987) and was made a Companion of the Order of New Zealand (CNZM) for services to conservation (2003).

42 On 23 September 1967, a referendum on the length of the parliamentary term was conducted (in conjunction with a referendum on liquor licensing hours). 68.1 percent of those voting (on a 69.7 percent turnout) rejected a possible four-year term. A contemporary cartoon showed an inebriated referendum participant declaring he'd voted 'to close Parliament at 6 pm, and keep the pubs open for four years'.

43 Henry Brougham, Scottish jurist and politician (1778–1868).

44 John Scott, 1st Earl of Eldon; British barrister and politician; Lord Chancellor of Great Britain between 1801 and 1806 and again between 1807 and 1827.

From 1993 to 2003 Jim was New Zealand Commissioner on the International Whaling Commission, serving three years as chair of its Finance and Administration Committee (responsible for budget and related issues) and a member of its Advisory Committee (which advises the Commission’s chair and secretary). He was formerly a member of the Humane Society of United States’ International Council of Advisers. He has chaired New Zealand government public policy reviews of wholesale electricity markets, defence funding and financial management, and reform of road funding and management; and also participated in two reviews of New Zealand’s accident compensation scheme.

Jim was founding chair of the New Zealand Council for Infrastructure Development (and, subsequently, its Patron), Honorary New Zealand Chair of the Trans Tasman Business Circle and a New Zealand delegate to the Australian New Zealand Leadership Forum, focused on the development of a Single

Economic Market (SEM) between the two countries (and was, for several years, a member of the Forum’s New Zealand Steering Committee). From 1998 to 2009, he was convenor/chair of the Project Manukau Audit Group, responsible for the environmental and resource management audit of Auckland’s Mangere Wastewater Treatment Plant.

Prior to his move to New York, Jim was Executive Chair of Macquarie Group Holdings New Zealand Limited (a subsidiary of Macquarie Group, Australia), chair of Goodman (NZ) Limited (manager of the publicly listed Goodman Property Trust), chair of publicly listed MetLifecare Limited and Just Water International Limited; and he was previously a director of several other companies (including Motor Race New Zealand Limited, Neuren Limited and Evergreen Forests Limited) and chairman of Pharmacybrands Limited.



Elye Parata presents a koha to Jim McLay on behalf of the *EmpowerNZ* participants

# The Importance of the Review

Sir Tipene O'Regan

## Summary of presentation

Much discussion about our constitution comes down to the question of whether we want a single written document or to follow this gradual build-up of convention. Our current arrangements are an accumulation of laws, principles and conventions – it's not such a bad model.

Let me tell you about the frog test: if you drop a frog in hot water, it immediately jumps out again. But if you put a frog in cold water and heat the pot, you get a boiled frog. So, one point about doing things incrementally over time is that we get to a place which may be completely unsatisfactory. But because we've arrived there and have adjusted to the weather, we end up with suboptimal outcomes. However, you can design, impose and follow a clear set of rules that may be vastly superior.

Professor Matthew Palmer wrote that the culture of constitutions is far more important than the word or the letter of the thing. He has pointed out that some of the finest constitutional provisions for indigenous peoples are to be found in states with horrible records for upholding such rights. For years, I have spoken on Waitangi Day about the absolute necessity for a written entrenchment of the principles of the Treaty of Waitangi. However, now, whilst I think our arrangements clearly require some ordering and tidying, I am less convinced that I am right and Palmer is wrong. I am now much more focused on the culture of the constitution than I was previously.

Our Constitutional Advisory Panel is engaged in initiating a process to advise the responsible Ministers what it is that New Zealanders want to talk about in this context. One of the challenges is getting people to have a conversation when it is not the everyday stuff of people's lives. We're not short of academics and lawyers and all sorts of highly skilled people wanting to advise us as to what should happen. The challenge is getting ordinary New Zealanders, going about their ordinary lives, to say how they want New Zealand to be in the future. It's about asking what are the values they want to see manifested in their world and in their society?

Jim McLay mentioned this idea of 'if it ain't broke don't fix it'. Some years ago, when historian Professor Bill Oliver was discussing the constitution, he said a curious thing about the character of the New Zealand identity. That as Kiwis, having planted the tree of identity in this remote and distant place, we come along every ten years and dig it up to see how the roots are getting on.

We also need to consider that society is going to be very different. Imagine all the demographic changes that will transform New Zealand as a society by 2050. Yet most of the rules we govern ourselves by have been rules that my dad, my grandfather, my great grandfather would have recognised. The conventions of Parliament have barely changed since my grandfather was there in the Ballance government. Do they still really work? How functional are they?

We all want democracy. 'Democratic' is a very good adjective, but 'democracy' is a very difficult noun. How do I want this future to be for my great granddaughter, who was born just five weeks ago? I am primarily concerned with how we get people to think about what kind of Aotearoa New Zealand we want.

To get this challenging conversation going, you have to look at the ideological foundations and flawed beginnings of New Zealand. Our state capitalised itself by decapitalising Māori. There are a lot of people who genuinely believe that the fundamental racist underpinnings of New Zealand have not yet changed. I still see trace elements of that today.

We need some enduring, agreed consensus, and we do need to settle it. It is not yet settled. But whether we need it in one document, or in an accumulation of interesting things in some constitutional tabernacle, I will leave that to your deliberations.

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### Sir Tipene O'Regan

Ngāi Tahu kaumatua Sir Tipene O'Regan is co-chair of the Constitutional Advisory Panel. Sir Tipene has extensive academic, governance, Treaty negotiations and Māori leadership experience. From a background in tertiary education he became Ngāi Tahu's chief Treaty claim negotiator. In more recent years he has led debate on developing iwi economic structures and modernising iwi governance models. He is currently the upoko (traditional head) of one of the 18 constituent regional rūnanga of Ngāi Tahu. Over the past 40 years he has served as a director or trustee of a wide range of commercial and non-profit enterprises in the public, private and Māori sectors. In 2009, Sir Tipene was recognised as one of the Twelve Local Heroes of Christchurch, with a bronze bust of him erected outside the Christchurch Arts Centre.

# The Lessons from the 2005 Inquiry

The Hon. Peter Dunne MP

## Summary of presentation

Can I begin by welcoming you all to Parliament Buildings. I think it is entirely appropriate that this important seminar about our future take place in the very room where important events of state often occur. I think there is a wonderful symbolism about that.

My argument to you this morning is essentially that the path we have 'sort of' started on toward constitutional reform is timid. I'll use the Constitutional Arrangements Committee which met in 2004/05 as a good example of that. But the background to the establishment of that committee is an important key to understanding why we went down the fairly limited path that we did.

At the start of 2004 Dr Brash made a very inflammatory speech to the Orewa Rotary Club. He argued that New Zealand was becoming a separatist state and that we should adopt that awful slogan, 'One law for all', in our approach to political and constitutional arrangements. When the next opinion poll showed a 17% jump in support for the National Party, the government panicked. They realised they had to do something to deal with the issues raised, and to show that we have a long-term plan for New Zealand.

The suggestion emerged over the first quarter of 2004 that maybe this was the time for a constitutional review – to put all these issues on the table and start to work our way through them. A select committee was formed, not to review the New Zealand constitution and to make changes, but, to quote from the committee's title: 'To Review New Zealand's Existing Constitutional Arrangements'. There is quite a significant difference in ambition.

The political reaction to the establishment of the committee was interesting as well. The Select Committee, when established, comprised of Labour, Act, United Future and the Green Party. It was immediately hamstrung by being a committee that represented only four of the six parties in the House. And when we completed our Inquiry and made our recommendations, even then, the Act Party dissented from a number of them.

That summarises the environment in which we operated and I think provides a fairly clear explanation as to why our recommendations were essentially worthy, very timid and in the end, not substantially significant. Although we did do some remarkably good work in terms of collating for the first time all of the legislation, understanding and regulations that could be deemed to be New Zealand's constitutional arrangements.

After the 2005 election when the immediate threat of the Dr Brash agenda died down, the government responded and was typically cautious. Our most 'radical recommendation' (I say cynically) about generic principles deserved a bolder response than, 'the Government agrees to give further consideration to the idea of establishing generic principles to guide significant constitutional change'. Profound!

I have a sense of anxiety that we may be going down a similar path now. I hope desperately to be proved wrong. But when you are starting out on your journey, you need to have a sense of where you want to end up. If the journey professes to promote constitutional reform in New Zealand, and developing a constitution that reflects our unique interest and composition as a nation, then you need to be committed to it.

I simply want to conclude by encouraging you in your work. I hope that you do not get distracted the way previous attempts have been. Good luck; it has been a privilege to talk to you. I wish you well in your deliberations over the next couple of days.

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### The Hon. Peter Dunne MP

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The Hon. Peter Dunne is the leader of the United Future Party and is currently a Minister outside Cabinet in the National-led government. He has been a Member of Parliament since 1984 and has held a range of portfolios during this time, including Minister of Regional Development, Minister of Internal Affairs, Associate Minister for the Environment and Associate Minister of Justice. Peter Dunne has been the Minister of Revenue and Associate Minister of Health since October 2005 and after the following year's general election he was also appointed Associate Minister of Conservation. From December 2004 to August 2005 he was chairperson of the Constitutional Arrangements Select Committee established to review New Zealand's constitutional arrangements. The Committee's report identified events of significant development in New Zealand's constitution since 1835 and made three recommendations aimed at improving wider public engagement and understanding of constitutional issues.

## The Key Elements of a Constitution

Professor Philip Joseph

In this short presentation, I have organised my thoughts under four key elements, which I term: the logistical element, the process element, the superstructural element, and the infrastructural element. The last of these – the infrastructural element – is the most important, but the other elements also need to be addressed.

### Logistical element

This element addresses the question: what are you seeking to achieve in this workshop? A choice will need to be made: to entrench or not to entrench? You may opt to consolidate our existing constitutional arrangements: for example, by integrating within the one instrument the Treaty of Waitangi (New Zealand's founding document), the primary provisions of the Constitution Act 1986 (identifying the basic structure of government), and the New Zealand Bill of Rights Act 1990 (codifying our primary civil and political rights).

This exercise would provide a constitution that is comprehensive and accessible but declaratory of our existing arrangements. Or you might opt for an exercise in constitution-building that is wholly constitutive. You might plump for a supreme law constitution that provides a new tiller for the ship of state. In this workshop, I will take a punt. I predict that you will seize the moment and plump for a formal, supreme law constitution.

Any lesser proposal would be seen as just that: a proposal for change which would not be distinguishable from the on-going constitutional changes that we have come to expect over the past 30-odd years. I suspect this workshop will set out with more ambitious purpose and advocate macro-constitutional change. Why would you squander the opportunity? To my mind, a change proposal which sought to repackage the status quo would be less than intellectually satisfying.

The logistical element is important because the election you make, one way or the other, will resolve several critical infrastructural issues: not least, to entrench or not entrench and the mechanisms for constitutional enforcement. A codified constitution enjoys 'higher law' status and controls the exercise of all public power, including legislative power. Once you have settled on your choice of constitution, you will need to address the process element.

### Process element

Let us suppose this workshop sets out with ambitious purpose. How, then, might a new constitution be adopted? We are not dealing with just another law enacted by majority of Parliament; we are dealing with the 'law behind the law' that is the embodiment of the State itself. The law behind the law denotes the constitutive laws that establish the organs of government and confer their respective constitutional authorities: to govern, to legislate and to adjudicate. A constitution in this sense, not being historically derived, must claim the authority of the people; it must have constitutional legitimacy.

How might the constitution acquire this legitimacy? What adoption process should be followed? Some States have convened a constituent assembly representing the main interest or power groups within society, with the objective to cement a popular consensus that might be broadly representative of the people. Usually these assemblies have been convened following some cataclysmic event, such as a revolution, defeat in war, or the desire or need to unite or break apart. However, none of those eventualities applies to us in 2012. Moreover, we are a unitary State free of the complexities of a federal system. So, would something more direct and simple suffice, such as a national referendum? Possibly 'yes', although the answer may be contingent on the referendum outcome. What if only a bare majority of voters (say, 51 percent) favoured the new constitution? Would that be enough to cement a popular consensus that could accord legitimacy to the new settlement?

These are process questions which will need to be addressed. A new constitution enacted by a bare majority of Parliament, without more, would not engender the necessary groundswell to guarantee its success. These issues were explored when the Fourth Labour Government (1984–90) proposed the White Paper Bill of Rights, which was to be a fully entrenched, supreme law bill of rights. The then President of the Court of Appeal, Sir Robin Cooke, endorsed the proposal but only if the instrument could exhibit (what he termed) 'practical sanctity'. Some indication of popular approval was needed for the courts to uphold it as against the legislative powers of Parliament.

### Superstructural element

I use the term ‘superstructural’ in contradistinction to ‘infrastructural’, which identifies my fourth key element. If the workshop promotes macro-constitutional change (a new codified constitution), then thought must be given to the principles, values and ideals that will inform the constitutional infrastructure – the detailed elements of the constitution that comprise the governmental system.

Probably most codified constitutions contain recitals or preambles that set out principles of social or state policy. These principles identify what the State stands for in terms of political or state philosophy. Often these principles will be couched rhetorically. The United States constitution, for example, begins with the wonderfully powerful and evocative words: ‘We the people ...’ The preamble acknowledges forming ‘a more perfect union’ that can secure the blessings of liberty and ensure the general welfare, tranquillity and happiness of the people.

So, that will throw down a challenge for would-be constitution-makers. What is this country’s dominant ideology? At once, we confront the hard questions. Is there a dominant ideology? Might we adhere to more than one ideology? All would agree that we are a liberal democracy: we hold to representative democracy, a system of independent courts, and the fundamental values of liberty and freedom that promote human autonomy and dignity.

In short, we proclaim the rule of law and the ideal of limited government. But, most would say we are also more than that: that we are a country organised on the principle of biculturalism that is enshrined in our founding instrument, the Treaty of Waitangi.

So, should we be talking about a melding of ideologies that can account for the unique foundations of Aotearoa New Zealand? I suggest the framers of a new constitution would need to embrace these two ideologies – liberal democracy and biculturalism. A codified constitution would presumably entrench the elements of representative democracy. But would it also entrench biculturalism and the Treaty (in addition to whatever Treaty reference is made in the preamble)?

I pose this question because of the historically contested meanings that surround the Treaty, and its disputed application to contemporary issues such as intellectual property rights, radio spectrum rights and water rights. These are questions which will need to be worked through, because a supreme law constitution controls all laws, including legislation, which, in most countries, is enforced by the power of judicial review. Laws repugnant to the constitution will be judicially struck down or disapplied (as the case may be).

So, the superstructural element is crucial in settling upon the principles, values and ideals that will inform the detailed constitution, which brings me to the fourth element.



### Infrastructural element

This is where the real bump and grind of the workshop will happen, in settling upon the detail of the constitution. Two features distinguish a formal codified constitution (if that is what the workshop will be advocating): supreme law and fundamental law. Supreme law denotes constitutional entrenchment: the constitution is protected from alteration by ordinary Act of Parliament. A supreme law constitution enjoys a higher legal sanctity than all other laws. Fundamental law, on the other hand, is constitutive. Fundamental law establishes the organs of government and confers their necessary authorities to function.

A proposal for a supreme law constitution has immediate consequence: the principle of parliamentary supremacy is jettisoned. Parliamentary legislation would be controlled by the constitution (including an entrenched bill of rights if this formed part of the constitution), and legislation that was repugnant to the constitution would be subject to judicial invalidation. Ardent democrats might rail against such a proposal. The people elect Parliament, not the judges. Their elected representatives ought to have the last word on what is law and what is not. But rule of law protagonists might counter that absolute power is anathema and cannot co-exist with the ideal of limited government and the rule of law. Already, one can discern the potential for bump and grind.

That said, there are certain characteristics or features common to all Western political systems. Each is founded on a separation of powers of sorts. I say 'of sorts' because the ideal of the separation of powers has been construed differently by different States. But putting the detail to one side, all modern Western constitutions are organised around a rudimentary separation of the executive, legislative and judicial powers. Powers are separated in order to limit powers. Power corrupts, observed Montesquieu in 1748, and absolute power corrupts absolutely. So, the infrastructural element would establish the three organs of government (the executive, the legislature and the judiciary) and would confer upon them their corresponding constitutional functions and powers.

Apropos your task: this would throw into question what sort of a separation of powers a new constitution would implement. In the United States, there is a pure ('paper') separation of powers. There is no mixed or merged personnel as between the separate organs.

However, contrast the position here, where we operate under the Westminster principle of the parliamentary ministry. It is a legal requirement of appointment as Minister of the Crown that the appointee be an elected member of Parliament (Constitution Act 1986, s 6). This represents a major departure from the separation of powers doctrine. But would we wish to jettison this central feature of our constitution? I would hope not as it has worked well until now. Better to sacrifice constitutional purity for a system that is workable, durable and robust.

The infrastructural element would also define the interrelationships between the organs. A supreme law constitution might incorporate the principle of judicial independence, guaranteeing judicial tenure and specifying the limited grounds on which a judge might be removed from office. The constitution might also codify, or endorse, the law of parliamentary privilege, guaranteeing Parliament's freedom of speech and autonomous functioning.

A new codified constitution would also need to settle upon an appropriate method of constitutional amendment. Many methods are practised around the world. Some States (e.g. the German Federal Republic) declare parts of their constitution to be inviolate and legally unalterable by any method. This feature may have resonance for Treaty advocates, who might agitate for the Treaty to be the centrepiece of their constitution. Declaring the Treaty to be inviolate and unalterable would protect it against either well-intentioned or mischievous change through the constitution's amending formula. It was this possibility that caused many Maori to oppose the entrenchment of the Treaty in the Lange Government's White Paper Bill of Rights.

Most States prescribe differing methods of amendment of varying rigidity. In the United States, constitutional amendment is carried by a two-thirds vote of both Houses of Congress and ratification by the legislatures of three-quarters of the states. The Australian constitution, in contrast, prescribes a simpler method on paper, but it has proved to be more difficult to satisfy in practice. An amendment must be carried nationally by a majority of voters and it must be carried in a majority of states. Perhaps an amendment formula might be simpler in New Zealand as we are a unitary State. Might a super-majority in Parliament or a national referendum of the people suffice? Those alternatives are the methods for altering the reserved sections of the Electoral Act 1993 (either a 75% majority vote of the House or a majority vote at a national referendum).

The infrastructural element would need to address two further things: the role of the Treaty within our constitutional arrangements, and the New Zealand Bill of Rights Act 1990. Should the Treaty and/or the Bill of Rights be included as part of the entrenched constitution? These are topics contained in the terms of reference of the Constitutional Advisory Panel. Supposing the Bill of Rights were to be included as part of the entrenched instrument: should further guarantees be included, such as pertaining to property rights, the environment, healthcare or education? Should further socio-economic rights likewise be included? In addressing these issues, realism may need to temper idealism. A constitution must be a workable instrument capable of delivering stable government. It should never promise more than it can deliver.

This workshop is convened with one eye on the Constitutional Advisory Panel's forthcoming review. Under the heading 'Crown-Māori relationship matters', the panel's terms of reference list the question of separate Māori representation. This is a matter which might be addressed under a codified constitution; or it might be thought preferable to include this topic under the specialised electoral statute (as it now is). Other matters mandated for the panel include: the size of Parliament, the length of the parliamentary term (and whether it should be fixed), the size and number of electorates, and electoral integrity legislation. These matters are all presently dealt with under the Electoral Act 1993, but some things (such as the term of Parliament) may be thought sufficiently important as to warrant inclusion under an entrenched constitution.

Some topics of obvious constitutional importance were (deliberately one assumes) left off the panel's smorgasbord. The head of state question is the most obvious omission. As this was not a listed topic, you too may wish to park this issue for another day. But, if you are genuinely contemplating a proposed new constitutional settlement, you may find it unnatural or artificial to treat as an elephant in the room – there but not there.

## Conclusion

I wish you well in your endeavours over these two days. It is going to be fascinating to see what transpires. This is partly because of the nature of the exercise. What is or is not constitutionally important, and worthy of consideration, is much like beauty – largely in the eye of the beholder. Matters which I have identified as key elements may bear little relation to matters which you might identify. But that is not important; what is important is a group of intellectually energised young New Zealanders rolling up their sleeves and engaging with issues of nation-building. I commend each of you for getting involved. Equally, I commend the McGuinness Institute, and particularly Wendy McGuinness, for this marvellous initiative.

To view this presentation visit our YouTube channel at [www.mcguinnessinstitute.org](http://www.mcguinnessinstitute.org) or use the QR code.



### Professor Philip Joseph

Widely considered to be New Zealand's leading constitutional scholar, Professor Philip Joseph is an Associate Dean at the University of Canterbury School of Law. Professor Joseph has written the leading text on New Zealand's constitutional arrangements, *Constitutional and Administrative Law in New Zealand*, and has published widely in this field. He is a member of the editorial advisory board of the *New Zealand Journal of Public and International Law* (Wellington), and a contributing editor to the *New Zealand Law Review*. In 2004, he was awarded the degree of Doctor of Laws in recognition of his research contributions in public law. Professor Joseph is also a consultant to the law firm Russell McVeagh, and has undertaken advisory work for government departments, public bodies, and parliamentary select committees.

# Why a Constitutional Conversation is Important

Dame Dr Claudia Orange

## Summary of presentation

Let's get our purpose clear: this is the first time we New Zealanders have been asked to have a national conversation on our constitution. You have two days to explore and draft our constitutional future. This is a unique opportunity. Your thinking, your propositions and what you produce will be important to the wider and deeper discussions on the constitutional review.

The constitution of a nation is about power – about the set of rules that govern how a government can exercise public power. Creating a constitution, therefore, can be complicated. Different people will disagree over how a government should exercise its powers. You too will no doubt disagree.

Up till now, we have done pretty well in a fluid situation. Matthew Palmer has noted that this flexibility means our constitutional arrangements can be changed quickly and easily. There has to be a trade-off, however, between flexibility and vulnerability. And though we tend to say that New Zealand has an unwritten constitution, a great deal is written in acts and procedures. You will need to decide if this is future-proof.

What would ensure a broadening and deepening of democratic rights in a draft constitution? What values should we or could we express in written form? Could we spell out in this document a set of principles which would apply to the detail of a written constitution?

If opting for macro-constitutional change, then there are several important factors for consideration. This is not an exhaustive list, and you will have other elements to consider. You might wish to examine our nation's relationships with tangata whenua and the role of the Treaty of Waitangi; our nation's relationship with migrants; our nation's future generations; the impact of demographic change; our nation's parliament, and the constitutional culture.

Matthew Palmer reminds us of other influential elements; our constitutional change has been a pragmatic evolution, certainly not a revolution, and often a practical response to events (more reactive than proactive). There is also an authoritarian streak in us. We like our governments to exercise power, firmly, effectively and fairly, and we respect strong leaders, though we look to them to be fair too. And we prize egalitarian values. These were

embedded in our early settlers and as early as 1840 in the attitudes of workers to their masters. It can be seen to some degree in the operation of Māori tribal dynamics. We support underdogs so long as they don't get too uppity. We prefer team spirit over too much individual brilliance. All are aspects to bear in mind.

Finally, building a consensus in your workshops on what is significant, what to include in a constitution and what principles it should express – all of these are not going to be easy to decide. But you bring fresh eyes, new thinking, and a broad, extensive awareness and know-how from the world at large – far more so than older generations. You are an internet generation who can bring to bear on your thinking the knowledge of other nations and their workings.

Remember, our government can't solve all our problems in New Zealand. As New Zealanders building our future, you now can set in place the overall elements by which a constitution can guide, not only our governments but also those arms of government, New Zealand institutions at large, as well as individuals – all of whom will contribute to a successful future for our national family.

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Participants listening to speakers' presentations. Clockwise from top left: Duran Moy and Maithili Sreen; Ihapera Paniora; Edward Willis (facilitator) and Emma Gattey

## The Working Dinner

### Grand Hall, Parliament

The first day of the workshop finished with a working dinner in Parliament's Grand Hall for participants and guests from among the morning's speakers, Constitutional Advisory Panel members, academics, politicians, journalists, business leaders and city councillors. The aim was to create a congenial atmosphere where the participants had the opportunity to share their questions, observations and insights with invited guests and unwind after a long day of hard work.

The evening opened with participant Alex Ladyman entertaining the guests with a performance on his piano accordion. From there, the co-chair of the Constitutional Advisory Panel, Emeritus Professor John Burrows, and Te Ururoa Flavell, Māori Party MP and member of the Cross-Party Reference Group, shared their views on the current review process. Justice Joe Williams also assigned each of the facilitators a challenging question that they had three minutes to answer during the dinner.



**Clockwise from top: Sir Tipene O'Regan and participant Tele'a Andrews; guests Wayne Silver and Max Harris; participant Alex Ladyman performs at dinner**



Clockwise from top: Charlotte Greenfield and Professor Philip Joseph; Paul Goldsmith and Jo Coughlan; Diana Tam, Julia White, Ryan Smits Maclaime and Tiana Morgan; Colin James, Te Ururoa Flavell, Emeritus Professor Ranginui Walker and Professor Philip Joseph; Dipti Manchanda; Wendy McGuinness and Ella Spittle; Deborah Coddington and Kieran Stowers; Rachael Jones

# Building a Constitution for the Future

Emeritus Professor John Burrows

## Summary of presentation

The Constitutional Advisory Panel was set up as an agreement between the government and the Māori Party. But that is not the reason why it is happening. That is the historical background. The reason simply is: why would you not want to occasionally review your constitution?

We are a panel of twelve and we represent the philosophy that the constitution is for the people. Our task is to ask New Zealanders what they think about the constitution, what they know, and what needs to be done. We are a diverse group, from all over the country, with a range of occupations and interests.

Constitutions are not about intellectuals or politicians imposing things on people. They belong to the people, and before there is any serious change there has to be general public approval for the change. The cynic says this means nothing will happen, because you'll never get agreement. I disagree. When time moves on, people do want change. I think there will be some agreement about at least some things in our mandate.

The terms of reference are slightly strange. We have eight issues to consider, and can consider others if they arise. But the issues are only part of the constitution. They range from fairly second-order stuff to some big questions. And there are a number of really big issues we have not been asked to look at, such as have we got the balance right between central and local government? Or controls on power? Or keeping the executive in order? Our job is not to get bogged down in minutiae, which is a real risk. We've got to see through the whole picture.

My favourite topic, as a lawyer, is about whether we should have written constitutions. There are two very good reasons why you might want them. Firstly, they educate people. Right now we have statutes, the Treaty, a Cabinet manual and so on. But if you have a written constitution with a lot of simple, clear propositions it is much easier to understand. Secondly, you distil the principles. New Zealand law is very detailed. We need to be able to take the principles from the mass of information. By writing these things down you can suddenly see what the basis of your constitution is – things like democracy, the independence of the judiciary, and the rule of law.

There is a big downside of a written constitution though. If it is written and given some clout, the jurisprudence created will be very complicated. Why is that? Because it is so important you want to get the right answer. And to get the right answer sometimes it takes a lot of judicial time.

Further, how do you define a constitutional question? Should the constitution be detailed or principled? Simplicity is key, but what is put in and what do you leave out? It is a real balancing act.

A critical question: should the Treaty of Waitangi go in the constitution? Some argue, what more fundamental constitutional document is there? Of course it should go in. Others would say it is prior to any constitution, the constitution flows from it, and it should stand as a very special document on its own.

If you do get a written constitution, how is it passed? Should Parliament do it? Do you have a special, devised process? We haven't done this before. Other countries have and we might be able to learn from them.

But don't ever expect too much from a constitution. They are fundamental to our society and to our law. You do have to have one. But a constitution is words on a bit of paper. For example, Syria's constitution declares that, 'the state protects the personal freedom of citizens and safeguards their dignity and security'. Everybody wants to look good on paper. But to make it work, it has to go into your bones; to become a part of you.

The other thing a constitution cannot do, it cannot find a government money. It's an interesting question whether a constitution can help a country with jobs and housing, but the government has got to have some money. That again goes to the question – what do you put in the piece of paper? Is it just what we might call jurisprudential rights? Or is it economic and social rights as well? Because some of those do cost.

So, thank you for the work you are doing; I greatly admire your enthusiasm. And we look forward to the outcome.

To view the full presentation visit our YouTube channel at [www.mcguinnessinstitute.org](http://www.mcguinnessinstitute.org) or use the QR code.



### Emeritus Professor John Burrows

Professor Burrows, co-chair of the Constitutional Advisory Panel, has had an extensive and prestigious legal career. He is the author of a leading text on statute law in New Zealand, has written on media law and contract law in New Zealand, and has contributed to books on tort law and commercial law. He was Professor of Law at the University of Canterbury for some 30 years and as a barrister of the High Court specialised in opinion work; he was appointed Queen's Counsel in 2005. Appointed a Law Commissioner in 2007, Professor Burrows led or jointly led Law Commission reviews of the Presentation of New Zealand Statute Law, Privacy, the Official Information Act 1982, Tribunals in New Zealand, and Private Schools and the Law.



## The Importance of the Cross-Party Reference Group

### Te Ururoa Flavell MP

#### Summary of presentation

It is a real privilege to be here with you tonight. Clearly there are some things that are even bigger than what we envisaged when we first started talking about this kaupapa, so the general gist for me to talk about tonight is – where did this whole idea come from?

You've heard the notion that this panel came from the Māori Party. The mighty Māori Party. I say mighty because there are only three of us, and yet we were still able to work in with 59 of the National Party to put this on the national agenda. And that, for me, is a major achievement. It is the start of a long conversation that is hopefully going to deliver something that will be for the betterment of the country.

So where did this whole notion come from? The Māori Party, as most of you will know, grew out of the foreshore and seabed debate. Many of those far more knowledgeable than me suggested that if a constitution had been in place at that time, perhaps the whole debacle would never have happened.

Our party asked about the review because of the strong need, we thought, and we still believe, for nationhood building and for the creation of a society that is far more inclusive. We talked about the Treaty as New Zealand's founding document. It belongs to all of us; it must be the backbone of constitutional change. I believe that if we were to educate people throughout the whole country about our history, and the rights inherent in Te Tiriti o Waitangi, about why things are the way that they are, then perhaps we could start changing things for the positive, for the whole country.

We want open and informed debate on constitutional change. The priority to review the constitution came about from decades of concern about the Treaty and its position within the constitution, and treatment by successive governments. I think it probably explains why I'm here in Parliament; it explains who I am, and what I believe right now.

Why is it so important to develop it and get this kōrero sorted? Basically because every day in Parliament, we raise these issues. The whole question about the constitution is pretty important right here and right now as the discussion goes on with respect to the rights and the interests of Māori and water. I'm not going to go into that sort

of discussion, but don't think that it is something distant that doesn't affect us here and now. It is something that affects us every day. These issues are staring us in the face right now, and that is why it is so important that we go forward.

Pretty much every party is included in the review process, and the hope is that with buy-in from all these parties, the discussion will be taken somewhere. It will be intense, it will be great, it will be powerful, it will be emotional. But this is the key: it is no use having all of the discussion unless we take it somewhere. Then it is really a waste of time and it will be back to the drawing board.

So, just to wrap up: thank you for having me. I look forward to seeing the outcomes of your hui. I think you're doing a great job right now and your kōrero is just so important.

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### Te Ururoa Flavell MP

Te Ururoa Flavell belongs to the Ngāti Rangiwewehi and Ngāpuhi iwi. He was first elected to the House of Representatives as a Māori Party Member of Parliament in September 2005 for the electorate of Waiariki and was re-elected in the 2008 and 2011 general elections. Te Ururoa is currently the Māori Party Whip, Member of the Māori Affairs Select Committee, Member of the Business Select Committee and Member of the Standing Orders Select Committee. Prior to becoming an MP, Te Ururoa worked in education, holding leadership positions at all levels of the education sector. He has been a teacher, school principal, CEO of Whare Wānanga and an education consultant. Throughout this time he has been involved in education programmes about Te Tiriti o Waitangi and is deeply involved in the settlements process on behalf of his own iwi and Te Arawa whanui. Te Ururoa is a long-standing supporter of the Māori civil rights movement.

## Eight Questions for the Facilitators

### Grand Hall, Parliament

Justice Joe Williams was unable to attend *EmpowerNZ* as planned, however we were determined to find a way to have his presence felt. Our solution was to ask Justice Joe Williams to set each facilitator a challenging question. During the working dinner the facilitators had three minutes to wrangle with their questions. Here are a summary of their answers.



From top: Dean Knight; Carwyn Jones

### The Hon. Justice Joseph Williams

Justice Joseph Williams is a New Zealand High Court Judge, a position to which he was appointed in September 2008. He holds a Bachelor of Laws from Victoria University (1986) and a Master of Laws with Honours from the University of British Columbia (1988). He was admitted to the Bar in 1988 and employed by Kensington Swan, Auckland, the same year, becoming a partner in 1992. He was a partner in the firm of Walters Williams from 1994 until 1999, before being appointed Chief Judge of the Māori Land Court in December 1999, retaining that position until 2008. He was also the chairperson of the Waitangi Tribunal. Justice Williams has also held a number of academic roles, and is a leading specialist on Māori legal issues.

### Dean Knight – Will the constitution help to feed my children?

Dean quipped that he wouldn't need the three minutes, because his answer was 'No, it's just a piece of paper.' However, he did agree that the question of whether a constitution can solve the problems within our community and address issues such as poverty and well-being was a valid one. The answer lies in the importance of the values, and the culture of our constitution. It has to be embraced by the people it serves, in order to achieve the change required – and to put food on the table.

He referred to Jim McLay's earlier idea that there were two types of constitution – constitutions with solutions, and constitutions with presence.

The former might include social and economic rights, with positive requirements for the government, but you still have to address the question of where the money comes from. You need to be cautious, and sceptical about whether constitutions promote solutions that will be realistic.

Dean spoke about the processes for engagement, conversation and *kōrero* between people, the community, the governors and the governed, in an attempt to create a dialogue about engaging with the state and improving citizens' well-being. Thus, a constitution of presence may put food on the table because it would enable people to have that conversation and advance that cause within their government.



### Dean Knight

See Dean's biography on page 64.

### Carwyn Jones – What’s wrong with the constitution we have now anyway?

Carwyn opened by saying he had been given the ‘simple’ question, so he had ‘simply’ prepared a list:

It’s not all in one place;  
 It has fuzzy edges and it’s hard to define;  
 It’s hard to access and to enforce;  
 It’s too easy to change and it’s too hard to change;  
 There’s no upper chamber, or even much room for sober second thought;  
 Mostly still unbridled power, and still the fastest law in the West;  
 Awkward separation of powers;  
 Executive control of Parliament;  
 The Westminster System, or even Geoffrey Palmer’s Washminster;  
 The use of urgency;  
 The Bill of Rights Act – not enough bite, too few rights!  
 Too much control;  
 Too much deference;  
 Focus on civil and political rights at the expense of cultural and social rights;  
 Weak judicial review;  
 Judicial activism;  
 Political interference in the courts;  
 Where is the Treaty of Waitangi?  
 Where is Tikanga Māori?  
 Where is The Declaration of Independence?  
 Where is The United Nations Declaration on the Rights of Indigenous Peoples?  
 It’s not designed to give effect to our international obligations;  
 Not enough protection for the national interests in the face of globalisation;  
 Not taking rights seriously!  
 Too much flexibility, not enough flexibility;  
 Parliamentary supremacy;  
 The electoral system;  
 Epsom;  
 Ohariu;  
 Representivity of Parliament;  
 Protection of privacy;  
 Accountability of MPs;  
 Central government’s relationship with local government;  
 1984 and all that;  
 Citizens’ initiated referenda;

The length of the electoral term;  
 Participation of democratic institutions;  
 Where are the incentives for long-term transformation?  
 The health of the social contract;  
 Finding duty bearers and rights holders;  
 Balancing rights is hard;  
 Limitations and constraints on the Human Rights Commission, the Ombudsman, Parliamentary Commissioners, the Environmental Protection Agency;  
 And too much power in the hands of the Human Rights Commission, the Ombudsman, Parliamentary Commissioners, the Environmental Protection Agency;  
 Often too few checks and balances within the systems;  
 And sometimes the checks become unbalanced;  
 Does the Cabinet Manual still mean anything?  
 Are our ministers effectively accountable to Parliament?  
 Her Majesty Queen Elizabeth II;  
 Common law constitutionalism;  
 Dicey, Hobbs, the Leviathan and indivisible sovereignty;  
 The prime minister, the Cabinet, the hyphen which joins, the buckle which fastens;  
 Access to justice;  
 Structural discrimination;  
 And the Union Jack  
 It belongs to another time and place and was never designed for us here and now.



Carwyn Jones

Carwyn is a Lecturer in the Victoria University Faculty of Law. He holds a Bachelor of Arts and a Bachelor of Laws from Victoria University, and a Master of Arts from York University in Canada. Before joining the Victoria University Faculty of Law, Carwyn worked at the Waitangi Tribunal, the Māori Land Court, and the Office of Treaty Settlements. He is currently a PhD candidate at the University of Victoria, British Columbia. His thesis focuses on the implications for Māori legal traditions of the current Treaty of Waitangi claims and settlement process. Carwyn’s other research interests include constitutional and administrative law, indigenous governance structures, research ethics and methodologies, and indigenous peoples’ rights. He maintains a blog, Ahi-kā-roa, which explores current issues in the law relating to Māori and other indigenous peoples.

### Jess Birdsall-Day – Why don't we do big, hairy, audacious ideas like a written constitution in New Zealand?

Jess clarified the question by using the simpler terms 'complicated' and 'risky' in place of 'hairy' and 'audacious'. And she found that New Zealand does have a strong history of big, complicated and risky ideas within our legal and constitutional system. For example, the signing of Te Tiriti, and being the first country to give women the vote. There are some terrible decisions as well, such as enacting the New Zealand Settlements Act 1863, and the events of Parihaka in 1881.

The establishment of the Waitangi Tribunal was particularly big, risky and complicated in the 1970s. During the same period, we saw the abolishment of New Zealand's superannuation scheme, which was certainly done in a big, risky and complicated way. A decade later New Zealand was declaring itself nuclear-free, yet at the same time selling off its assets. These are contentious issues, but Jess pointed out that New Zealand's history of big, risky and complicated ideas has involved both positive and negative developments.

Adopting a written constitution is big in terms of the scope of the task, the scope of its reach, and the scope of its change. But as big, risky and complicated as the potential for constitutional change in New Zealand is, the enthusiasm supplied by the members of the panel at the workshop left her heartened that a big, hairy, and audacious idea like a written constitution was a distinct possibility.



Jess Birdsall-Day

Jess is currently completing her Master of Laws at the University of Auckland, specialising in Commercial Law. Jess holds a Bachelor of Laws with Honours and a Bachelor of Arts majoring in History and Statistics. She has practised law at Chapman Tripp in both the Commercial and Banking and Finance teams. Jess's interests lie in public and constitutional law, and the interaction of public law with the commercial sphere. She is also passionate about justice and education, especially for Māori and Pacific peoples. Jess has been involved in introducing JustSpeak to Auckland; this project aims to provide a platform for young people to participate in the criminal justice debate. She was also a key member of the group which established The TULA'I Project, which seeks to provide Pacific law students with the opportunity to use their language and/or cultural background to advance Pacific causes and serve Pacific communities in Auckland and the Pacific region.

### Natalie Coates – Why should we trust the judges with a written constitution?

Natalie stressed the importance of this question in the face of the *Draft Constitution*, and asked whether the participants might want to put in enforcement provisions. She provided a brief legal realist analysis, explaining that the ways laws are framed and the ambiguous nature of language means judges do have options open to them in interpreting the law, and potentially will bring their personal morals into play. If that's the case, then of course we shouldn't trust them.

Natalie acknowledged the risk of giving judges this sort of power, but stressed that it largely depends on how prescriptive our constitutional laws are and how much room we give our judges to move. This was something to bear in mind in the choice of language for the constitution.

However, judges do not have totally free reign. What is this magical force that binds and restricts but doesn't formally bind, Natalie asked. To pick up on a recurring theme: culture. Judges feel personally bound by the institution of being a judge. They are expected not to implement their own will and agenda, but to respect judicial process, the law, and their role as interpreters. Furthermore, outside the legal profession, judges are seen as respected members of society, and with this comes a pressure to live up to that.

Judges are also required to explain their decisions. They need to show they are acting in a reasoned and principled way, and to explain how they came to a particular decision. That decision is open to being critiqued by lawyers and other members of the judiciary.

The reason judges should be trusted comes down to the pressure and desire they feel to do the role they are supposed to do.



Natalie Coates

Natalie has recently joined the law faculty at the University of Auckland as a law lecturer. She holds a Master of Laws from Harvard University, as well as a Bachelor of Laws with honours and a Bachelor of Arts with honours (majoring in Māori Studies) from the University of Otago. Natalie's research interests revolve around Māori legal issues, indigenous rights and legal pluralism. Both her honours dissertation for law and her substantive research paper for her LLM looked at the association between the New Zealand legal system and Māori customary law. Natalie will be teaching law courses at Auckland University in jurisprudence and the Treaty of Waitangi

### Mihiata Pirini – Aren't Kiwis too shy to have a flash constitution?

Mihiata questioned whether we really think Kiwis are shy – and whether we aren't actually all that flash already.

New Zealand may not have a 'flash' document to hold up, proclaiming 'we the people'; our Bill of Rights Act may have been drafted on Sir Kenneth Keith's kitchen table. But we certainly have enough challenges, intrigues and complexities, which is pretty cool. So whether it is written and codified or not, our constitution is pretty flash.

Although a constitution is about power and who exercises that power, it is also about culture. So, by identifying our constitution, we also constitute ourselves. However, we might not have reached a point where we are ready to do this. Maybe it's going to take a little more time to figure out who we are and how we want to write that down.

Mihiata's answer was thus, no, we are not too shy to have a flash constitution, as it's already pretty flash. And it's true that like the kiwi, we're at risk of predators now, and threats to our nation, whether from domestic sources or international sources. Hopefully, unlike the kiwi, it's not going to take us thousands of years to regain our wings and be able to protect ourselves.



Mihiata Pirini

Mihiata is currently working at the Law Commission as a legal and policy advisor. She studied law and French at Victoria University and spent some time after graduation working as an English teaching assistant in Saint-Nazaire, in the northwest of France. She has also spent a short time clerking at Chapman Tripp. Mihiata is very interested in all things to do with citizen-state engagement, language and linguistics, facilitation, dispute resolution and clear communication.



From top: Jess Birdsall-Day; Natalie Coates; Mihiata Pirini

### Marcelo Rodriguez Ferrere – Are we grown up enough yet to have a real constitution?

Marcelo opened by remarking that in one sense, ‘yes’, because Syria, for example, has a constitution and we’d like to think we are at least as ‘grown up’ as a country mired in civil war. Many New Zealanders forget - or just don’t know - that New Zealand is the world’s oldest continuous democracy, and so it is less about whether we are grown up enough to have a ‘real’ constitution, and it’s more about whether we are grown up enough to have the conversation about it: whether or not we can be ambitious and serious about making some changes.

New Zealand has had an amazing constitutional history, and there is much to be proud of. But we tend to rest on our laurels, viewing historical achievements as related to our being New Zealanders. In reality, many of these things were historical accidents. New Zealand being the first country to give women the vote is seen as something that was always going to happen - something that was intrinsic to ‘New Zealand’ - and that is not a fair assessment, for it undermines the ambition and perseverance of Kate Sheppard and the suffragette movement she led. Similarly with Māori seats; there had been some discussion at the workshop from Jim McLay and Sir Tipene O’Regan that this was not as progressive a move as many consider it to have been; that far from giving the tangata whenua a voice, it may have instead marginalised them.

New Zealanders sometimes tend to have too much of a ‘She’ll be right, it’ll come together’ attitude, which is both something to be proud of and something to be cautious about, because we cannot be so lackadaisical when it comes to discussing the our constitution. It will not just ‘happen’ - it is something we need to talk about seriously and work hard for - just like every other constitutional moment in our past. This forum demonstrated that we are stepping up to the plate and taking the question seriously, but our nation’s tendency for apathy is something we must keep in check.



#### Marcelo Rodriguez Ferrere

Marcelo has recently completed his Master of Laws at the University of Toronto. He is a law graduate from Otago University and practised at Chapman Tripp and as a judges’ clerk at the High Court before leaving New Zealand for Toronto. His interests are in administrative law and judicial deference, and both his undergraduate and graduate dissertations focused on deference in judicial review. He is returning to New Zealand in June to undertake some teaching at the University of Otago.

### Diane White – Isn’t a constitution something the Americans do?

Diane thought her question deserved a simple answer – ‘No!’ However, she considered it an interesting question to ask why we might think this. One powerful contributor is the deficiency of civic education. There is considerable scope for improvement in this area. Currently, civic education is largely limited to a basic introduction to the Treaty of Waitangi, and even this is not taught not in the context of civics but history – a topic not deemed to be of current or future relevance. Further, our current model of education does not seek to foster a culture of discussion or questioning the status quo. The lack of understanding about the fundamentals of government, combined with the tendency to quiet those who ask ‘but why?’, has manifest itself in what appears to be a general apathy towards our constitutional arrangements.

We seem to have adopted an ‘if it ain’t broke, don’t fix it’ attitude. If the majority of New Zealanders are not even aware something – namely, our constitution – exists, how can we know if it is broken and in need of repair? The attitude we have adopted presupposes a widespread basic understanding of our current civic arrangements – something Diane does not believe exists.

During the constitutional review process we need to be mindful of this lack of education and engagement around constitutional issues, and the risk of exclusion this presents. Can we hold this great, national ‘constitutional conversation’ if a large part of the population does not know the conversation is happening, or what the conversation is about? One thing to come out of this review might be a strong call to act on the lack of civic education in New Zealand.



#### Diane White

Diane holds a Bachelor of Laws and a Bachelor of Arts majoring in English Literature and International Relations from Victoria University of Wellington. She was admitted to the roll of Barristers and Solicitors of the High Court of New Zealand in June 2012. She lives in Auckland and works at the Auckland District Court as a Legal and Research Advisor. Diane has a strong interest in civic and youth engagement in justice issues. She is part of the group JustSpeak, which aims to provide a platform for young people to participate in the criminal justice debate, and is currently involved in establishing JustSpeak in Auckland. She has also been involved in a number of other community organisations, such as the Wellington Peoples Centre and Workers’ Rights Wellington. Diane worked at the McGuinness Institute in 2011–2012 and was involved in the early stages of the *EmpowerNZ* project.

### Edward Willis – Why should we trust the politicians with an unwritten constitution?

Edward stated that he believes our unwritten constitution is a wonderful, beautiful thing, and something to be proud of. His answer was that politicians are not as powerful as we might think, and they are not the ones who make the decisions. Parliament is. And this is a great thing because Parliament is not only making legislation, but holding those politicians to account.

He summarised Quentin-Baxter’s argument that politicians and constitutional actors not only have to obey the law, they are held to account by Parliament, and this was one of the most fundamental gifts that the Westminster system gave us.

Edward further explained that Parliament is not as powerful as we’d like to think, and works within a lovely system of checks and balances. For example, if Parliament wants to override human rights or the Treaty of Waitangi, it must do so in express terms. And if Parliament has to put its actions into express terms, it is forced to slow down and consider this. Furthermore, there are other actors involved, such as the Governor-General. And if Parliament were ever to undermine a fundamental constitutional principle, it would be very surprising if the Governor-General assented to that. Edward thus concluded that the unwritten constitution is really a beautiful thing.



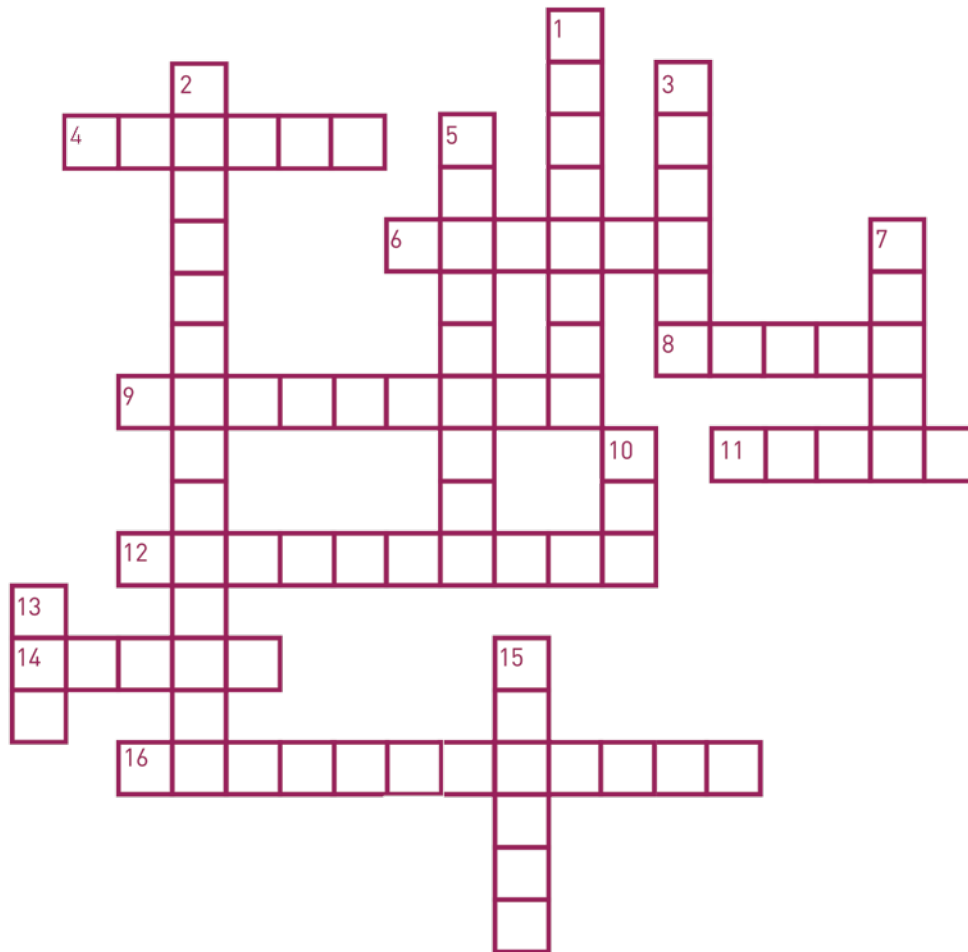
#### Edward Willis

Edward is a Senior Solicitor at Webb Henderson. He holds of Bachelor of Arts in Law and Philosophy and a Master of Laws with Distinction from Victoria University. He has previously worked as a solicitor at Minter Ellison Rudd Watts, and in Legal Counsel for the Commerce Commission. Currently, Edward is working toward a PhD at the University of Auckland, focusing on the implications of New Zealand’s unique constitutional arrangements. His experience combines insight into government processes and public law issues with specialist understanding of competition law. More recently, he has worked alongside clients in the private sector on regulatory law and policy, and has helped them to more effectively and strategically engage with government at all levels. He has published a number of articles relating to his specialities in economic regulation, competition law, public law, policy and government engagement, and constitutional law.



From top: Marcelo Rodriguez Ferrere; Diane White; Edward Willis

## Constitutional Crossword



### Across

- 4. What percentage did the New Zealand dollar devalue by as a result of the 1984 constitutional crisis?
- 6. Other than our nation, and the United Kingdom, name the other country with an uncodified constitution.
- 8. How many sources or types of sources does the *Cabinet Manual* name?
- 9. Easy to use as an adjective, this noun can be difficult to define.
- 11. Country with the oldest unamended constitution (since it was imposed in 1947).
- 12. A constitutional text from 1215.
- 14. Country with the longest written constitution in the world.
- 16. Authority that independently determines the pay of our MPs.

### Down

- 1. Who issued instructions on a potential treaty for New Zealand in 1839?
- 2. Scandinavian term 'ombudsman' translates to mean what?
- 3. Treaty that grants New Zealand the Sovereignty rights to the fifth largest Exclusive Economic Zone in the world.
- 5. Which state's written constitution names New Zealand in its provisions?
- 7. Pacific Island nation that has had its current constitution since 1875.
- 10. Country with the shortest written constitution in the world.
- 13. How many provisions in NZ law are constitutionally entrenched?
- 15. Which European country added a Charter of the Environment in 2004?

Answers on page 89

## Cross-Party Reference Group Panel

Banquet Hall, Parliament

During the ‘Shaping the Elements’ part of the workshop on the second day, the participants had the opportunity to listen to a panel of politicians and then share some ideas. The panel was chaired by Te Ururoa Flavell (Māori Party), and the other members were Hone Harawira (Mana Party), Charles Chauvel (Labour Party), Paul Goldsmith (National Party) and Metiria Turei (Green Party).

The MPs were first given three minutes to answer a set question – *Is the description of our constitution as set out in the Cabinet Manual 2008 an adequate compass for the 21st century?* They were then given five minutes in the ‘Hot Seat’ of each group’s table, where participants were able to grill them on any of the sections they had been working on for the *Draft Constitution*. This was the participants’ chance to ask tough questions and get some feedback on what they had been working on that morning.



**Te Ururoa Flavell co-chairs the Cross-Party Reference Group Panel. At EmpowerNZ, Te Ururoa chaired the panel of MPs, representing all major political parties on the Panel: Hone Harawira, Charles Chauvel, Paul Goldsmith and Metiria Turei.**

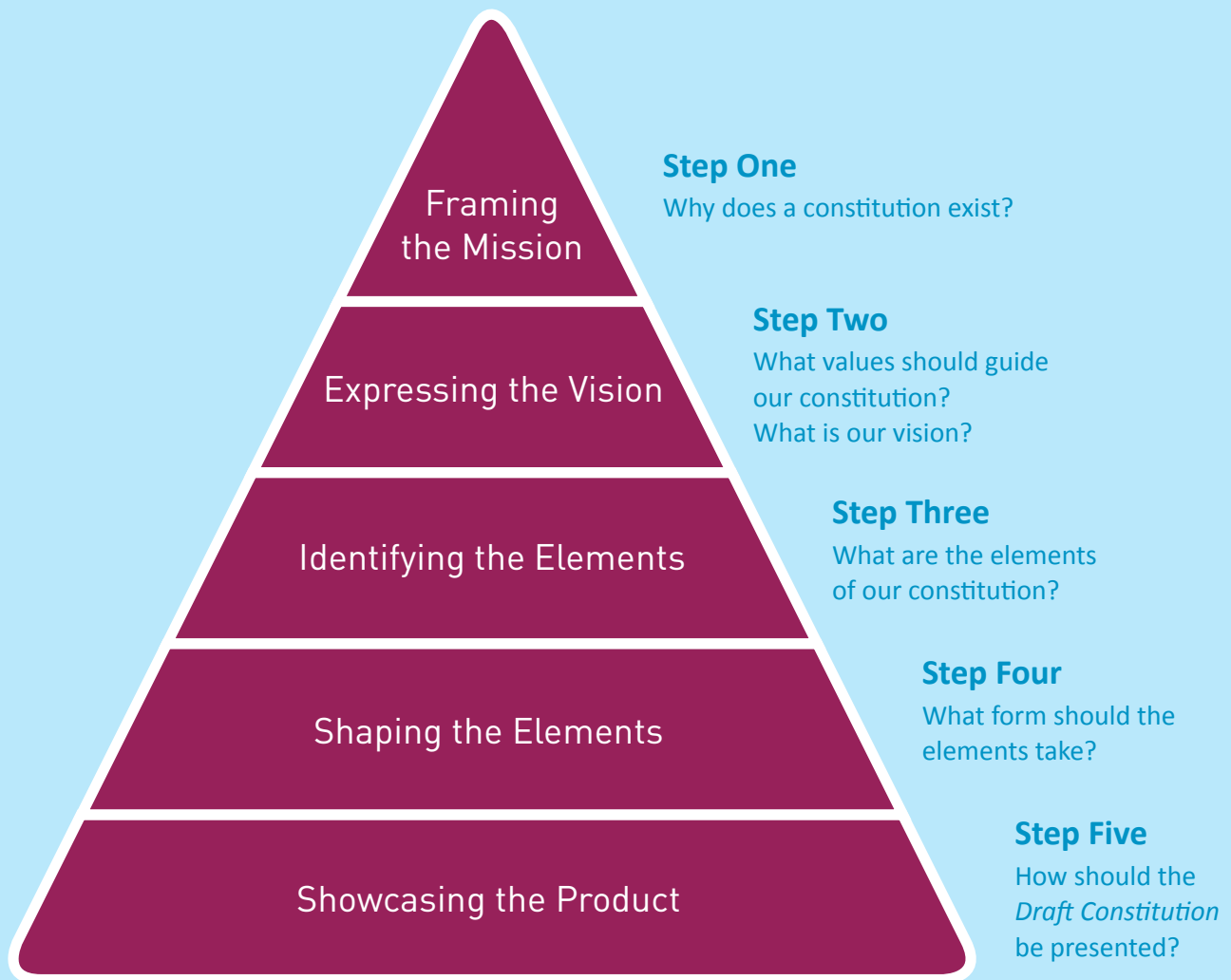


Clockwise from top: Hone Harawira; Metiria Turei with participants; Charles Chauvel; Charles Chauvel with participants; Joshua Pietras thanks Metiria Turei; Hone Harawira with participants; Paul Goldsmith; Paul Goldsmith with participants

# Part 3 | Process

## Overview

Equipped with expert input and a diverse range of personal experiences and opinions, the fifty participants were tasked with working together to draft a constitution under extreme time pressure. In the following section, lead facilitator Dean Knight explains how the drafting process was structured, from the initial articulation of values to the presentation of the final document. We also have two perspectives on the social media and design aspects of the process.



## Preparing the Draft Constitution

Dean Knight, with assistance from Lydia Nobbs

Designing a workshop that would produce a draft constitution in two days was a challenge. Of the four key components – the participants, the facilitators, the speakers and the method – the Institute set up the first three. I was enlisted to lead the delivery of the method component: the preparation of the *Draft Constitution* itself.

Those of us who developed the process (the Institute, my colleague Carwyn Jones, and me) aimed to deliver something that would provide some scaffolding for the participants during the drafting sessions in the workshop. Devising a structure and process wasn't easy. In reality we had less than 36 hours to develop a product that could be presented to over 200 people. And much of that time would also be taken up by speakers sharing their wisdom and advice, along with other supporting activities.

The process had to be logical, flexible and simple. Logical so that participants understood the stages and could trust the process. Flexible so that we could respond to the dynamic as we went along. Simple, so that it was easy for participants and the audience to grasp. And, most importantly, it had to be a process that enabled the participants to make their own choices and take charge of the product themselves. As much as possible, our process couldn't and shouldn't dictate a particular output.

From my perspective, it was critical to keep the participants working freely and to ensure they were not unduly constrained. While the formal constitutional review provided the immediate context for the drafting process, participants were encouraged to approach the drafting task as if it was a blank canvas. They were not confined merely to reviewing the existing arrangements or required to concentrate solely on the matters identified for discussion in the Panel's terms of reference.

To reinforce this, a physical blank canvas was introduced on the first morning. Of course, while we wanted to ensure participants kept an open mind, none of us deliberate in a vacuum. The social, political, cultural and historic context in which these young New Zealanders were operating meant that, while the canvas was blank, it was not entirely colourless – depicted by dowsing the blank canvas with coffee.

Although the 50 participants came to *EmpowerNZ* as individuals, with their own experiences, skills

and backgrounds, groups formed an integral part of the workshop. Prior to the workshop, the participants were grouped where there were similarities in knowledge and education. They were sent a series of challenging questions, designed to draw upon their present understanding and prepare them for the task ahead.

After much discussion it was decided that we would use the model of a pyramid, which would be further divided into five distinct steps.

Each of the five steps in the pyramid is discussed below. The exercises posed broad questions and were prescription-free experiments that aimed to provoke discussion. A record of the resulting ideas was displayed on pinboards at the event. This enabled everyone to see the development of ideas as the thinking progressed or the challenges became more apparent.

The process of deliberation occurred in three types of group:

- (i) the plenary group (called Group 1);
- (ii) the facilitator groups (Groups 2 to 8), and
- (iii) the work-stream groups (which were formed on Day 2).

Through the first day of drafting, most of the work was undertaken in the facilitator-led groups on common tasks. The typical approach was to begin with an explanation of the purpose of each exercise from me. The participants would then break into their facilitator groups to complete the exercise, assisted by their facilitators and using discussion and worksheets, with multimedia technologies available.

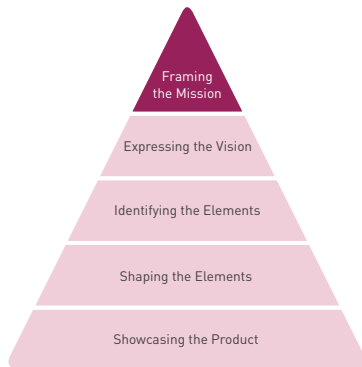
At the conclusion of each exercise, I would assemble the plenary group to extract all of the ideas and to form a consensus.

The work-stream groups for the second day – those who crafted the elements of the *Draft Constitution* – were formed at the end of the first day, and participants self-selected themselves into these.



Clockwise from top: Paula Gillon; Maithili Sreen and Christian Silver; Ryan Smits Maclaime, Higano Perez, Tiaki Hana Grant-Mackie, Julia Whaipooti, Jeremy Wilson, Richard Ley-Hamilton, Carwyn Jones and Elye Parata; Banquet Hall, Parliament; Completed exercise sheet

### Step One: Framing the Mission



The framing of the mission was an important first step as it gave us an opportunity to identify a common understanding of what we were trying to create, and who we were creating it for.

This step began on the first day after participants were treated to advice and wisdom from a ‘living library’ of assembled experts and civic leaders. The workshop participants were tasked with a framing mission: defining the purpose of the constitution, and identifying its audience.

First, participants were asked to discuss what the purpose of a constitution is, and who its audience is. From there, each group was asked to give a single-statement answer to the question: ‘Why does a constitution exist?’ This worksheet asked groups to:

1. Brainstorm in groups and capture statements of purpose on Post-It notes;
2. Brainstorm the audience in groups on Post-It notes;
3. Have a group discussion to pool ideas around purpose, flesh out who the audience is and extract the essence of the mission in one sentence.

The second worksheet involved participants in their groups identifying themselves on a continuum on the question of a written and rigid or unwritten and flexible constitution. There were no expectations about where participants placed themselves on the continuum. The exercise was designed to provide a provisional sense of their views about how much they expected a constitution should be written and certain, as opposed to how much should be left to evolve organically. Although the ultimate task was to draft a constitution, it was important not to bias the task toward a fully codified constitution. The extent of codification was a choice for the participants.

The worksheet asked groups to:

1. Mark on the continuum a (provisional) view on the balance between an unwritten and a written constitution.

After much animated discussion, the plenary group came together to attempt to find common ground. The participants gathered around a whiteboard and together we fleshed out the areas of agreement among the groups. Ideas included:

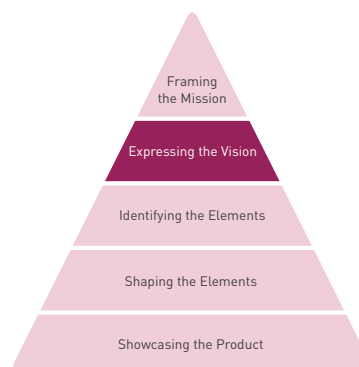
- ◆ Promoting New Zealand and benefiting the nation
- ◆ Reflecting
- ◆ Expressing our nation’s values, spirit, identity and principles
- ◆ Defining the relationship between people and the state, and between the state and state bodies
- ◆ Whether to use the word ‘citizen’ or ‘people’
- ◆ Enabling the exercise of public power
- ◆ The limits to public power and protections of the people
- ◆ Identifying rights and responsibilities of all people and the state

The plenary group reached consensus on the following purpose statement:

*Our constitution is a framework or social contract for the benefit of New Zealand that:*

- (a) *expresses* our nation’s values, spirit, identity and principles;
- (b) *defines* the relationship between people and the state, and between the state and state bodies;
- (c) *enables* the exercise of public power and *limits* public power for the protection of the people; and
- (d) *identifies* the rights and responsibilities of all people and the state.

### Step Two: Expressing the Vision



The next stage of the pyramid was about translating the mission statement above into a vision statement, which allowed participants to explore imagery and values that might reflect and represent the essence of the constitution. Images speak in a different

## Exercise 1: WHY DOES A CONSTITUTION EXIST?

Step 1: Framing the Mission: the purpose of our constitution and its audience

PURPOSE

AUDIENCE

WHY DOES A CONSTITUTION EXIST?

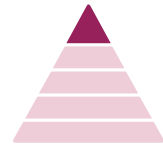
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1. Brainstorm in groups and capture statements of purpose on Post-It notes
2. Brainstorm in groups the audience on Post-It notes
3. Have a group discussion to group ideas around purpose, flesh out who the audience is and extract the essence of the mission in one sentence



## Exercise 2: WHY DOES A CONSTITUTION EXIST?

Step 1: Framing the Mission: the purpose of our constitution and its audience

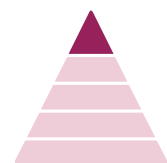
CONTINUUM

FLEXIBLE | UNWRITTEN

RIGID | WRITTEN



1. Mark on the continuum a (provisional) view on the balance between an unwritten and a written constitution.





Clockwise from top: Reed Fleming, Emma Gattey, Zachary Kedgely-Foot and Diane White; Dean Knight presents participants with *EmpowerNZ* certificates - he is seen here with Jessica Bush; Emily Schwikkard, Mihiata Pirini and Ruth Markham-Short; Alex Ladyman, Louis Chambers, Alice Osman, Jack Starrett Wright, Sarah Baillie, Rachael Jones, Charlotte Greenfield, Helen O’Leary, Diana Tam and Marcelo Rodriguez Ferrere; Todd Barrowclough and Emma Gattey; Kieran Stowers.

way to text and were important in giving the constitution life. Values provide a ready way of capturing the heart of the constitution in a simple, short and accessible manner.

The groups were encouraged to be creative and think widely about how the themes could be represented. After they had had time to discuss their ideas, a speaker from each group came forward to share their group's image with the rest of the workshop participants. There were a number of times when the ideas of groups overlapped, reflecting both the applicability of many of the images to New Zealand's constitution and the common understanding the framework developed in the previous exercises.

The third worksheet required the facilitator groups to identify imagery that they felt resonated with the constitutional ideas they wanted to project.

The groups were required to:

1. Brainstorm in groups and capture the narrative on Post-It notes (what imagery reflects your thoughts – find your creative place – look at the item, image, quote or photo you brought to the workshop; look at the groups – is there anything in common?)
2. Have a group discussion about the imagery and extract the group's favourite image.

### Step Two (a): Imagery

The final group images were as follows:

#### Group 2: Presented by Oska Rego

*A pohutukawa tree in bloom, on a beach with the sea in the background and the Southern Cross overhead*

The aesthetic appeal of this symbol was explained as a tree growing and changing with time – not being stuck in the past. It has many branches, and thus is wide-ranging in scope. The setting provides a public place for people, and the stars represent the navigational effect a constitution can have on society.

#### Group 3: Presented by Duran Moy and Pania Newton

*A woven korowai*

This symbol embodies an inclusive dimension – that many hands are involved; it is made of many different sources, and consolidates to a common purpose. Future wearers can add to it, and enhance its mana. Further, it is adaptable, and can be added to or modified. It is not fixed in time, but can represent a living and breathing cloak.

#### Group 4: Presented by Lauren McGee

*A fruit tree*

This symbol delves deep into the ground, is firmly rooted in its history, with solid branches growing outwards, and has the function of protecting society. The metaphor is extended by the idea of different branches of government, which form one canopy over society. These could be pruned, symbolising that the tree is capable of being changed and modified according to the needs of New Zealand, and evolves with society.

#### Group 5: Presented by Jeremy Wilson and Dipti Manchanda

*A hearing aid*

This symbol was used as a reminder that when it comes to our constitution, not everyone has access to the conversation, and not everyone speaks with the same voice. Language is central to who we are and serves as a gateway to culture and identity. Against this, the group had an additional symbol in the form of a woven backdrop, a common theme among several groups. This carried the message that a constitution can provide a supportive framework for society and as a safety net when all is not going according to plan.

#### Group 6: Presented by Helen O'Leary and Rachael Jones

*A jigsaw*

The idea behind this symbol was that it is made up of 'bits and pieces' that join together to form a whole. For many people, the constitution can be a puzzle. It might make sense to those versed in the law and history, but perhaps not to the people the discussion is aimed at.

#### Group 7: Presented by Kieran Stowers

*A window*

The group described government under New Zealand's current constitutional arrangements as a black box; the citizens of New Zealand cannot see in nor can the government see out. This means that control is a monopoly. The window represents transparency and accountability, being able to see a two-way dialogue. Furthermore, glass can provide a reflection – a reflection of who New Zealanders are as a people.

### Group 8: Presented by Todd Barrowclough and Ihapera Paniora

*A circle of kuia, weaving*

The group likened the weaving to a process and an art, carried out and passed on, embedded in time and nature. The metaphor carried ideas of intergenerational connectedness; however, the nature of connectedness is dependent on how it is woven. The group decided that the article being woven was a bungee cord.

A straw poll was taken among the participants to identify the support for different images. The image chosen to represent all participants was *a window*, as identified by Group 7. Participant Kieran Stowers described the symbol:

*‘The window speaks of transparency and clear accountability, people who look in it can see their own reflection, which is important as a constitution needs to reflect the ambitions, the values, and mana of the People first. It’s also scalable and most importantly repairable, because no constitution is perfect.’*

This image was then used by the designers (led by Gillian McCarthy) to inspire the look and feel of two draft designs for the *Draft Constitution*. These two concepts were presented back to the participants, who voted for their favourite, which was then developed further for the final document.

While the most popular image adorned the front of the constitution, elements of others were also worked in elsewhere in the constitution. Graphic facilitator Megan Salole also recorded the ideas in the large mural that framed the meeting space.

### Step Two (b): Values

For this constitution, our values are a statement of who we are and what we believe in. And a discussion that leads to the identification of values, which can be instrumental in building consensus and establishing a common ground. It was important that we could have such a discussion to provide the unifying elements for the work that was to follow.

As such, the second part of Step Two was about finding values that the participants wanted the *Draft Constitution* to contain or embody. Each group was tasked with generating four values that would then be put forward alongside the other groups’ values. Then the final list of values was decided upon by the participants as a whole.

The groups were asked to:

1. Brainstorm in groups the values that should drive everything you do over the two days; what values do you want our constitution to stand for?

2. Have a group discussion to group ideas around values, flesh out and extract the essence of these ideas into four values.

Group members put forward ideas on Post-It notes and then they began sifting out to four values. The focus was on finding agreement and commonality, to express a vision of what those four values might be.

Once all the groups had agreed on four values, the worksheets were pinned to a wall so that the participants could see what each of the groups had come up with:

*Group 2: Sustainability, Community, Freedom, Balance*

*Group 3: Accessibility, Diversity, Enduring, Innovation*

*Group 4: Accountability, Durability, Democratic, Egalitarian*

*Group 5: Equality, Dignity, Sustainability (Kaitiakitanga), Opportunity*

*Group 6: Representative Government, Tolerance and Acceptance, Pragmatism, Checks and Balances*

*Group 7: Mana, Fairness, Transparency, Kaitiakitanga*

*Group 8: Respect, Sustainability, Legitimacy, Equity*

Once the participants had had an opportunity to look over the ideas of each group, we set about trying to synthesise these values into something the whole group could agree on. We did this by grouping together similar concepts and looking for the concepts that best captured the mood of the room. A representative of each group read aloud the four values they had decided on. The floor was opened up for dialogue within the plenary group. The debate was at times specific. For example, there was robust discussion about the use of the term *kaitiakitanga* over sustainability. After hearing from individual participants, and letting the arguments for each term bounce back and forth, a show of hands indicated that the former best represented the tenor of the group.

The deliberation was kept quite an intuitive process, and only loosely structured. Occasionally, a straw poll was taken to check the mood of the room. If the debate became unproductive at times, we would ‘park’ the discussion, and move on to considering another value, or conflate two other ideas to take both forward.

The plenary group’s final listing of values was:

**Mana**, *dignity, tolerance, respect*

**Kaitiakitanga**, *sustainability, durability, continuity, endurance*

**Fairness**, *equality, accessibility, fair play, justice*

**Accountability**, *transparency, respect, legitimacy, openness*

**Liberty**, *freedom, opportunity, autonomy*

### Exercise 3: FOUR VALUES THAT SHOULD GUIDE OUR CONSTITUTION

Step 2: Expressing the Vision: the imagery and values of our constitution

IMAGERY

SELECT ONE IMAGE THAT CAPTURES THE ESSENCE OF THE CONSTITUTION

1. Brainstorm in groups and capture the narrative on Post-It notes (what imagery reflects your thoughts – find your creative place – look at the item, image, quote or photo you brought to the workshop; look at the groups – is there anything in common?)
2. Have a group discussion about the imagery and extract the group's favourite image



### Exercise 4: FOUR VALUES THAT SHOULD GUIDE OUR CONSTITUTION

Step 2: Expressing the Vision: the imagery and values of our constitution

VALUES

SELECT FOUR VALUES THAT SHOULD GUIDE OUR CONSTITUTION

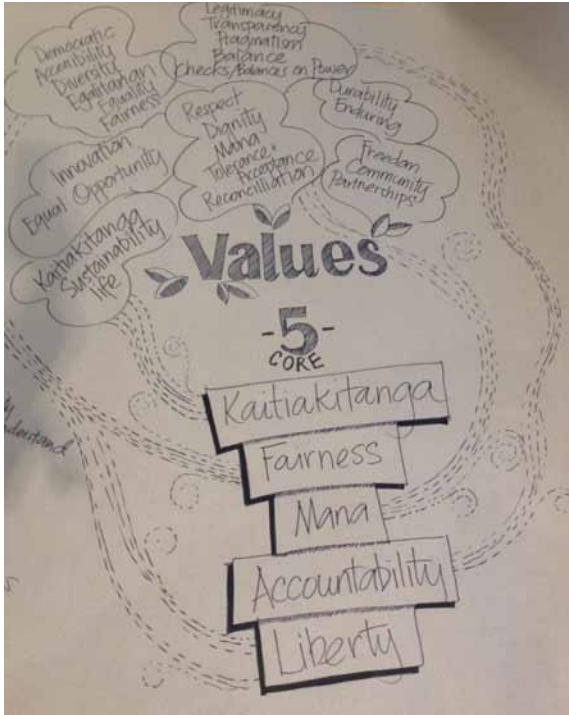
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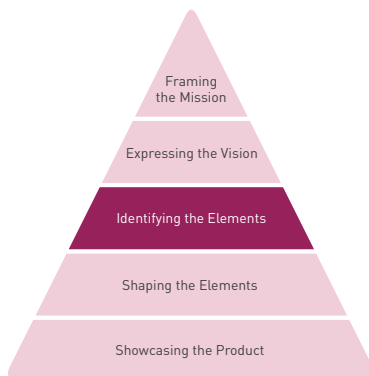
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1. Brainstorm in groups the values that should drive everything you do over the two days; what values do you want our constitution to stand for
2. Have a group discussion to group ideas around values, flesh out and extract the essence of these ideas into four values





### Step Three: Identifying the Elements



The third stage of the pyramid involved building upon the framing mission, the imagery and the values, and turning those concepts into the elements that would hold the *Draft Constitution*.

Earlier in the day Professor Joseph had discussed the key elements of a constitution as logistical, process, super-structural, and infra-structural. Therefore this 'identifying the elements' stage of the pyramid was about revisiting this idea and identifying the structural components that would make up the final *Draft Constitution*.

The worksheet given to the participants asked them to:

1. Brainstorm in groups and capture on Post-It notes any elements that you think might/should be included in the constitution (think blank canvas).

The intention was to categorise the content of the discussions with a view to deciding what the

work streams would be for the following day. The next worksheet was designed to get participants to identify what the hot elements were and what were not, 'hot' elements being those on which ready consensus was unlikely.

This worksheet required participants to:

1. Write your ten final themes and your ten final chapters (or whatever number you have) onto Post-It notes
2. Place your final themes Post-It notes under 'hot issues' or 'not hot issues'
3. Place your final chapters Post-It notes into hot issues or not hot issues
4. Then look at your matrix, discuss whether this matrix best reflects your thinking as a group. If yes, why so; if not, why not?
5. Write on each Post-It note whether each theme or chapter has an element that can be (a) borrowed from our existing constitution; (b) borrowed but requires revision; or (c) invented completely from scratch.

In this context, a 'theme' is an idea that weaves its way through the entire constitution, and a 'chapter' is a discrete idea, or a grouping of similar topics that conveniently cover one aspect of the constitution. These terms were not designed to be exact or concrete; rather, they were a helpful framework for evaluating which areas needed focus during the next stage of the *Draft Constitution* process. The resulting table demonstrates that there were some overlaps between these two concepts.

The groups were firstly given 15 minutes to discuss the theme and chapters they had identified, using large A2 flipcharts, with the aim of establishing where the tensions and hot issues lay. The groups then reassembled into the plenary, and through an intensive collaborative exercise were able to establish where the work and crafting needed to happen the following day.

The process again involved establishing where consensus lay and over which issues there was tension or lack of agreement. The idea behind discussing 'hot issues' was to try to identify and isolate possible issues that it would be very difficult to generate consensus on. This would mean that adequate time and attention could be given to those issues that required it, and things that people felt might be more 'given' could be addressed in short order.

This was not an easy task and it took considerable time for the issues and ideas to take shape. They are listed on page 60.

### Themes and chapters identified by the plenary group

After identifying guiding values for the *Draft Constitution*, participants agreed on a series of core themes and specific chapter topics that they wanted to address. As the table illustrates, there was considerable crossover between ‘themes’ and ‘chapters’. Rather than providing a rigid structure, the list was a tool for focusing discussions.

Themes	Chapters
Supremacy of the constitution over all or part of the constitution	<b>Content and source of human rights</b>
Enforcement and content of human rights	Socio-economic
Crown–Māori relationship	Marriage
Treaty issues	Indigenous
Parliamentary supremacy	New Zealand Bill of Rights Act 1990
Democracy	<b>Māori representation</b>
Legislative process	<b>Electoral system</b>
Rule of law	MMP
Separation of powers, checks and balances, independence and the role of the ombudsman	Other
Enforcement powers of state	Term of Parliament
Constituting organs (Constitution Act)	<b>Process of amendment</b>
	<b>Immigration policies</b>
	<b>Operation of executive government</b>
	<b>Environmental protections</b>
	Animal rights
	<b>Who/what the constitution applies to?</b>
	Definition
	Application
	Scope
	<b>Creation and change</b>
	<b>Republic or monarchy</b>
	<b>Fiscal responsibilities, powers and obligations</b>
	<b>Emergency powers</b>
	<b>Process of incorporation of international law</b>
	<b>Media and provision of public services</b>
	<b>Recognition of local government</b>
	<b>Operation/constituting the legislatures</b>
	<b>Appointment and oversight of judges</b>
	<b>Treaty of Waitangi provisions</b>
	<b>Ministerial responsibilities</b>
	<b>Government formation and transition</b>
	<b>Civic engagement, methods and process</b>
	<b>Official information</b>
	<b>Judicial review</b>



Overnight, the team of facilitators worked on grouping these elements together and allocating them to different work streams. The division and allocation was largely pragmatic: trying to achieve a balance between a coherent group of topics and an achievable programme of work. In the final outcome, the different work streams were reflected in the different chapters of the *Draft Constitution*.

**These themes and chapters translated into the following work streams:**

#### A. Skeleton constitution and non-contentious elements

Structure; preamble; chapters; constitutive elements from the Constitution Act 1986; Rule of Law; judicial independence; democracy; separation of powers; checks and balances/accountability, e.g. ombudsman; open and transparent government, e.g. OIA; ministerial responsibility; government formation and transition; civic engagement and participation

#### B. Rights

Human rights; socio-economic rights; environmental rights; animal rights

#### C. Crown–Māori relations

Treaty of Waitangi; indigenous rights

#### D. Legislature

Law-making body and process; parliamentary supremacy; elections and representation

#### E. Other organs of government

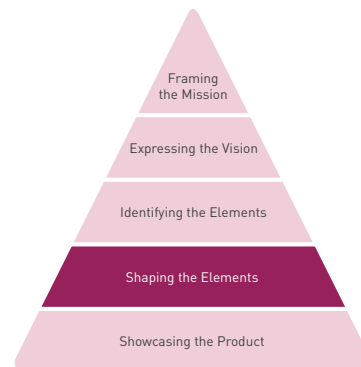
Executive; judiciary; Head of State; local government; and their powers

#### F. Operational elements

Supremacy; entrenchment; enforcement; scope; adoption; revisions; review



### Step Four: Shaping the Elements



The second day was focused on the final two stages of the pyramid: Shaping the Elements and Showcasing the Product. These would build on the previous day's efforts and progress toward a written *Draft Constitution* that reflected the participants' work and could be presented to guests and Members of Parliament that evening.

The day started with Wendy checking in with the participants. Knowing where they were at and the time pressure they were under, they were asked: did they want to accept that producing a draft constitution by the end of the day would be too difficult, or were they up to the challenge and willing to push on ahead?

There was some pretty heavy discussion within the groups but they all came back with a resounding yes to the latter – the participants did want to aim to complete the task knowing that they would likely not have an opportunity to see the full document before it was presented.

To begin with the participants self-selected into six work-stream groups. Participants were able to take part in the work stream that aligned with their particular interest. These groups each dealt with a section of the *Draft Constitution*.

After an hour each group had the opportunity to share their thoughts with the whole room. It became evident that there was a lot of overlap between the various groups' areas – for example, the relationship between (F) Operational elements and (C) Crown–Māori relations, or between (B) Rights and (D) Legislature – which meant that a lot of go-between was needed to ensure these areas aligned.

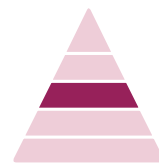
This was also an opportunity for groups to provide some instruction for others on how they were addressing an issue. For example, one participant urged others not to use 'entrenched' as a synonym for 'important'. This would streamline the work because most groups would consider the issues

### Exercise 5: WHAT ARE THE ELEMENTS?

Step 3: Identifying the Elements: the themes and chapters of our constitution

#### ELEMENTS

1. Brainstorm in groups and capture on Post-It notes any elements that you think might/should be considered for inclusion in a constitution (think blank canvas)



### Exercise 6: WHAT ARE THE HOT ISSUES AND WHAT ARE NOT?

Step 3: Identifying the Elements: the themes and chapters of our constitution

	THEMES	CHAPTERS
HOT ISSUES (LITTLE CONSENSUS)		
NOT HOT ISSUES (CONSENSUS)		

1. Write your ten final themes and your ten final chapters (or whatever number you have) on to Post-Its
2. Place your final themes Post-It notes into hot issues or not hot issues
3. Place your final chapters Post-It notes into hot issues or not hot issues
4. Then look at your matrix, discuss whether this matrix best reflects your thinking as a group – if yes why, if no why not?
5. Write on each Post-It whether each theme or chapter has an element that can be (a) borrowed from our existing constitution; (b) borrowed but requires revision; (c) or invented completely from scratch.



they were discussing to be important, therefore the ‘Operational elements’ group would be asked to entrench a whole range of ideas.

The participants then worked frantically to bring their thinking together and prepare the final text of the *Draft Constitution*. The prioritisation of each work stream’s programme was helped by an exercise where groups were given about 30 minutes to quickly prepare a very rough draft of their chapter. The exercise was originally intended to extract some rough text to assist the designers in their task of working up the imagery and style of the constitution. However, it also proved to be very useful in focusing each work stream on the important things to include in the constitution and allowed other less important elements to be jettisoned. The outcome of this quick-fire brainstorming session was then used as a basis for inter-group consultation, with each group being given copies of the rough first draft and invited to provide feedback.

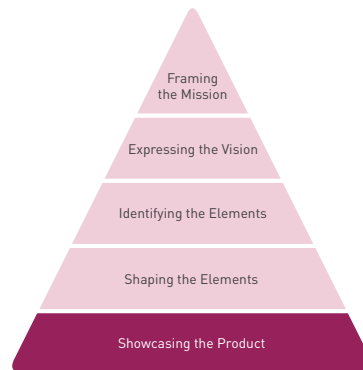
For the final few hours the room buzzed as groups finalised their ideas and text, and designers shaped the layout of the final document. Shaping the elements of the *Draft Constitution* was therefore completed under significant time pressure. To have a finished product by 5pm, ahead of the presentation at 7pm, was a challenge.

This meant it was not possible to gain complete consensus over the whole document. The self-selected work-stream groups (A–F) were able to liaise with other participants and to receive a degree of feedback on their general approach, but there was not enough time to check consistency and obtain complete consensus around all elements of the text. It was for this reason that participants felt strongly that the word ‘Draft’ should be placed on the front page of the final document.



**Designer Gillian McCarthy and Dean Knight finalising the Draft Constitution**

### Step Five: Showcasing the Product



The final stage of the workshop was the opportunity to show and explain the *Draft Constitution* to invited guests, members of the Constitutional Advisory Panel, and Members of Parliament.

The Finale was an important stage in the process. It represented the culmination of two days’ hard work – a deadline that kept us motivated and focused. It also fulfilled a number of other important roles.

It symbolically completed the challenge delivered to participants at the beginning of the workshop when Wendy McGuinness handed a blank scroll over to me, on behalf of the participants. We were charged with filling the baton with the constitution over two days. The baton was then ceremoniously handed over to Dr Orange who was tasked with taking it to the public through Te Papa.

The Finale was also an important opportunity for us to explain the process that we had been through and the thinking that had gone on behind the document. Writing a constitution in two days was always going to be a big ask. But the greatest value came from the discussions and ideas that happened over that time. It was fitting then that the participants had a chance to express themselves at the end, not just to show off what they had produced, but also to share the journey they had just completed.

Finally, the Finale was an opportunity for the spirit behind the whole event to come together. It certainly delivered the audience a dynamic and informative representation of the two-day workshop.

The *EmpowerNZ Draft Constitution* is a starting point for a conversation about what our constitution could be. I look forward to seeing how that conversation develops in the coming years.



## Dean Knight

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Dean Knight is a Senior Lecturer in the Victoria University Faculty of Law, an Associate of the New Zealand Centre for Public Law, and a PhD candidate at the London School of Economics. He holds a Bachelor of Laws with Honours and a Bachelor of Commerce and Administration from Victoria University, and a Master of Laws from the University of British Columbia. Before joining the Victoria University Faculty of Law, Dean spent eight years in private practice with an Australasian law firm in their litigation, environment, and public law teams. One of his main areas of specialisation was local government, and he spent some time seconded as in-house counsel for a local authority. His research interests are public, constitutional and administrative law, local government law and democracy, and gay and lesbian legal issues. Dean is one of the co-authors of LexisNexis' Local Government loose-leaf text, and is a member of the editorial committee of the *New Zealand Journal for Public and International Law*. He also maintains a blog, *Elephants and the Law*.

## #EmpowerNZ

Niki Lomax

*EmpowerNZ* presented an exciting opportunity for collaboration and conversation around some critical issues for New Zealand's future. It also presented us with an opportunity to broaden the conversation and experiment with the use of social media.

The main vehicle for this experiment was Twitter. We wanted to encourage participants and guests to tweet about their experience and the conversation that was happening at Parliament, and we wanted observers from around New Zealand to feed into this by tweeting at us.

To facilitate this, each working group had an iPad that was logged in to one of eight *EmpowerNZ* Twitter accounts. This enabled the groups to tweet at each other, at the Institute, and to others in the twittersphere. Participants and guests were also encouraged to tweet from their personal Twitter accounts, using the hashtag #EmpowerNZ.

At the same time I was stationed at a 'Twitter desk' and live-tweeted proceedings throughout the two days from the McGuinness Institute account – @mcginstitute. I posted photos, comments and quotes from speakers, asked questions and retweeted feedback.

All these Twitter contributions, serious or silly, appeared on a live-feed onstage so that everyone in

the room could see what was being said. It brought the twittersphere into the room, while the room was being broadcast on the twittersphere.

The experiment was ultimately a successful one. On Wednesday afternoon, the #EmpowerNZ hashtag was top trending in New Zealand – meaning it was the most talked about topic among New Zealand Twitter users at that particular time. And while the twittersphere is by no means a democratic representation of New Zealand's citizenry, it did demonstrate the possibilities of new media as a tool to facilitate interaction and debate.

Niki Lomax

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Niki joined the Institute in April 2012 after completing a Bachelor of Arts with First Class Honours in Politics and History from the University of Otago. Over the previous summer she worked with University of Otago lecturer and political commentator Dr Bryce Edwards, co-authoring a journal article for *Environmental Politics*. Niki has volunteered as a writer for the University of Otago's student magazine, *Critic*, and helped organise the Otago Politics department's Vote Chat series, which broadcast a succession of public conversations with New Zealand politicians during the 2011 election. Niki has been the recipient of two academic scholarships, including one that allowed her to study at the University of Glasgow on exchange in 2010.





**Kieran Stowers** @kieranstowers

27 Aug

"Democratic is a good verb, but democracy is a very difficult noun".  
Let me assure you. #empowernz

[Collapse](#) [← Reply](#) [↻ Retweet](#) [★ Favorite](#) [⋮ More](#)

**1**  
RETWEET



**Reed Fleming** @reedfleming

29 Aug

"why does it need to be formatted and in a font created 300 years ago?" Our constitution is accessible and attractive. It's ours.  
#EmpowerNZ

[↻](#) Retweeted by McGuinness Institute

[Collapse](#) [← Reply](#) [↻ Retweet](#) [★ Favorite](#) [⋮ More](#)

**3**  
RETWEETS

**2**  
FAVORITES



**Group Three** @EmpowerNZ3

27 Aug

The Hipster group aren't enjoying conforming to the theme/chapter boundaries set by the institution. #rebellion #EmpowerNZ

[Collapse](#) [← Reply](#) [↻ Retweet](#) [★ Favorite](#) [⋮ More](#)

**1**  
RETWEET



**McGuinness Institute** @McGInstitute

28 Aug

Just got a visit from some kids from the Chatham Islands!  
#EmpowerNZ [pic.twitter.com/mseGDr94](https://pic.twitter.com/mseGDr94)

[📷 Hide photo](#) [← Reply](#) [↻ Retweet](#) [★ Favorite](#) [⋮ More](#)



## A Designer's Perspective

Gillian McCarthy

At the *EmpowerNZ* workshop a three-person design team worked alongside the participants. The team members – Gillian McCarthy, Katy Miller and Machiko Niimi – are Design graduates from the University of Otago. They were tasked with helping the participants visually communicate their ideas for the draft constitution.

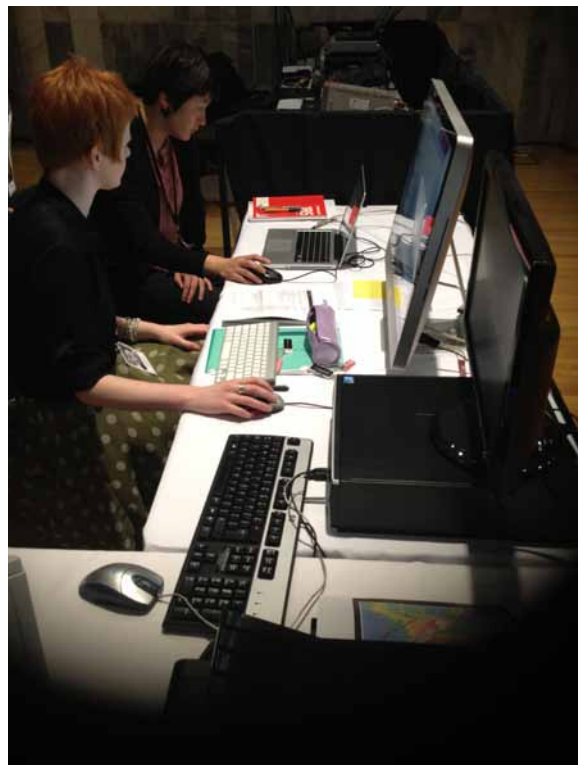
After listening to the participants' ideas, the designers presented two concepts to them so that they might choose the visual style that best represented their constitutional preferences. The participants overwhelmingly chose the typographic and illustrative style that can now be seen within the draft constitution. This visual concept reflects the handwritten style of the Treaty of Waitangi. The graphic use of painterly, fragmented typography celebrates the distinct style of New Zealand artists such as Dick Frizzell and Colin McCahon, and reflects the diversity of voices in the constitutional conversation that is currently taking place. The graphic style draws on what it means to be a New Zealander and celebrates New Zealand's creative style and our do-it-yourself, number-8-wire approach. The participants also chose to include a window symbol on the cover of the document. This was to represent both transparency and barriers within the constitutional environment, and the possibility of a two-way dialogue.

It was important for the designers to consider the audience of the draft constitution: academics, politicians, organisations, the general public and such. The designers aimed to communicate complex ideas in multiple ways to this diverse audience, who had different levels of prior knowledge and interest. To do this they balanced detailed text with graphic panels that included eye-catching typography and custom illustrations by Megan Salole. These panels allow readers with little prior constitutional knowledge to quickly browse the document and form an understanding of the main ideas and sections within the draft constitution. Further, the detailed text allows readers to understand the important facets of each section. Balancing these two approaches allowed the draft constitution to be accessible and engaging for a wide audience.

The designers were grateful for this opportunity provided by the McGuinness Institute to work alongside a very compelling group of participants, and to share their design expertise in the development of this significant project.

### Gillian McCarthy

Gillian is currently a student at the University of Otago and has been working part-time at the Institute since late 2010. Having completed her degree in Design with First Class Honours, she is now working toward a Bachelor of Arts in Psychology and Art History. Gillian's main responsibility was to design event materials in the lead-up to *EmpowerNZ* and to help design the *Draft Constitution* document.



**Top (from left): Gillian McCarthy and Machiko Niimi**

**Bottom (from left): Katy Miller, Machiko Niimi and Gillian McCarthy**



The alternative concepts presented by the designers to the participants

## Illustrating EmpowerNZ

Megan Salole

As the participants of *EmpowerNZ* listened to speakers, workshopped and prepared their *Draft Constitution*, graphic facilitator Megan Salole documented their ideas and the themes of the workshop on a mural covering one wall of Parliament's Banquet Hall. The entire mural can be viewed at [www.empowernz.org](http://www.empowernz.org). Megan is also responsible for all the artwork included in the *Draft Constitution* (see page 70).



# Part 4 | Outputs

## Overview

The key output of the *EmpowerNZ* workshop was the *Draft Constitution*. Participants presented the document to the public at Parliament, along with an explanation of the thinking behind it. Below is a reproduction of the six page booklet titled *Draft Constitution*.



An interactive version of the booklet can be found at [www.empowernzconstitution.org](http://www.empowernzconstitution.org). This website was designed and built by one of the participants, Christian Silver, in response to a desire by the 50 participants to develop new tools for youth to explore and understand our constitutional arrangements. Christian began building the website while the group rushed to get the final document to print. At the end of January 2013, the website had attracted 140 unique visitors, and 1,242 individual hits without any marketing, simply by word of mouth.



## The Draft Constitution

Wendy McGuinness

The intensive two days of the *EmpowerNZ* event culminated in a grand finale where the participants presented the result of their labours to 200 guests gathered in Parliament's Banquet Hall.

To begin the workshop I had passed an empty baton to Dean and the participants. Their task throughout the workshop had been to fill this baton with a draft constitution for New Zealand. The baton would now be taken back from the participants as the final act of the workshop.

The finale also provided an opportunity for Dean and the participants to explain to the guests the most important part of the event: the discussion, ideas and process that were behind the draft. Dean gave the guests an overview of the 47 hours since he had first met all 50 of the participants and given them a pep talk. The outcome of the ambitious project, he said, was a blueprint for society, and for a generation, while noting that the term 'ambitious' was probably an understatement.

Dean described the amount of mahi or work the task had entailed, outlined the method that had been taken, and explained the role of the Finale

in showcasing the product. The participants knew they had been guinea pigs, but had learnt a lot in the process – about constitutional reform, change, parliamentary-style deliberations, how constitutions work, and indeed, about themselves and each other.

Teams of participants took it in turn to describe the various components of the *Draft Constitution* and the ideas and deliberations behind the final form. They explained that while the product was by no means perfect, or legally binding, it represented a statement of what an educated, rational and engaged youth are looking for in a country that they want to live in and leave for future generations.

Finally, Dame Dr Claudia Orange brought the event to a close, receiving the baton, now filled with the *Draft Constitution*, and accepting the mantle to take the message to the public, through Te Papa.

The entire Finale can be seen on the McGuinness Institute's YouTube channel.



Participant Sarah Baillie presents the *Draft Constitution* and, using the baton, passes it to Dr Claudia Orange on behalf of Te Papa



Participants present the *Draft Constitution*. Clockwise from top left: Kirsty Allan and Alice Osman; Ihapera Paniora and Pania Newton; Tele'a Andrews; Julia Whaipooti and Alice Osman

## Thanks to all our finale guests, including...

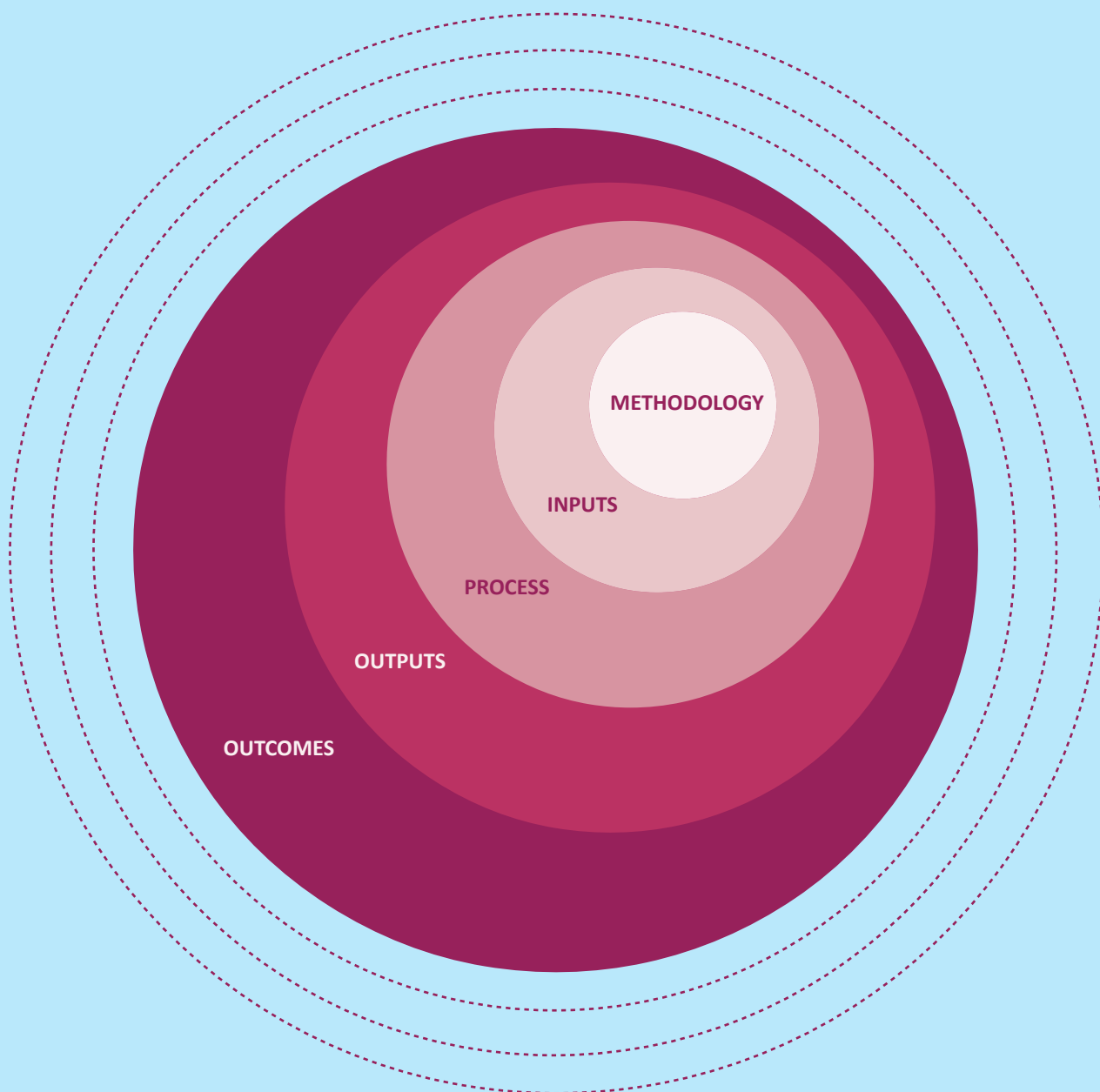


**Clockwise from top left: Pania Newton with Constitutional Advisory Panel members Hinirewa Poutu and Professor Ranginui Walker; Chris Nees and Higano Perez; Sarah Bayly, Evan Bayly, Deputy Ombudsman Leo Donnelly, Mark McGuinness, Annie McGuinness and Lachlan McGuinness; Elle Hunt, Julia Hollingsworth, Charlotte Greenfield, Sylvia Avery and Finn O'Dwyer-Cunliffe; Daniel van Ammers, Renata Mokena-Lodge and Paul Bruce; Steven Young and Yezdi Jal Karbhari**

# Part 5 | Outcomes

## Overview

A project is only as good as the outcomes it produces. One of the key purposes of *EmpowerNZ* was to engage a group of young people in intensive, well-informed discussion about constitutional issues. The analysis in the following sections suggests that outcome was achieved: participants gained a better understanding of New Zealand’s constitutional processes, charted the terrain of the current debate, and developed their own views in conflict and collaboration with other group members. But in terms of taking the debate to a wider audience of young New Zealanders, the task has only just begun. On the following pages Professor Philip Joseph examines the notable features of the *Draft Constitution*; and a participant, facilitator and guest each reflect on what they learnt from the workshop. Finally, Wendy McGuinness provides an overview of the outcomes of *EmpowerNZ* and suggests how the debate on New Zealand’s constitutional future could be taken forward.



## A Constitutional Expert's Reflections

Professor Philip Joseph

The two-day workshop was an innovative and challenging initiative. I enjoyed my role: addressing the students on the key elements of a constitution and acting as roving facilitator during Day 2 of deliberations. The student discussions became increasingly intense as the work streams warmed to their tasks. The groups experienced some difficulties avoiding inconsistencies and coordinating their proposals, given that each had to devise a distinct component of the constitutional design. But despite the pressures and the daunting Day-2 deadline, the students retained their composure and did marvellously well to produce a coherent *Draft Constitution*.

There were both notable and unusual features of the final product. The clear preference for political rather than judicial solutions was, for me, notable, given the 'judicialisation' of constitutional discourse in North America and other parts of the world. Under section 1.5 of the *Draft Constitution*, a court might declare legislation unconstitutional but such declaration would have no effect on the continuing validity and operation of the enactment. The thought that unconstitutional legislation might remain valid and operative is unusual to say the least, although section 1.5 does oblige the legislature 'to respond to any declaration of unconstitutionality'. This mechanism contemplates a constitutional dialogue between the political and judicial branches, with a declaration of unconstitutionality prompting the introduction of remedial legislation to make good the omission or departure.

An unusual feature of the proposed institutional design concerns the Waitangi Tribunal. Again, there is a clear, if implicit, preference to avoid judicial solutions where issues can be resolved through extra-judicial means. Part 2 of the *Draft Constitution* authorises the Waitangi Tribunal to oversee Crown-Māori relations and secure compliance with the 'principles' and 'spirit and intent' of the Treaty of Waitangi. What is unusual is that the Tribunal may provide direct remedies for breach of the Treaty. The Tribunal is not a court of law and its findings are not binding in law, nor does it have power to order reparations or relief.

Under section 6 of the Treaty of Waitangi Act 1975, the Tribunal may make recommendations to the Crown where it finds Māori have been prejudicially affected by action in breach of the principles of the Treaty. The Tribunal may

recommend that the Crown compensate or make reparations or otherwise remove the prejudice. Section 2.7 of the *Draft Constitution* affirms the right of Māori to bring a claim under section 6, but section 2.8 then empowers the Tribunal to 'provide a remedy to a claimant if a breach of a right arises from a breach of the principles of Te Tiriti'. How might these provisions mesh together? Does section 2.8 not subsume section 2.7? The relationship between these provisions is an uneasy one and may require further thought. In particular, should the Tribunal exercise constitutional authority to order (as opposed to recommend) reparations?

Another unusual feature concerns the selection of rights and responsibilities warranting protection under Part 1 of the *Draft Constitution*. As expected, this part adopts the rights and freedoms affirmed under the New Zealand Bill of Rights Act 1990 (section 1.1). Section 1.2 then adopts several socio-economic rights and affirms the government's responsibility to promote the realisation of the rights within its available resources. However, two further affirmed rights warrant mention: namely, the rights to academic freedom and to be free from discrimination on the ground of gender identity. I applaud the right to academic freedom affirmed under sections 160–161 of the Education Act 1989 but I do not regard it as a hallowed right warranting constitutional endorsement. The pre-eminent right to freedom of speech might arguably trump the right to academic freedom, with the latter representing but one manifestation of the right to freedom of speech.

Nor would I single out the right to freedom from gender discrimination for special treatment. First, if such discrimination occurs in the public sector, then it is already covered by section 19 of the New Zealand Bill of Rights Act. Section 19 incorporates the grounds of unlawful discrimination under the Human Rights Act 1993 (including discrimination on the ground of sex) and makes them applicable in the public sector. Secondly, if gender discrimination occurs in the private sector, then the question must be asked: What distinguishes this ground of unlawful discrimination from the other grounds under the Human Rights Act 1993? Section 21 defines 13 grounds of unlawful discrimination that are lacking any ethical justification. Gender discrimination is but one ground. A suggested amendment would be to replace reference to gender identity in section 1.2(c) with a generic reference to

the grounds of unlawful discrimination defined under the Human Rights Act 1993. That would then extend the same protection against all forms of unlawful discrimination to both the public and private sectors.

Part 3 of the *Draft Constitution* establishes a Republic of Aotearoa New Zealand but otherwise remains more or less faithful to the current structure of government. Two points of distinction concern the proclamations of who we are as a nation in section 3.1, and the aspirational values identified in section 3.9 concerning the legislative branch of government.

Part 4 is titled ‘Mangai o te motu’ (the voice of the people). This Part is also largely declaratory of existing arrangements concerning the electoral system (the Electoral Act 1993 is affirmed in section 3.7) and the operation of the legislative branch of government. However, it does introduce one important change which is commended. Section 4.4 extends the parliamentary term from three years to four and fixes the term. This change removes the prerogative of the prime minister (tumuaki under the *Draft Constitution*) to call an early election where the polls indicate an advantage. However, this change, while commended, omits an important safety valve were a vote of no-confidence in the government carried mid-term. In that event, there may or may not be another party leader who could claim the confidence of the House of Representatives. Should it transpire that no one could form an alternative government, then the only recourse would be to hold fresh elections to resolve the political uncertainty. It is suggested that the following proviso (shown in italics) should be added to section 4.4: *‘The parliamentary term shall be four years and the electoral term shall be fixed, subject to a vote of no-confidence in the government which may necessitate the calling of an early election.’* All countries that have fixed their parliamentary term operate under this safety valve. Omitting it creates potential for constitutional impasse.

Part 5 attends to operational elements. The only matter I raise concerns the privative clause under section 5.4. This clause locks in the commitment to seek political rather than judicial solutions. It confirms the intent behind section 1.5 (apropos legislation inconsistent with adopted rights) by declaring that the judiciary has no power to declare legislation ‘to be invalid’. However, I would also add the phrase ‘or otherwise disappplied or inoperative’. Following the House of Lords decision in *R v Secretary of State for Transport; Ex p Factortame Ltd* [1990] 2 AC 85 (HL), the courts often speak of ‘disapplying’ legislation rather than

invalidating it. Whether or not one invalidates or disappplies legislation, the result is the same: the enactment is made inoperative. However, it is not clear whether the courts regard these two things (invalidating and disapplying) as distinct forensic exercises. Consequently, it would be prudent also for the privative clause to prevent a court disapplying and/or making inoperative an unconstitutional enactment.

I conclude with one final reflection: what is the exact status of the Treaty of Waitangi under the *Draft Constitution*? The Treaty is covered in Part 2 but only Parts 3 and 4 (the Branches of Government and the Voice of the People) are entrenched and placed beyond alteration by ordinary Act of Parliament. On orthodox principles, a government could alter any part of Part 2 (dealing with the Treaty and Treaty principles) by legislation passed by a bare majority of the House. This raises the question whether legislation enacted in breach of the Treaty or its principles would be ‘unconstitutional’. The doctrine of implied repeal (assuming it applies to non-entrenched constitutional statutes) holds that a later inconsistent statute prevails over an earlier one to the extent of the inconsistency. Thus a statute enacted in breach of the Treaty or its principles would prevail over Part 2 of the *Draft Constitution* by impliedly repealing the operative provision or provisions. It is doubtful that that result would have been intended by the work stream that promoted the inclusion of the Treaty in Part 2. One solution would be to include Part 2 within section 5.3 and make it an entrenched part of the *Draft Constitution*.

## A Facilitator's Reflections

Diane White

*EmpowerNZ* was an opportunity for a group of talented, bright young minds to come together and imagine a new constitution for New Zealand. The task was formidable: two days, a blank canvas, and the knowledge that around a hundred people would be gathering to see the results. As facilitators, our task was similarly daunting: to guide the groups through the process, keep spirits high when energy levels were low, and ensure the end goal was always kept in sight.

In the days and weeks that followed the workshop, I reflected on a number of lessons I learnt from my experience as a facilitator. The first was the challenge of facilitating a group of seven or eight unique personalities, in what was at times a stressful and exhausting process. Within any group of New Zealanders, you will find a huge diversity in personality, experience, and ideology. The participants at *EmpowerNZ* were no different. While most had legal backgrounds and were similar in age, they were by no means a homogeneous group. With difference comes the potential for conflict. But with difference also comes the potential for great collaboration. It was the role of the facilitators to help the groups overcome any conflict and encourage them to collaborate in the difficult task of drafting a constitution.

The move from conflict to collaboration became evident over the two-day period. On the first day participants vigorously debated every point, and discussions over semantics stretched out over what seemed like hours. It quickly became apparent that this approach, given the time constraints and the enormity of the task, would make the overall goal of drafting a constitution unachievable. It was not until the participants realised that the task required collaboration, compromise and trust that the process could move forward. Dean Knight, the lead facilitator, made the comment at the start of the second day that often it was 'about achieving the least bad outcome', rather than securing personal victories. With such diversity in the room, it would be impossible to draft a constitution to which every individual agreed. Instead, it was about reaching a level of consensus with which everyone felt comfortable and in which all views had been considered. Within this model there was still the opportunity for participants to disagree openly; however, there was more willingness to embrace compromise in the spirit of collaboration.

The second lesson on which I reflected was the importance of imagination. People often mistake imagination for naivety. In fact, the two have little in common. Imagination is the ability to look beyond the status quo – to look beyond 'what works'. Many of our leaders and our decision-makers lack imagination. They have been tainted by cynicism, worn down by countless challenges, and constrained by what is 'workable'. They have lost the ability – the imagination – to look beyond the only reality they have ever known and what they have come to believe is the only reality that can exist. They are rarely given an opportunity to just imagine. If they did, they might discover workable solutions to some of today's greatest challenges.

The imagination of the participants was somewhat fettered by the desire to come up with a workable, practical constitution. However, the end product was bold – not only in its content, but also in its presentation. The way in which a constitution is traditionally displayed – with few, if any, visual elements and instead lengthy, indigestible chunks of text – is an example of the need for imagination. Why should a document, presumably for the people and by the people, be displayed in a way that only a very select few can understand or engage with? Why should a constitution be something we just read – at the least, why can't parts of it be visual or interactive? Since we are a country of innovators, the *EmpowerNZ* participants decided that we deserve better than a piece of parchment stored in a glass box, and they built a constitution that aims to engage rather than exclude.

The lessons from the workshop go far beyond the constitutional review. A commitment to collaboration, and a willingness to embrace imagination, is not something we often see in New Zealand's distinctly partisan political landscape. When collaboration happens, it still remains an exercise in political point-scoring – who came up with the idea, who drafted the policy, and so forth. When imaginative solutions are posed, they are laughed down – often without robust debate as to their merits and potential. What this constitution, and the process by which it was drafted, showed was the futility of this approach. When people become blinded by their own ambition and their desire to see only their view succeed, they will inevitably fail. Instead, in the spirit of collaboration and imagination, great things can be achieved – in this case, a constitution fit for the 21st century.

## A Guest's Reflections

Max Harris, working dinner guest

I was honoured to attend the *EmpowerNZ* working dinner, as a guest of young film-maker and social entrepreneur Guy Ryan. Throughout the week of the conference there had been a buzz surrounding the event, on Twitter and amongst young people working in Wellington. I therefore arrived at Parliament for the working dinner excited to see what had been happening.

When I arrived, my excitement lifted a further notch when I saw that I was seated at a table with Dame Dr Claudia Orange, an historian whose work on the Treaty of Waitangi I'd read at school and university – and who I'd always admired. But it was the participants at the conference, also seated at my table, who truly drove the conversation over dinner. They asked interesting questions about the law and also about future careers, in journalism and elsewhere. They were from different universities – I had good conversations with students from Otago and Victoria. And I got a real sense of their curiosity about, and commitment to, constitutional issues. The talk was so lively that I hardly had a chance to talk to Dr Orange until later in the night!

The guest speakers, John Burrows QC and MP Te Ururoa Flavell, provided additional spark for conversation. It was fantastic to hear John Burrows speak about the Constitutional Advisory Panel. He spoke with energy and vitality about the task ahead, and did well to lay out the competing views on constitutional change. Te Ururoa Flavell outlined, with humility and earnestness, the importance of thinking about the constitution, and explained the importance of constitutional review from the perspective of the Māori Party. Both speeches led to further comments and reflections from the conference participants at my table.

We then heard from the young workshop facilitators, answering in brief questions posed to them by Justice Joe Williams relating to the constitution. The perspectives offered here were very varied. One facilitator mentioned in passing the value of parliamentary sovereignty; another took a 'legal realism' perspective to constitutional issues; many highlighted the questions that remained unanswered about our existing constitutional make-up. These humorous and engaging presentations illustrated the diverse views that New Zealanders have about the subject of constitutional change.

After a bit more talk (and a chance for me to gush briefly to Dr Orange about her work, as well as an opportunity to talk to Dr Ranginui Walker about his views on change in constitutional attitudes over the past twenty or thirty years) the night was over – the conference participants had to get some sleep before the work was continued the next day.

Two thoughts struck me from the night as a whole. First, this was no narrow legal conversation. At my table, during the speeches, and in the facilitators' presentations, the discussion carried beyond just the content of the constitution – to bigger questions about the content of our culture in New Zealand. Perhaps we will not be able to determine what our constitution should be like before we determine the key features of our culture. Whatever the case may be, it was enriching to explore these broader concerns.

Secondly, the night underscored that the conference was not just about old thinking on constitutional issues, nor solely about the thoughts of young people – it represented a fruitful fusion of old and new voices. Dr Orange was surrounded by young people. The more experienced guest speakers were coupled with the younger facilitators' views. And it was emphasised that the constitutional project required fresh ideas and inherited traditions.

The night, to me, was an example of inter-generational leadership at work – where skills and ideas were being passed down the generations, while feedback and critical thinking was at the same time being passed back up. It's that kind of leadership that we'll need if we are to forge ahead with our own constitutional development, I think – and that's why it was so encouraging to see that leadership being modelled at what was an enjoyable and memorable dinner.

Max Harris

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Prior to leaving Wellington to take up a Rhodes Scholarship at Oxford University, Max was judge's clerk for the Chief Justice, the Rt Hon. Sian Elias. He has a particular interest in constitutional debates and public interest law, and has been heavily involved in many volunteering, social justice and public interest law spheres.

## A Participant's Reflections

Louis Chambers

The more I look back on *EmpowerNZ*, the more I think that the value of the conference was not in the outcome, but in the process. At the time, I felt deeply committed to our task of developing a constitution for New Zealand. I was not convinced that we should make radical changes to New Zealand's existing constitutional arrangements, but I felt committed to working with the other young people to give the exercise our best shot.

Immediately after the conference, I felt disappointed and drained. We were on a tight time-frame and we hadn't really proofread the final document before it went to the printers. Sub-groups tasked with developing different sections of the constitution had taken quite different approaches, reflecting, among other things, different views about the relationship between Parliament, the courts, the executive and the people of New Zealand. We had achieved consensus on the core values which guided the constitution, but under time constraints we had to trust each other to work on the specifics without being able to fully check in as a group.

With hindsight, I can see that this sense of disappointment was the inevitable result of an incredibly ambitious goal and a limited time-frame. We were always going to struggle to produce something that pleased everyone at the conference and which was word-perfect. Our constitution reflects the inherent constraints when 50 students from very different backgrounds have two days to build trust, develop knowledge, and then use that new-found knowledge and trust to construct a country's constitutional architecture.

What I will take away from *EmpowerNZ* is not a clear picture of the exact constitutional arrangements that New Zealand should adopt. Instead, I'll have an understanding of the process by which collective decisions can be made, a solid grasp on New Zealand's constitutional processes, and an appreciation of the diversity of perspectives regarding what a constitution for New Zealand should be.

The conference was incredibly well organised and facilitated. We spent the first day working on building trust and consensus around what a constitution ought to do and what values should guide it. This provided a space for people to think constructively about the fundamentals that should inform any constitution. It allowed us to explore issues as a group. It meant that, on Day 2, when we

were pressed for time, people trusted each other and could work under common assumptions developed the day before.

The knowledge in the room was also superb. Everyone left the conference with a new level of understanding about New Zealand's constitutional arrangements and why they matter. New Zealanders generally want to get on with things and are sceptical of too much high-level discussion about a constitution. *EmpowerNZ* gave us all the skills to communicate with confidence about what a constitution is in New Zealand and how it could be changed. Experts like Professor Philip Joseph provided the wisdom necessary to guide our discussions.

We also left the room with a clearer understanding of how many different responses there are to the question 'How ought power to be exercised in New Zealand?' Paul Goldsmith warned us that 'decisions divide'. This is certainly true when those decisions concern important subjects like entrenching socio-economic rights, preserving parliamentary sovereignty, recognising the place of Māori in New Zealand, and the status of the New Zealand Bill of Rights. We didn't all agree on the answers to these questions. But the process of working together, of listening and learning from each other, means that we gained a greater appreciation for the diversity of perspectives. We also achieved broad consensus on many of these: we agreed that parliamentary sovereignty should be preserved, but that it should not go untempered; we agreed that the unique place of Māori in New Zealand should be recognised; and we agreed that a longer electoral term would be appropriate.

Although I initially had doubts about how successful our drafting exercise had been, I firmly believe that the real benefit of the event was that it developed 50 constitutional ambassadors. We now have a heightened understanding of the importance of constitutional issues in New Zealand and how poorly they are understood by the general public. We know about the challenges of relating to one another but we are unified around a broad platform of agreement and acceptance of the diversity of perspectives on this tough issue. New Zealand's response to constitutional issues has tended to be reactive. Developing ambassadors with a thorough grounding in the area will only help to improve the quality of our constitutional framework when reviews and changes occur.



### Louis Chambers

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Louis Chambers was a participant at the *EmpowerNZ* workshop. He is a co-founder and the external relations coordinator for Generation Zero, a youth climate-change action group, and an organiser for Law for Change, a group advocating for students and young lawyers to take up public-interest legal opportunities and careers. Louis studied Law, Economics and Environmental Management at Otago University, and was recently awarded a Rhodes Scholarship to study at Oxford University.

## The Way Forward

Wendy McGuinness

Youth in their twenties today will shape New Zealand in the 21st century. They are the New Zealanders who will rely on our constitution in order to manage challenges and optimise opportunities – therefore what they think matters. The workshop was designed to test whether youth were interested in exploring New Zealand’s constitutional future, whether they believe the current constitutional framework is fit for the 21st century, and which areas they found controversial. In this section we will answer these three questions, briefly review participant feedback, provide insights from the *Draft Constitution*, identify my personal observations, and outline the next steps.

### Are youth interested in exploring New Zealand’s constitutional future?

The answer is a definite yes. The workshop was over-subscribed (even after increasing the number of participants from 40 to 50); attendance throughout was 100 percent, with many participants working into the early hours to bring their ideas to fruition. There are youth clearly interested in tackling complex long-term issues facing New Zealand, however, as indicated in the feedback, participants found it difficult to find peers interested in discussing such complex issues and an audience interested in listening to their thoughts. In engaging with both the process and the issues, the participants were in their element, and their discussions continue today through other channels.

### Is the current constitutional framework fit for the 21st century?

Generally participants would argue no; they raised at least four high-level concerns. Firstly, they were extremely concerned about a lack of accessibility. Participants were concerned that the primary source of New Zealand’s constitutional arrangements lay within the *Cabinet Manual*, rather than a document written for all New Zealanders.

A second but related concern lay around the position of the Treaty of Waitangi within the *Cabinet Manual*; it is positioned after the Constitution Act 1986, and listed as number five of six within a section titled ‘Other major sources of the constitution’. This created some confusion that became problematic; is the Treaty the central nucleus of our constitution or not? There was some discussion around the role of the 1835 Declaration of Independence and whether an 1840

treaty was relevant in 2012, but participants generally grounded themselves by referring back to what they had been taught – that the Treaty is the founding document of this nation. However, there was little clarity as to what a founding document means in legal or practical terms; is it a historical document that records the birth of a nation, or is it a living, breathing document to be reinterpreted by every successive generation?

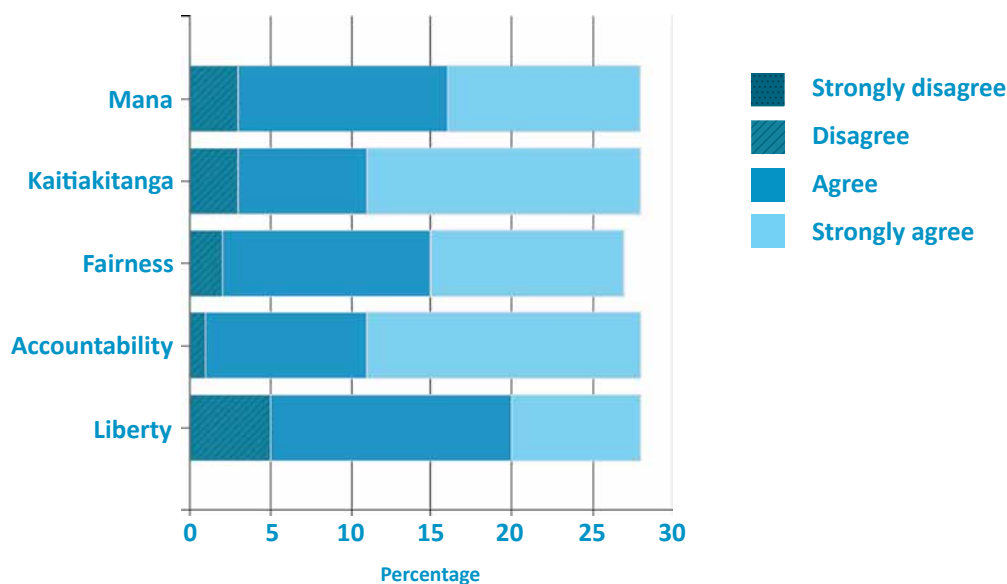
There was also uncertainty about what the future looked like post Treaty settlements. Even though participants looked forward to a time when the Treaty settlement process would be complete, no one was quite sure what that means in practice, leaving a great deal of uncertainty – or wriggle room – depending on your outlook. This meant that there was an inability to move from broad conceptual agreement to the specific; broad concepts such as partnership and equal rights and responsibilities were easily agreed, but once the discussion moved into the practicalities it was extremely difficult to gain consensus.

Lastly, participants generally believed that a constitution for the 21st century should embody our unique values. For example, environmental protection should be better recognised.

### What were the hot issues?

We positioned the workshop as an experiment in order to ensure all those involved had realistic expectations as to both the outputs and the long-term outcomes. We also wanted to ensure participants were aware that although we would endeavour to design a process to deliver a draft constitution fit for the 21st century, we were in no way sure it was possible to achieve this output in two days. Many of the participants indicated in their feedback that another day would have resulted in a document that represented most of their views; they believed a form of consensus would have been reached. The participants were prepared to accept it was going to be hard to develop a consensus – but they were going to give it a go anyway. It was this attitude that is arguably my most enduring memory of the event; they wanted to get it right. It was not possible to reach consensus on the resulting *Draft Constitution* as the participants were unable to review the entire document before the end of the workshop. Consensus was only ever reached on the purpose statement and the values (pages 53 and 57). However, as participant feedback indicates, differences of opinion over values still existed (see survey opposite).

### Survey response – Do you generally agree or disagree with the five values in the Draft Constitution?



Hot issues identified included:

1. What are the values that should underlie a New Zealand constitution in the 21st century?
2. What is the role of government in reviewing and shaping our constitution? (How can a constitution be developed for the people by the people without being captured by government self-interest?)
3. What is the role of the Treaty today (as discussed above)?
4. Should New Zealand become a republic and if not, what other changes should be made to progress and align our constitutional framework?
5. How should we develop clear linkages between the rights of New Zealand citizens and our responsibilities, for example, it was noted that the rights of New Zealanders are documented in the Bill of Rights, but there is no equivalent Bill of Responsibilities. What is the social contract that exists in New Zealand between citizens and the government?
6. Where is the current social contract documented?
7. How will global trends, challenges and opportunities guide and drive our constitutional framework in the long-term. For example, what are our responsibilities as global citizens to climate refugees?
8. To what extent should New Zealand's constitution be entrenched or codified?

9. Does the Waitangi Tribunal have a role in the post Treaty settlements era?
10. Should New Zealand's constitution be brief and high level or detailed and operational in terms of enabling and constraining public power?

#### Participant feedback

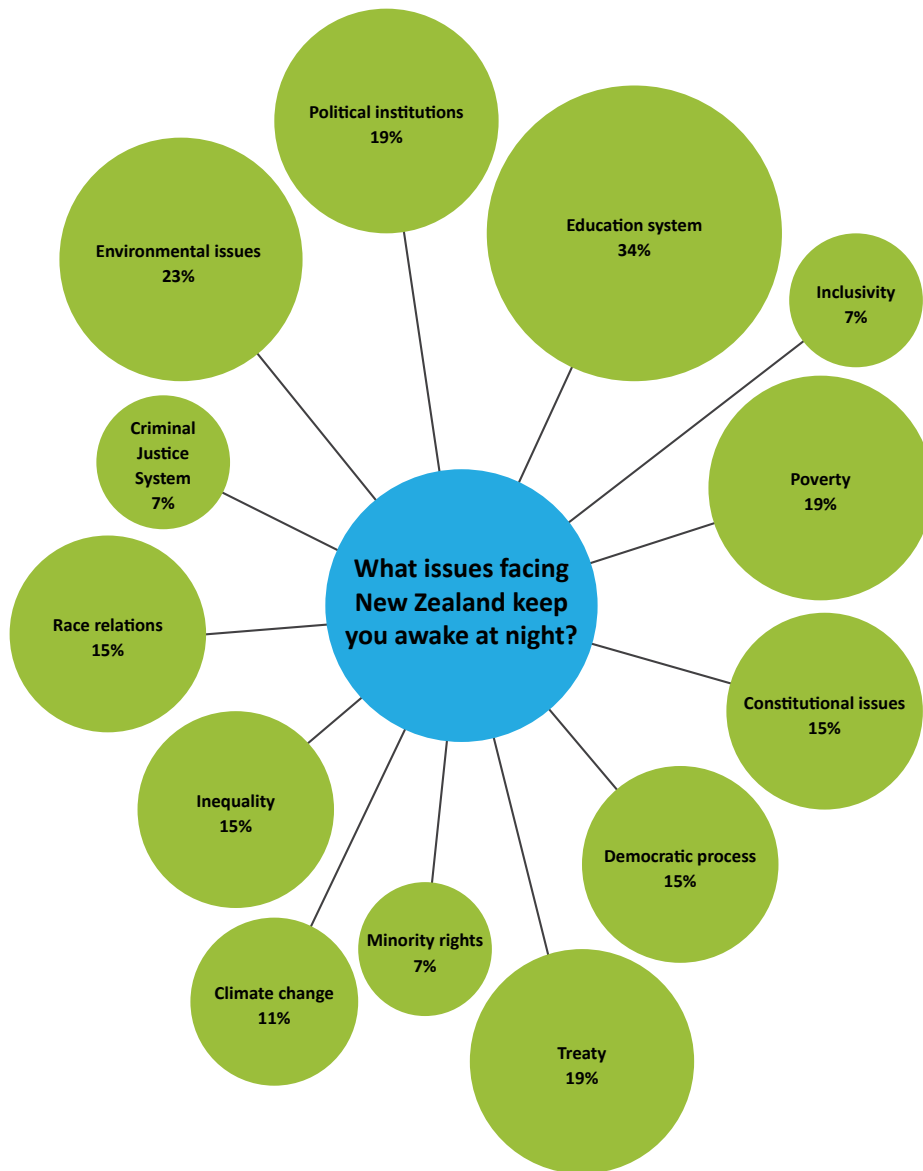
We gathered participant feedback from two key sources: feedback forms made available to participants during the workshop and an online survey conducted after the workshop. The detailed results of the feedback are published in Working Paper 2012/03: *EmpowerNZ Participant Feedback*.

Overall the participants were overwhelmingly positive about their experience, with more than two-thirds indicating that the workshop had exceeded their expectations. They particularly enjoyed meeting other young people passionate about New Zealand's future, and having an opportunity to interact with experts on constitutional issues. A participant noted:

*'So thankful for the initiative which has inspired me to become interested and more importantly involved in expanding a conversation I didn't previously think I could contribute meaningfully to - now I know that I can and that I must!'*

A key theme that emerged from their feedback was that the workshop was highly educative and had increased their ability to engage with the current debate surrounding the Constitutional Review. Many noted that the civics education they had received at school was inadequate, and that

Survey response – Which issues facing New Zealand keep you awake at night? (Topics were self-selected)



although the Treaty of Waitangi is taught in an historical context, its implications for the present day are not often explored.

The Institute was also keen to hear from participants about what they consider to be the other important issues facing New Zealand. In his book *Seven Strategy Questions: A simple approach for better execution* (2010) Harvard Business School Professor Robert Simon proposes seven key questions that should be asked as part of the strategy development process. The last of Simon’s seven questions is: ‘What strategic uncertainties keep you awake at night?’ In order to gain an

insight into the challenges seen through the eyes of youth, we adapted this question and asked them to respond. Their responses are shown above.

**The Draft Constitution**

Given the inability to have a plenary on the final *Draft Constitution*, the document produced at the end of the two days should be read as views of working group members rather than views of all 50 participants. The work streams agreed at the beginning of day two (see page 61, A-F) were rewritten and reordered into the following section headings for the final *Draft Constitution*:

- Section 1: Preamble
- Section 2: Rights and Responsibilities
- Section 3: Māori–Crown Relationship
- Section 4: Organs of Government
- Section 5: Voice of the People
- Section 6: Operational Elements

Given that each working group only focused on their topic for most of that day, their outputs are bold and in places quite novel. For example in their *Draft Constitution*:

- 1) New Zealand could become a republic while also acknowledging its historic relationship with the United Kingdom. There was a sense that New Zealand will become an independent nation in the 21st century; however, it can do so without disconnecting completely from the United Kingdom. In other words New Zealand could position itself as a republic with strong allies.
- 2) New Zealand could embrace Māori terminology within the constitutional framework without impacting on the specific roles of key parties. They wanted to rename the prime minister ‘Tumuaki’ and create a new head of state called ‘Kaitiaki’, while also wanting the Kaitiaki to be given powers similar to those currently exercised by the Governor-General.
- 3) New Zealand could uphold the doctrine of parliamentary sovereignty while also wanting more checks and balances through instruments such as the establishment of an independent Constitutional Commission, reviews of the constitution every 20 years, and giving effect to the principles of Te Tiriti o Waitangi.
- 4) New Zealand could entrench the Organs of Government and the Voice of the People, including a four-year parliamentary term. However, this was only on the basis that additional checks and balances were put in place to strengthen

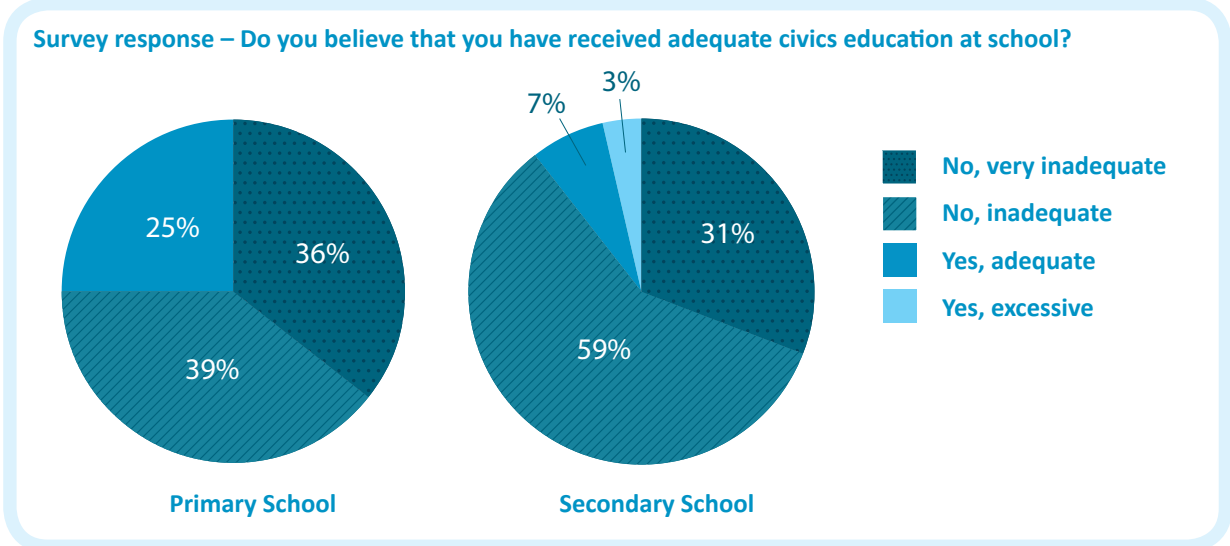
our constitution. They were keen to provide government with a longer period to develop and implement policy for the long term.

The final *Draft Constitution* shows that young people want to be part of the conversation; that they want the constitution to have a greater public profile (not just sit within a *Cabinet Manual*) and they want a constitution that is unique to New Zealand, one that reflects more of how they feel and one that speaks to the people.

**High-level observations**

The constitutional review is the first time in New Zealand’s history that the public have been invited to discuss our shared constitutional future; it is a unique opportunity to learn about our country, our people, and our inner thoughts. Possibly because the *EmpowerNZ* workshop was one of the first events designed to contribute to the Constitutional Review, a number of people have asked me for my personal observations on how to progress the discussion. Like most reflections, they have changed over time, and I expect they will continue to change. However, the following are my thoughts as at February 2013.

- 1) New Zealand has arguably taken a short-term approach to resolving the Treaty issue. We have taught our youth that the Treaty is the founding document of New Zealand, but we have not recognised it as such in either our constitutional framework, which is described in the *Cabinet Manual*, or in our Oath of Allegiance. Currently, to be permitted to sit or vote in the House of Representatives, a Member of Parliament is only required to swear allegiance to Her Majesty the Queen. There is no requirement to swear allegiance to New Zealanders or to the Treaty. Further, and more importantly, we have committed youth to a



treaty signed in 1840 without providing the language or the thinking that underlies our current legal approach, which embraces (in part) an ongoing relationship. Teaching the Treaty's existence as a founding document is not enough; we must also find a way to teach New Zealanders what this means (and does not mean) in 2013 and beyond.

2) There is a lack of transparency in our current constitutional framework that is an obstacle to public engagement and accountability. It prevents the public from understanding how their beliefs and values are reflected in decisions made by Parliament. Among the workshop participants there was no desire to remove power from government or to make it more rigid; rather, there was a demand for greater transparency. This was best encapsulated by the imagery exercise; the 50 participants chose a window to reflect the public desire to see how power is distributed within the inner engine room of Parliament. It was this image that was chosen for the front cover of the *Draft Constitution*, to remind readers that transparency is a key concern.

3) Further, there is also a lack of a common language in New Zealand for discussing constitutional issues, which makes understanding the relevance of our history to its current and future well-being difficult. Throughout the workshop the need for civics education was a continuing theme. Of the 29 participants who responded to the feedback survey, 91.9% believed

they had received inadequate or very inadequate civics education (see pie charts on page 84). When considered in the context of the findings of the *2005 Inquiry to review New Zealand's constitutional arrangements*, which was chaired by Peter Dunne (see page 27), this percentage suggests that more research needs to be completed to quantify the extent of the shortfall of civics education in New Zealand, and how, if it does exist, it can be resolved. For the record, the *Inquiry* made three recommendations:

- i. Some generic principles should underpin all discussions of constitutional change in the absence of any prescribed process,
- ii. 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, and
- iii. The Government might consider whether an independent institute could foster better public understanding of, and informed debate on, New Zealand's constitutional arrangements.

The government's response to the *Inquiry* supported the first and second recommendations, but did not support the third. Importantly, despite the government's support for recommendations one and two, very little work has been undertaken



Dean Knight addresses guests at the Finale

to develop generic principles or foster civics education in New Zealand.

4) In my opinion there are three key pillars that are necessary to create a resilient constitution that can survive the test of time. The first pillar is a clear statement of purpose (or mission); there must be community-wide consensus about what the constitution should deliver to New Zealand now and in the future. It is clear that our constitution should remain both fluid, as it needs to be reinterpreted continually and redesigned in response to current and emerging events, and fixed, in order to provide stability. Jim McLay did an outstanding job of explaining why in times of crisis New Zealanders look to the constitution to find a way forward. The current Constitutional Review is an opportunity to revisit our constitution to ensure it is designed for the coming century. For those undertaking workshops or preparing submissions to the Constitutional Advisory Panel later this year, I recommend setting out early in any document what you believe is the purpose of the constitution. The workshop participants produced a very useful purpose statement (see page 53) which acted as an anchor for their discussions and served as a great way to identify critical components and stress-test the final draft. My other piece of advice is to keep the discussion groups small and diverse in opinion, ideally a maximum of eight people, so that everyone can listen, share, learn and reflect on the issues. Only when a clear view is agreed within each group should the dialogue be taken into a larger plenary discussion.

5) The second pillar is process. I suspect that where you begin a process of writing a constitution is very important, as it is likely to significantly affect the outcome. In other words, different approaches will deliver different outputs. For example, at the workshop our focus was initially around values and vision. This led to a lively and challenging conversation around a shared set of values and a common vision for New Zealand. In contrast, I suspect that a conversation that begins with the 1840 Treaty would likely produce a very different constitution based on the relationship between two peoples and their responsibilities to the land we live on and the Pacific Ocean that surrounds us. Another approach could start from a legal perspective, exploring New Zealand's constitutional journey to date in terms of systems, laws and institutions. This approach is likely to suggest ways in which the current system could be improved, removing obstacles and adding new instruments, laws or institutions so that more effective and efficient decisions are made in terms of time, costs and outcomes. A fourth approach could be to start a conversation about the rights and responsibilities of New Zealanders today and

in the future. This approach is likely to lead to a more globally aligned, multicultural constitution evolving from a much deeper discussion of the social contract between New Zealand citizens, government and the international community.

There are bound to be numerous other ways of beginning a constitutional conversation, with no one way necessarily being any better than another. However, seen together, they should provide a mix of perspectives and ideas that, when reviewed against an agreed statement of purpose, is likely to produce an optimal constitutional framework fit for the 21st century.

6) The third pillar is the need to discuss rights in the context of responsibilities. A number of times during the workshop the conversation became centred solely on rights. This concerned me as I have found in the past that discussions based solely on rights tend to be framed in terms of 'I want' statements. In contrast, I feel more comfortable with a 'rights and responsibilities' discussion where rights are discussed alongside responsibilities, resulting in 'we need' statements. I find it surprising that New Zealand immigrants are not required to commit to a comprehensive set of clearly laid out responsibilities, and that the Bill of Rights Act 1990 does not contain a list of such responsibilities. I believe a constitution is a social contract, and that our constitutional framework should be worded in a way that articulates shared *responsibilities* rather than privileging the *rights* of one New Zealander over another. In terms of the Treaty, this approach could ensure all New Zealanders have equal rights, and at the same time, that all New Zealanders have equal responsibility to protect and treasure New Zealand's unique assets: our land, our native flora and fauna, our ocean, the culture of our first nation peoples, and our historical relationship with the British Crown. Further, an equal rights and responsibilities approach would mitigate the need for the Māori seats. A more equitable approach to representation would be to ensure parliament required a minimum percentage of MPs that self-identify as Māori.

7) Lastly, whatever constitutional framework is finally agreed upon, it will face criticism. In the weeks following the workshop I was surprised to see a piece in the media that implied the 50 participants had played the role of 'lab rats' or 'pawns' of the Constitutional Advisory Panel. I was amused: anyone who attended the finale would know that these young people could not be pushed around – quite the contrary. Their independent thinking, values and strength of character were on display for everyone to see. For the Institute, this misunderstanding was a reminder of the importance of good communication, and the need to work with the media to ensure they understand that the Institute is a privately funded independent think tank, and that it is common

practice internationally for think tanks to use initiatives such as workshops to explore the future. It also shows that a thick skin is needed when one wades into the public arena to tackle big, contentious issues; long-term issues are hard – so we need to harden up.

### The facilitation team

The strength of the workshop model is that it is organic, benefits may be lost if the facilitator becomes too prescriptive or tries to exert control over the dialogue and push for particular outcomes. We must continue to be careful not to occupy the space we are trying to create. This can be a real challenge when the issues in question are ones we have strong personal feelings about. It necessitates an awareness of one's own biases, and clarity over the role the Institute is playing: providing resources but not shaping outcomes. Both Dean Knight and Carwyn Jones, in our preworkshop meetings, strongly emphasised the need for the participants to own the final output. I particularly appreciated Dean Knight's ability to draw a distinction between exploring an issue and shaping an issue, and Carwyn Jones' leadership at the Pōwhiri, his session on conflict resolution and his ability to turn the final presentation into an art form.



**Top: Carwyn Jones speaks to the participants with Dean Knight in the background**

**Bottom (from left): Mihia Pirini, Natalie Coates and Jess Birdsall-Day**

We were very fortunate that Dame Dr Claudia Orange and Professor Philip Joseph were able to be in the room and offer their expertise when asked.

Their academic professionalism was apparent throughout; if they could not provide answers they provided opinions, but they were careful to make the distinction between the two clear. The line between facts and fiction was never treated lightly and I thank them for this. This distinction is particularly important for fostering intergenerational leadership and, as a result, we would always endeavour to ensure there are wise counsel in the room.

In running *EmpowerNZ* we were able to draw on a great many lessons we learnt from the *StrategyNZ* workshop. We learnt that imagery and design must be part of the process upfront; it unleashes the creative powers and makes workshoping complex issues fun. Many of the participants were amazed at how the imagery helped bring the document together, and convey a New Zealand aesthetic that they could be proud of. The design-led approach also urged the participants to consider the importance of effective and engaging communication.

### The next steps

How can we move the conversation forward, to a constitution fit for the 21st century? For me this means we firstly need to agree a set of common values, as it is these that should form the nucleus of any discussion on our constitution – what are the values that we want to live by in the 21st century and how are these to be reframed in terms of rights and responsibilities? The values that existed when the Treaty was signed in 1840 are important and useful, but what is fundamentally important in the 21st century is how those values, and the resulting rights and responsibilities, are defined; how they are articulated today will drive our behaviour tomorrow.

This wrestling between the past, the present and the future was clearly apparent during the discussions. I was interested in how the participants self-selected into topic areas at the beginning of day two, with only a small group focusing on the Treaty. By day two, many were keen to have conversations on the ethics (and implications) of issues such as climate change refugees, child poverty and inequality.

Second, we need to find a shared vision for this country that we can work towards, either together or individually. Our constitution is one way, and arguably the easiest way, to broadly state a shared vision for New Zealand.

### In 2013

The Constitutional Advisory Panel will continue their public engagement programme until the middle of 2013. After that time they will be preparing their report for Cabinet. We will continue to follow the progress of the constitutional review

through to its conclusion in 2014 through our *Project Constitutional Review* and the website [www.empowernz.org](http://www.empowernz.org). To help progress the conversation, the Institute is pleased to announce three further outcomes of *EmpowerNZ*:



#### Dr Claudia Orange receives the *Draft Constitution* in the glass baton

1) Dr Orange, who was the recipient of the *Draft Constitution* incased in its glass baton, and in her capacity with Te Papa, will play a central role in taking this conversation forward. Te Papa is planning activities to encourage the public to engage with the constitutional review, with a particular focus on engaging students and young people. Included in this work is the Treaty Debates Series 2013 – My Voice Counts, held at Te Papa in January 2013. Speakers include Carwyn Jones and participants of *EmpowerNZ*. This work will complement the public engagement work of the Constitutional Advisory Panel.

2) Contributing to the wider public debate, Dean Knight and participant Julia Whaipooti have prepared an article about *EmpowerNZ* for publication in the *New Zealand Journal of Public and International Law* in February 2013.

3) Lastly, we have invited the participants to prepare a collective youth submission for the Constitutional Advisory Panel in early July. We see this as an excellent opportunity to bring together what was learnt from the exercise of drafting a constitution fit for the 21st century.

#### Final reflections

There is a small but growing community of passionate New Zealanders who care deeply about the state of our constitutional arrangements and what these might mean for our future. Respected academic figures, former and current Members of Parliament, and the young lawyers who took on the role of facilitators all demonstrated a zeal for educating and involving as many people as possible in this discussion. However, at the heart of this discussion is a need to equip our youth with the skills to manage the challenges and opportunities ahead; this goes far beyond a group of 50 young people.

Government must work harder to improve the literacy of all youth; civics and democracy are the building blocks of a sustainable future for New Zealanders. We need a constitution that frames the debate; one that guides the discussion in terms of values, rights and responsibilities. Although many of my generation have worked hard, for me this is not enough. We must leave the next generation of New Zealanders in a better place than we found it. We must not pass on the problems, but only the opportunities; this is the true challenge for my generation.

Lastly, and most importantly, I would like to acknowledge the 8 facilitators and 50 participants who attended *EmpowerNZ*. They worked hard, together and individually. They were brave and fearless in the face of a big and complex idea: a constitution fit for the 21st century. New Zealand's future is all the better for your values and energy – go well and go hard!



#### Attendees at the finale give the participants a well-deserved standing ovation

## Acknowledgements

The McGuinness Institute would like to acknowledge the following people and institutions for helping make *EmpowerNZ: Drafting a Constitution for the 21st Century* such a success.

### Host

Paul Goldsmith MP

### Special partner

Te Papa Tongarewa

### Speakers

The Hon. Jim McLay

Emeritus Professor John Burrows QC\*

The Hon. Peter Dunne #

Te Ururoa Flavell MP #

Professor Philip Joseph

Dame Dr Claudia Orange

Sir Tipene O'Regan\*

### Panel of Cross-party Reference Group representatives

Te Ururoa Flavell, Māori Party MP (Chair) #

Charles Chauvel, Labour Party MP

Paul Goldsmith, National Party MP

Hone Harawira, Mana Party MP #

Metiria Turei, Green Party MP

### Special contributors

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Kura Moeahu (Kapa haka group Nga uri o Tamarau)

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Katy Miller

### Illustrations

Megan Salole

\* Members of the Constitutional Advisory Panel

# Members of the Cross-Party Reference Group

### Crossword Answers

Across: 4. Twenty, 6. Israel, 8. Seven, 9. Democracy, 11. Japan, 12. Magna Carta, 14. India, 16. Remuneration

Down: 1. Normanby, 2. Representative, 3. UNCLOS, 5. Australia, 7. Tonga, 10. USA, 13. Six, 15. France

### Working dinner guests

Emeritus Professor John Burrows QC\*

Charles Chauvel

Deborah Coddington\*

Jo Coughlan

Leo Donnelly

Paul Eagle

Te Ururoa Flavell #

Paul Goldsmith

Max Harris

Colin James

Professor Philip Joseph

Mark McGuinness

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Rod Orange

Sir Tipene O'Regan\*

James Palmer

Hinurewa Poutu\*

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Wayne Silver

Emeritus Professor Dr Ranginui Walker\*

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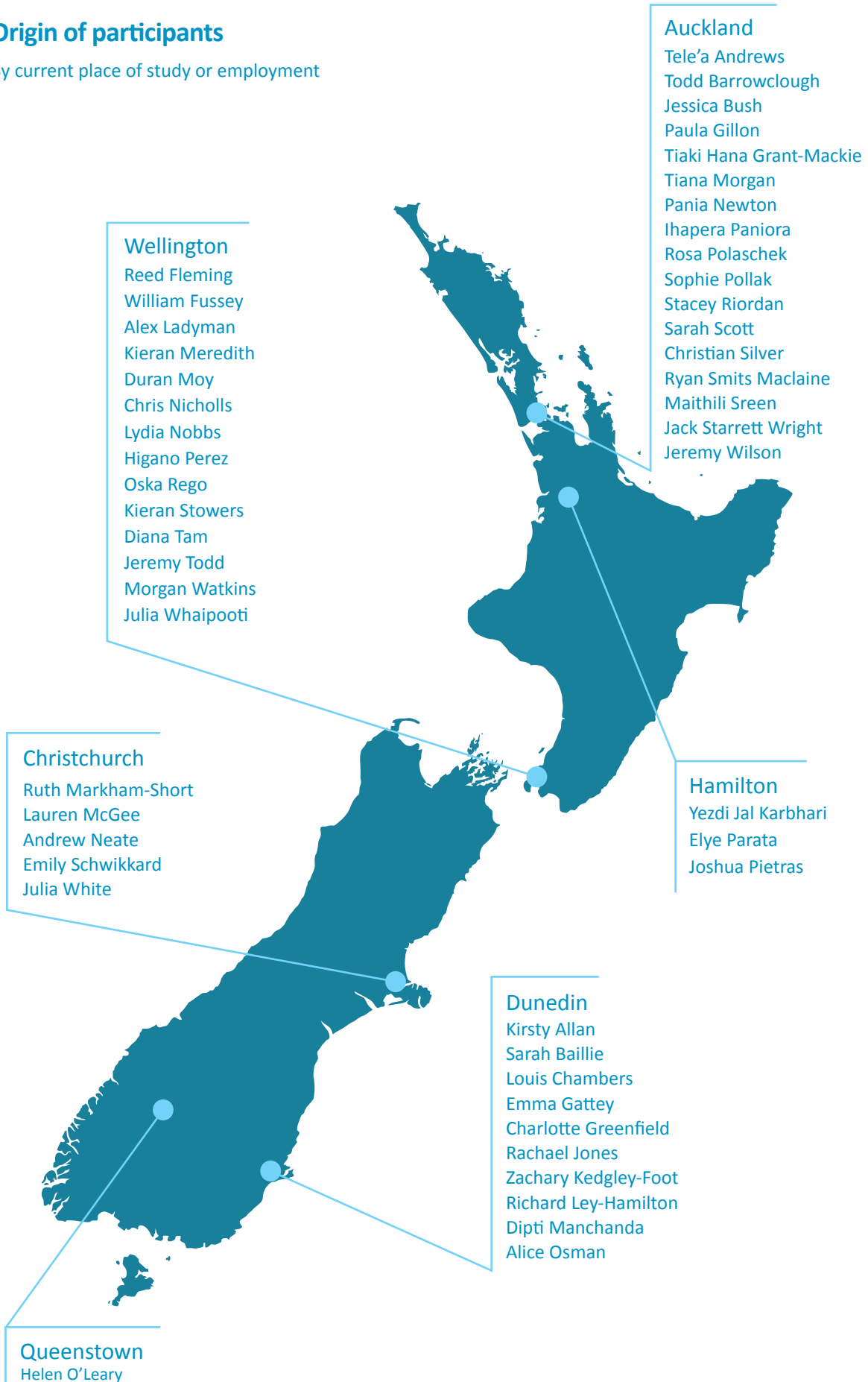
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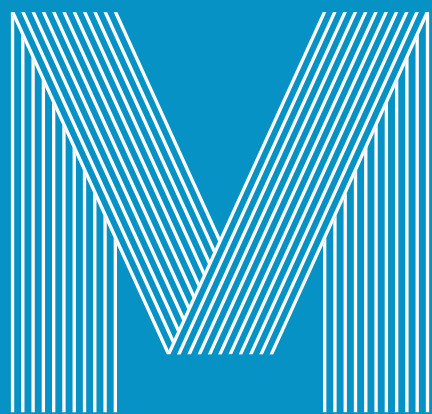


To learn more about this initiative visit [www.empowernz.org](http://www.empowernz.org)

## Origin of participants

By current place of study or employment





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