

Workshops on the Constitution Grand Hall, Parliament– 28/29 August 2012

Kia ora tataua katoa – greetings everyone

Given the details of the challenge before you – as outlined by the previous speakers, you now know just what a challenge these two days are going to be. Some of you might be thinking: Is this mission impossible? Banish the thought! Already you have gained a fair grasp of the elements of a constitution, and Dean Knight is shortly going to suggest a way forward – first steps - that you will build on in the workshops.

Let's get our purpose clear, then: For the first time in our country, we New Zealanders are being asked to have a national conversation on our constitutional provisions. And you – specifically – over two days have the luxury of space and the support of experts to explore our country's constitution and to draft its future. This is a unique opportunity. You have a real chance to use this to make a difference to New Zealand.

What you produce will be important to the way our nation may decide how we should express our democratic rights and how we should protect those things that are dear to our identity as New Zealanders. Your thinking and your propositions will - by tomorrow night - be framed up and will thereafter resonate powerfully in the many wider and deeper national discussions on the constitutional review.

Let's begin with a simple but key point: The constitution of a nation is about power - about the set of rules that govern how a government can exercise public power. It identifies who or what institutions should exercise power and how they should do it. In a democracy the government is usually the most powerful coercive force within a country so the rules about how power is exercised are very important indeed. They ensure that power is not abused and that government uses its powers wisely.

Creating a constitution can be complicated as 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 and flexible situation where we abide by a number of acts, conventions and procedures In short we have some written

documents and some unwritten practices and ways of doing things. So, though we tend to say we do not have a written constitution, a great deal is written in acts and procedures. But is this good enough in future? You will need to decide this.

As law expert Matthew Palmer notes¹: Compared to other nations our constitutional arrangements can be changed quickly and easily. But there are pros and cons to such a flexibility. People may not even notice when some things change. And this could make our constitution vulnerable to changes that allow for the abuse of public power. There has to be a trade-off between flexibility and vulnerability.

What, therefore, can you suggest, that would ensure a broadening and deepening of democratic rights in a draft constitution? What values for example, should we or could we express in written form? For example, would it be preferable to consider a document that would spell out over-riding goals that would embrace a set of values which should be adhered to, so that the details of a constitution and constitutional conventions might be developed further - and within the compass of this document?

Could we spell out in this document a set of principles which would apply to the detail of a written constitution? Perhaps a constitution – as it is finally worked out by legal scholars - could sit under this set of principles? The principles could serve like a sheltering cloak, giving protection of New Zealanders' rights, and unifying New Zealanders in their commitment to political and civil responsibilities. The principles could give mana to the constitution.

If you decide, however, to opt for macro constitutional change, then there are several elements which seem to me to be important factors in considering the constitution - and any set of principles. This is not an exhaustive list, and you will have other elements you might consider more important:

Our nation's relationships with tangata whenua

The 1840 Treaty of Waitangi set us on a path different from other nations in founding a new nation based on principles of justice and fairness, where two peoples could thrive and benefit

¹ Matthew Palmer, Constitution, in Te Ara, www.teara.govt.nz/en/constitution

from the best in each culture. And we both have done so, despite some downsides to our records.

How then can we entrench the Treaty principles in a constitution? Should we do so? Currently, policy and practices are evolving, but they are subject to the vagaries of shifting parliamentary composition in our three year electoral patterns.

As Palmer notes² : “The Treaty occupies an uneasy, uncertain place in New Zealand’s constitution. Its general meaning is commonly interpreted by official institutions and the law as being about relationships and procedural fairness. Despite these general principles, its meaning in particular cases can be unclear, and it is also unclear which institutions have the job of providing clarity.”

We tend to have knee-jerk reactions to events, such as the Court of Appeal ruling on the foreshore and seabed in June 2003, and Don Brash’s Orewa speech in early 2004. We need a Tribunal or other body that will adjudicate on such contemporary issues which are bound to arise from time to time. Is there an on-going role, therefore, for the Waitangi Tribunal?

Our nation’s relationships with migrants

The growing diversity of our population brings a richness to our lives, but the likelihood of the on-going growth of migrants as a proportion of the population suggests that protection against discrimination will continue to be important. In association with that aspect, inclusivity of migrants and respect for their values is all important if migrants are to celebrate being New Zealanders and contribute to the well-being of our national family.

Our nation’s future generations:

Giving voice to varied and changing ways of life and living in New Zealand is undoubtedly going to be a challenge to future Parliaments. But currently we do not oblige people to vote in elections. Should we do so (as Australia does)?

- How can we ensure that individuals and communities participate in political and governmental processes?

² Matthew Palmer, Constitution, in Te Ara > www.teara.govt.nz/en/constitution

- How can we be sure that civil and political rights continue to be protected?

Demographic change will be a driver of changing relationships.

The need for flexible capacity to change our constitution can be expressed by statistics: Auckland's population in 2021 will be only a little more than 53% European; Asian around 27% and Maori and Pacific around 29%. Overall, New Zealand's population change is less dramatic, but there will certainly be marked change by 2021. The 2006 census recorded over 200 ethnic categories and more than 120 distinct languages.³ These figures suggest a need to be flexible in drafting a constitution, and possibly to accommodate changing values and new values; indeed the figures demand that we think further out over many decades in drafting a constitution, and that we be broader in concept than we have customarily been to date.

Our nation's parliament

Drawing on Matthew Palmer's wise reflections again: With one House, no federal structure (that is, separate states as in Australia and the USA), and no ability of the judiciary to strike down legislation, parliamentary sovereignty is stronger in New Zealand than in any other Westminster democracy. In the 1980s and 1990s a series of measures limited the scope of the executive powers of parliament. Several acts, such as the Official Information Act, Bill of Rights, and Human Rights amendments, have been significant. So too is the adoption of the MMP electoral system which ended the reign of single-party majority governments. Negotiation has become essential to form governments and pass legislation. But will MMP survive? Parliament has powers to change legislation, so nothing in future is set in concrete.

And so, given the powers of parliament, what principles in its performance should be further built into any constitution?

A constitutional culture

Referring again to Matthew Palmer, he reminds us that we should bear in mind that underlying a nation's constitution are national

³ Paul Callister and David Bromell, 'A changing population, changing identities: The Crown-Maori relationship in 50 years' time?' Institute of Policy Studies working Paper 11/09 June 2011.

attitudes to the exercise of public power⁴. He expresses it as a kind of constitutional culture - inherent in and an expression of our shared understandings of what is important in the world and how we differ from other groups. This constitutional culture is our collective mindset or set of attitudes that relate to the exercise of public power. Over time there is an ongoing interaction of the beliefs and behaviour of all those who participate in a constitution – it is not a fixed thing. And there are also a variety of cultural attitudes at any time, which in turn also shift.

In broad terms, our constitutional changes have tended to be pragmatic. 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 Maori tribal dynamics. We support under-dogs 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.

⁴ Matthew S.R. Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution*, Victoria University Press, Wellington, 2008, pp. 278-282..

