

# *New Zealand Journal of Public and International Law*



VOLUME 10 • NUMBER 2 • DECEMBER 2012

---

THIS ISSUE INCLUDES CONTRIBUTIONS BY:

Shireen Daft  
EmpowerNZ  
Carwyn Jones  
Dean Knight and Julia Whaipooti

Cheryl Saunders  
Anna-Marie Skellern  
Pádraig McAuliffe  
Rt Hon Jim McLay

---

**Victoria**

UNIVERSITY OF WELLINGTON

*Te Whare Wānanga  
o te Ūpoko o te Ika a Māui*



FACULTY OF LAW  
*Te Kauhanganui Tātai Ture*

NEW ZEALAND JOURNAL OF  
PUBLIC AND INTERNATIONAL LAW

© New Zealand Centre for Public Law and contributors

Faculty of Law  
Victoria University of Wellington  
PO Box 600  
Wellington  
New Zealand

December 2012

The mode of citation of this journal is: (2012) 10 NZJPIL (page)

The previous issue of this journal is volume 10 number 1, July 2012

ISSN 1176-3930

Printed by Geon, Brebner Print, Palmerston North

Cover photo: Robert Cross, VUW ITS Image Services

# CONTENTS

Foreword	
<i>Claudia Geiringer and Rayner Thwaites</i> .....	vii
Constitution as a Catalyst: Different Paths within Australasian Administrative Law	
<i>Cheryl Saunders</i> .....	143
The Climate Change Response Act 2002: The Origin and Evolution of s 3A – The Treaty Clause	
<i>Anna-Marie Skellern</i> .....	167
Integrating Responses to Violators and Corporate Accomplices: A Role for the Security Council?	
<i>Shireen Daft</i> .....	193
Suspended Disbelief? The Curious Endurance of the Deterrence Rationale in International Criminal Law	
<i>Pádraig McAuliffe</i> .....	227
Book Review: <i>Tribal Constitutionalism – States, Tribes and the Governance of Membership</i>	
<i>Carwyn Jones</i> .....	263
1984 and All That: Opening Address to the EmpowerNZ Workshop	
<i>Hon Jim McLay</i> .....	267
EmpowerNZ: Drafting a Constitution for the 21st Century	
<i>Dean Knight and Julia Whaipooti</i> .....	287
Draft Constitution for the 21 <sup>st</sup> Century	
<i>Participants at the EmpowerNZ Youth Workshop</i> .....	301

The **New Zealand Journal of Public and International Law** is a fully refereed journal published by the New Zealand Centre for Public Law at the Faculty of Law, Victoria University of Wellington. The Journal was established in 2003 as a forum for public and international legal scholarship. It is available in hard copy by subscription and is also available on the HeinOnline, Westlaw, Informat and EBSCO electronic databases.

NZJPIL welcomes the submission of articles, short essays and comments on current issues, and book reviews. Manuscripts and books for review should be sent to the address below. Manuscripts must be typed and accompanied by an electronic version in Microsoft Word or rich text format, and should include an abstract and a short statement of the author's current affiliations and any other relevant personal details. Manuscripts should generally not exceed 12,000 words. Shorter notes and comments are also welcome. Authors should see earlier issues of NZJPIL for indications as to style; for specific guidance, see the *New Zealand Law Style Guide* (2 ed, 2011). Submissions whose content has been or will be published elsewhere will not be considered for publication. The Journal cannot return manuscripts.

Regular submissions are subject to a double-blind peer review process. In addition, the Journal occasionally publishes addresses and essays by significant public office holders. These are subject to a less formal review process.

Contributions to NZJPIL express the views of their authors and not the views of the Editorial Committee or the New Zealand Centre for Public Law. All enquiries concerning reproduction of the Journal or its contents should be sent to the Student Editor.

Annual subscription rates are NZ\$100 (New Zealand) and NZ\$130 (overseas). Back issues are available on request. To order in North America contact:

Gaunt Inc  
Gaunt Building  
3011 Gulf Drive  
Holmes Beach  
Florida 34217-2199  
United States of America  
e-mail info@gaunt.com  
ph +1 941 778 5211  
fax +1 941 778 5252

Address for all other communications:

The Student Editor  
New Zealand Journal of Public and International Law  
Faculty of Law  
Victoria University of Wellington  
PO Box 600  
Wellington  
New Zealand  
e-mail nzjpil-editor@vuw.ac.nz  
fax +64 4 463 6365

# NEW ZEALAND JOURNAL OF PUBLIC AND INTERNATIONAL LAW

## *Advisory Board*

Professor Hilary Charlesworth  
*Australian National University*

Professor Scott Davidson  
*University of Lincoln*

Professor Andrew Geddis  
*University of Otago*

Judge Sir Christopher Greenwood  
*International Court of Justice*

Emeritus Professor Peter Hogg  
*Blake, Cassels and Graydon LLP,  
Toronto*

Professor Philip Joseph  
*University of Canterbury*

Rt Hon Judge Sir Kenneth Keith  
*International Court of Justice*

Professor Jerry Mashaw  
*Yale Law School*

Hon Justice Sir John McGrath  
*Supreme Court of New Zealand*

Rt Hon Sir Geoffrey Palmer  
*Distinguished Fellow, Victoria  
University of Wellington*

Dame Alison Quentin-Baxter  
*Barrister, Wellington*

Professor Paul Rishworth  
*University of Auckland*

Professor Jeremy Waldron  
*New York University*

Sir Paul Walker  
*Royal Courts of Justice, London*

Deputy Chief Judge Caren Fox  
*Māori Land Court*

Professor George Williams  
*University of New South Wales*

Hon Justice Joseph Williams  
*High Court of New Zealand*

## *Editorial Committee*

Professor Claudia Geiringer (Editor-in-  
Chief)

Dr Rayner Thwaites (Editor-in-Chief)

Amy Dixon (Student Editor)

Professor Tony Angelo

Mark Bennett

Professor Richard Boast

Associate Professor Petra Butler

Associate Professor Alberto Costi

Dr Joel Colón Rios

Dean Knight (on leave)

Meredith Kolsky Lewis

Joanna Mossop (on leave)

Professor ATH (Tony) Smith

## *Assistant Student Editors*

Aysser Al-Janabi

Carissa Cross

Holly Hill

Shang-Chin Lai

Leeanne Templer

Marin Van Hove

Stephanie Zhang

The New Zealand Centre for Public Law was established in 1996 by the Victoria University of Wellington Council with the funding assistance of the VUW Foundation. Its aims are to stimulate awareness of and interest in public law issues, to provide a forum for discussion of these issues and to foster and promote research in public law. To these ends, the Centre organises a year-round programme of conferences, public seminars and lectures, workshops, distinguished visitors and research projects. It also publishes a series of occasional papers.

*Officers*

Director

*Professor Claudia Geiringer*

Associate Director

*Associate Professor Petra Butler*

Associate Director

*Carwyn Jones*

Associate Director

*Dr Rayner Thwaites*

Centre and Events Administrator

*Anna Burnett*

For further information on the Centre and its activities visit [www.victoria.ac.nz/nzcpl](http://www.victoria.ac.nz/nzcpl) or contact the Centre and Events Administrator at [nzcpl@vuw.ac.nz](mailto:nzcpl@vuw.ac.nz), ph +64 4 463 6327, fax +64 4 463 6365.

# EMPOWERNZ: DRAFTING A CONSTITUTION FOR THE 21ST CENTURY

*Dean R Knight\* and Julia Whaipooti<sup>§</sup>*

## ***I INTRODUCTION***

New Zealand is once again reflecting on its constitutional arrangements, with the Constitutional Advisory Panel charged with considering a range of constitutional issues and engaging the public in discussion about the nature of New Zealand's constitution.<sup>1</sup> As an independent precursor to the formal constitutional review, the EmpowerNZ workshop challenged 50 young people to draft a new constitution for New Zealand. The aim 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. 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. Participants were encouraged not to feel confined merely to reviewing the existing arrangements, and not to concentrate solely on the matters identified for discussion in the Constitutional Advisory Panel's terms of reference.

The ultimate product of the workshop, the *Draft Constitution for the 21st Century*, is reproduced in this journal (the *Draft Constitution*).<sup>2</sup> This note provides some context to the document: (a) characterising the workshop and its participants; (b) narrating the drafting and deliberative process; and (c) offering some personal reflections on the process, product and experience generally.

---

\* Senior Lecturer, Faculty of Law and Associate Director, New Zealand Centre for Public Law, Victoria University of Wellington; Lead Facilitator, EmpowerNZ. Thanks to Wendy McGuinness, Rory Sarten and Lydia Nobbs for sharing their draft report on the workshop, from which some aspects of this account have been drawn. Also thanks to Diane White and Reed Fleeming for feedback on drafts of this note.

§ LLB Student, Victoria University of Wellington; Ngāti Porou; EmpowerNZ youth participant.

1 See Constitutional Advisory Panel interim website: <[www2.justice.govt.nz/cap-interim](http://www2.justice.govt.nz/cap-interim)>.

2 See also EmpowerNZ website for the constitution and associated resources: <[www.empowernz.constitution.org](http://www.empowernz.constitution.org)>.



## **II PARTICIPANTS AND SUPPORT PROGRAMME**

The workshop was devised and organised by the McGuinness Institute, an independent think-tank lead by Wendy McGuinness.<sup>3</sup> A number of other people assisted with preparations, including Dame Dr Claudia Orange from Museum of New Zealand/Te Papa Tongarewa, and Dean Knight and Carwyn Jones from Victoria University of Wellington's Faculty of Law.

Fifty youth participants were invited to participate.<sup>4</sup> The decision as to who to invite was based on recommendations from university lecturers, civic leaders and workshop facilitators. Other young people were also able to apply directly for inclusion. The aim was to ensure a diverse range of participants while also ensuring those attending had a degree of interest in, and basic knowledge of, constitutional matters or governance.<sup>5</sup> The knowledge requirement meant, unavoidably, that law students were over-represented, although students of history and other humanities were also well represented. To assist the youth participants through the process, facilitators were also enlisted, based on their knowledge and expertise in constitutional law and their facilitation skills.<sup>6</sup> A team of creative designers also assisted the participants in bringing their work to life.<sup>7</sup> In addition, the deliberative process was recorded by one of the designers in an organic sketch mural, capturing key moments and topics through the workshop.<sup>8</sup>

The workshop took place over two days at Parliament Buildings. The programme involved a mix of presentations from constitutional experts, parliamentarians and civic leaders, along with time dedicated to the drafting process. Following a pōwhiri welcoming participants and a brief address from the workshop's official parliamentary host, Paul Goldsmith MP, the workshop commenced with a keynote address from Hon Jim McLay.<sup>9</sup> As the Attorney-General at the time of New

---

3 For information about the Institute and the workshop see <[www.mcguinnessinstitute.org](http://www.mcguinnessinstitute.org)> and <[www.empowernz.co.nz](http://www.empowernz.co.nz)>. EmpowerNZ was an initiative that developed, in part, from a previous Institute event exploring New Zealand's future aspirations: <[www.strategynzsite.info](http://www.strategynzsite.info)>.

4 As part of their commitment to the process and recognition of their opportunity, participants agreed to "pay it forward" through committing to 10 hours of voluntary service over the next 18 months. This includes initiatives to help create greater awareness and understanding of constitutional issues in New Zealand, and encouraging people to become involved in the review process.

5 The gender split was 50-50; the ethnic mix roughly reflected New Zealand's ethnic diversity; participants were aged between 16 and 29, with most in their early 20s; participants were drawn from throughout the country.

6 The team of facilitators was comprised of: Dean Knight (Lead Facilitator), Jess Birdsall-Day, Natalie Coates, Carwyn Jones, Mihiata Pirini, Marcelo Rodriguez Ferrere, Diane White and Edward Willis.

7 This team was comprised of Gillian McCarthy, Katy Miller, Machiko Niimi and Megan Salole.

8 See EmpowerNZ "Mural" <[www.empowernz.co.nz/empowernz-workshop/mural](http://www.empowernz.co.nz/empowernz-workshop/mural)>.

9 His keynote address is reproduced in this issue of the journal. See also Sustainablefuture "EmpowerNZ Workshop Keynote Address – Hon Jim McLay" (6 September 2012) <[www.youtube.com/watch?v=mvxoZ1PbhUo](http://www.youtube.com/watch?v=mvxoZ1PbhUo)>.

Zealand's last great constitutional crisis (which arose during the government transition following the 1984 election), he spoke of his involvement in the resolution of that conflict and reflected on the value of constitutions in times of crisis. From his current position as New Zealand's ambassador to the United Nations, he also addressed the international dimension to constitutionalism and New Zealand's international reputation for adherence to democratic values. This was followed by context-setting addresses from Sir Tipene O'Regan, one of the co-chairs of the Constitutional Advisory Panel,<sup>10</sup> and Hon Peter Dunne MP, the chair of the earlier select committee inquiry into New Zealand's constitutional arrangements that took place in 2005.<sup>11</sup> Two experts then offered some reflections from their areas of expertise on the process of drafting a constitution in the context of New Zealand. Professor Philip Joseph from Canterbury University spoke of the constitutional dimension, setting out a taxonomy of different possible elements for the constitution: logistical, process, superstructural and infrastructural.<sup>12</sup> Dr Orange, one of New Zealand's leading historians on the Treaty of Waitangi, addressed the role of a constitution in New Zealand's culture and relationships, particularly the relationship between the State and Māori.<sup>13</sup> Professor Joseph and Dr Orange remained at the workshop over most of the two days, available to provide expertise and advice to participants when needed.

Other addresses and conversations were woven throughout the programme. Professor John Burrows, the other co-chair of the Constitutional Advisory Panel, addressed participants at a working dinner.<sup>14</sup> He encouraged participants to focus on what was truly important when drafting the constitution, in part to ensure the simplicity and clarity of the ultimate document. Te Ururoa Flavell MP, the chair of the cross-party reference panel that has been formed as part of the constitutional review process, also addressed participants on the origins of the review and his hopes for the process.<sup>15</sup> Other Members of Parliament, including some from the cross-party reference

---

10 Sustainablefuture "EmpowerNZ Workshop – Sir Tipene O'Regan" (6 September 2012) <[www.youtube.com/watch?v=Z-sdZMLz0jE](http://www.youtube.com/watch?v=Z-sdZMLz0jE)>.

11 Sustainablefuture "EmpowerNZ Workshop – Hon Peter Dunne" (20 September 2012) <[www.youtube.com/watch?v=Ve-qaCmNrVo](http://www.youtube.com/watch?v=Ve-qaCmNrVo)>. For the earlier report, see Constitutional Arrangements Committee *Inquiry to Review New Zealand's Existing Constitutional Arrangements* (10 August 2005).

12 See Philip A Joseph "The Key Elements of a Constitution" (paper prepared for EmpowerNZ: Drafting a Constitution for the 21st Century, Wellington, 28–29 August 2012); see also Sustainablefuture "EmpowerNZ Workshop– Professor Philip Joseph" (11 September 2012) <[www.youtube.com/watch?v=4xTOIG1giA0](http://www.youtube.com/watch?v=4xTOIG1giA0)>.

13 Claudia Orange "Workshop on the Constitution" (paper prepared for EmpowerNZ: Drafting a Constitution for the 21st Century, Wellington, 28–29 August 2012); see also Sustainablefuture "EmpowerNZ Workshop – Dame Dr Claudia Orange" (11 September 2012) <[www.youtube.com/watch?v=xCPhSTFhxb8](http://www.youtube.com/watch?v=xCPhSTFhxb8)>.

14 See Sustainablefuture "EmpowerNZ Workshop – Emeritus Professor John Burrows" (12 September 2012) <[www.youtube.com/watch?v=wtBsBvFWqXc](http://www.youtube.com/watch?v=wtBsBvFWqXc)>.

15 See Sustainablefuture "EmpowerNZ Workshop – Te Ururoa Flavell" (12 September 2012) <[www.youtube.com/watch?v=6DsWGBqnYQQ](http://www.youtube.com/watch?v=6DsWGBqnYQQ)>.

panel, met with participants on the second day.<sup>16</sup> After a panel presentation reflecting on the current state of New Zealand's constitution, each MP spent five minutes in a "hot seat" with each group discussing and providing different perspectives on some of the issues arising out of the drafting process.<sup>17</sup>

While the wealth of expertise provided youth participants with a number of tools to help craft their product, the experts did not lead them along a specific constitutional pathway. The draft constitution was an organic development born of the minds of the youth participants themselves.

### ***III WORKSHOP METHOD AND PROCESS***

Over the course of the two days, participants were given around 11 hours in plenary and break-out groups to draft their constitution. The drafting process was facilitated, with five distinct steps being used to guide participants through the process:



In the first step, "Framing the Mission", participants were invited to settle a short statement of the purpose of their constitution and its intended audience. Building on their own knowledge, background reading and advice from the civic experts in the earlier addresses, the participants settled on the following explanation of their purpose:<sup>18</sup>

---

16 Including Te Ururoa Flavell MP (Māori Party), Charles Chauvel MP (Labour Party), Hone Harawira MP (Mana Party), Metiria Turei MP (Green Party) and Paul Goldsmith MP (National Party).

17 Professor Joseph and Dr Orange joined the MPs for the hot seat conversations.

18 This version has been slightly corrected for grammar, syntax and clarity.

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.

A preliminary view was also sought from participants about the extent to which a constitution should be written or unwritten. While, inevitably, a drafting process tends towards a written product, it was important to ensure that participants had the freedom to deliberate on whether to codify elements of the constitution or to leave some elements at large and unwritten.

Participants were encouraged to capture the intended character of their constitution in the second step, "Expressing the Vision". Before moving to the detail of the constitution and its component parts, participants were asked to identify some text and imagery that conveyed the essence of their constitution. Participants proposed a number of images: a pohutukawa tree in a beachside setting, a woven korowai (Māori cloak), a fruit tree, a hearing aid, a jigsaw, a window and a circle of kuia (older women) weaving a bungee cord made from harakeke (flax). The image of the window received the most support in the workshop and it ultimately adorned the cover of the *Draft Constitution*. Participants explained the metaphor of the window as capturing notions of transparency and clear accountability, but also imparting the idea of reflection – mirroring the ambitions, values and the mana of people that look through it. The other images, stylised by the team of designers, were also interwoven throughout the *Draft Constitution*.

Participants were also asked to identify a set of values that would capture the higher-order character of the constitution – those principles that the text would ultimately embody and embrace. Groups of participants generated four proposed values each and, following deliberation in a plenary session, all participants ultimately endorsed five values. The five agreed values (along with some closely-related concepts identified in the deliberative process) were:<sup>19</sup>

- *mana* (dignity, tolerance, respect);
- *kaitiakitanga* (sustainability, durability, continuity, endurance);
- *fairness* (equality, accessibility, fair play, justice);
- *accountability* (transparency, legitimacy, openness);
- *liberty* (freedom, opportunity, autonomy).

The third stage, "Identifying the Elements", moved participants to the body of the constitution and involved them brainstorming its different elements. All ideas, big and small, were tabled. Participants were then asked to identify whether the element was best seen as a chapter (a discrete topic that could be set out in its own separate section in the constitution) or a theme (something that

---

<sup>19</sup> These values were adopted in the Preamble to the *Draft Constitution for the 21<sup>st</sup> Century* [*Draft Constitution*].

infiltrated the constitution as a whole and which would need to be interwoven throughout the text). The elements were also sifted to identify whether the element was "hot" or not (with "hot" elements being those on which ready consensus was unlikely). Finally, participants were asked to reflect on whether the element could be borrowed from New Zealand's existing constitution (with or without revision) or would need to be invented from scratch.

From these elements, a number of different work streams were identified for the following day's drafting sessions and deliberations:

- skeleton constitution and non-contentious elements (such as general structure, preamble, constitutive elements from the Constitution Act 1986 and standard constitutional principles);
- rights;
- Crown-Māori relations;
- legislature;
- other organs of government; and
- operational elements (such as adoption, supremacy, entrenchment, enforcement, revisions and review).

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*.

Each work stream was allocated to (self-selecting) groups for the fourth stage, "Shaping the Elements". At this stage, the work stream groups were charged with converting the brainstormed ideas into the text and body of the constitution and presenting their work to the plenary group for feedback and wider deliberation. With only six hours left to workshop the constitution on the final day, the process of drafting and consultation proved challenging. The original objective was to ensure that the text from each work stream was agreed by the plenary group as a whole. However, in the end, this proved impossible given the limited time and, instead, participants did their best to liaise with and consult the other work streams. There was some early opportunity for each work stream to outline their general approach, followed by a plenary group discussion. The prioritisation of each work stream's work 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. Over the hours that followed, the participants continued to deliberate and draft text for inclusion.

A final document was pulled together at the close of the second day, with the different text and chapters from each work stream amalgamated together and interwoven with graphics and imagery from the design team. Consolidating the document took some effort, too, particularly ironing out potential inconsistencies, clarifying gaps and addressing some rough edges in the drafting – while also respecting the drafting intentions of each work stream. The fact that time did not permit consensus to be built around each and every element led to the constitution being labelled a "draft" constitution at the request of some of the participants.

The final stage, "Showcasing the Product", focused on presenting the *Draft Constitution* and explaining the process to an assembled audience of over 200 invited guests.<sup>20</sup> A central feature of the project was ensuring that the constitution was accessible and understandable to its audience, as well as being engaging. In the finale, the participants narrated the drafting process, presented the constitution itself and explained its key features and reflected on their overall experience. The event culminated in the participants symbolically handing the *Draft Constitution* over to Dr Orange on behalf of Te Papa. The intention is that the *Draft Constitution* will be shared with the wider public and serve, hopefully, as a conversation starter for further constitutional reflection and debate.

#### **IV DRAFT CONSTITUTION: KEY FEATURES**

Ti Hei Mauri Ora

He aha te mea nui o te nei ao?

He tangata, he tangata, he tangata

People, people above all.<sup>21</sup>

The *Draft Constitution* is both bold and modest. On the one hand, it adopts a number of ambitious and innovative provisions. It speaks in a modern voice, expressing constitutional norms as aspirational values and easy-to-read rules. On the other hand, it signals a commitment to many of the fundamental principles and structures inherent in our current constitutional fabric, most notably, parliamentary sovereignty and responsible government.

First, and fundamentally, participants on the whole had no desire to depart from the principle of parliamentary sovereignty by imposing judicially enforceable constraints on Parliament's law-making power. Participants rejected the idea of a higher-order and supreme constitution, as seen in other countries, for example the United States; there was obvious concern amongst participants that giving the judiciary power to strike down Parliament's legislation would involve giving significant power to an unelected minority. The commitment to political, rather than judicial, solutions was pretty strong. Instead, the idea of a dialogue model – where the different organs and entities of

---

20 See Sustainablefuture "EmpowerNZ Workshop – Finale (full)" (27 September 2012) <[www.youtube.com](http://www.youtube.com)>.

21 Introductory words of the *Draft Constitution*, drawn from a Māori saying, which translates to: "The sneeze of life. What is the most important thing in the world? It is people! It is people! It is people!"

government work in an interactive, and perhaps frictional, partnership – was embraced. For example, the *Draft Constitution* adopts a privative clause clarifying that nothing in the constitution gives the judiciary the power to declare any enactment invalid.<sup>22</sup> Instead, for example, the judiciary is directed to interpret enactments consistently with the rights protected in Chapter 1 and is also empowered to issue "declarations of unconstitutionality". Although such declarations would not invalidate legislation, the legislature would be obliged to "respond" to them.<sup>23</sup> A Constitution Commission is also empowered to "assess whether legislation and policy is consistent" with the stated rights and the House is required to consider any inconsistencies reported to it.<sup>24</sup>

Similarly, the Treaty of Waitangi is recognised and its role enhanced but it is not explicitly afforded supreme status. The Treaty is declared to be "a fundamental document of Aotearoa"<sup>25</sup> and the Waitangi Tribunal is given greater powers to express and give effect to the indigenous rights flowing from the Treaty (the power to "investigate and promulgate" those rights and to "provide a remedy to a claimant if a breach of a right arises").<sup>26</sup> While this moves the Tribunal beyond its present recommendatory jurisdiction, the *Draft Constitution* remains vague about whether the remedial power extends to invalidating legislation – it probably does not.<sup>27</sup>

Secondly, the organs of government and their relationships are largely maintained. The *Draft Constitution* borrows much from the Constitution Act 1986 in constituting the different organs and providing for their operation. Proportional representation and reserved Māori seats are endorsed.<sup>28</sup> But some significant tweaks are also made:

- The term of Parliament is extended to a fixed four-year term;<sup>29</sup>
- The Prime Minister is renamed Tumuaki;<sup>30</sup>

---

<sup>22</sup> *Draft Constitution*, cl 5.4. Professor Joseph has suggested that this privative clause could be enhanced to ensure its desired effect: Philip A Joseph "Reflections" <[www.mcguinnessinstitute.org](http://www.mcguinnessinstitute.org)> at 3.

<sup>23</sup> *Draft Constitution*, cl 1.5.

<sup>24</sup> *Draft Constitution*, cls 1.3 and 1.4.

<sup>25</sup> *Draft Constitution*, ch 2.

<sup>26</sup> *Draft Constitution*, cl 2.6 and 28.

<sup>27</sup> See also Professor Joseph's comments about the ultimate uncertainty about the role of the Treaty in terms of implied repeal: Joseph "Reflections", above n 22, at 3.

<sup>28</sup> *Draft Constitution*, cls 4.4 and 4.5.

<sup>29</sup> *Draft Constitution*, cls 3.8 and 4.4. Professor Joseph suggests this provision might benefit from an additional safety valve, explicitly providing for election when the government loses its mandate to govern after losing a confidence vote: Joseph "Reflections", above n 22, at 2.

<sup>30</sup> *Draft Constitution*, cl 3.12.

- Judges are appointed by the Attorney-General based on the recommendations of a judicial commission.<sup>31</sup>

Consistent with the New Zealandisation of the constitution, a republic is declared.<sup>32</sup> A ceremonial Head of State, elected by super-majority in Parliament and styled on the present Governor-General, replaces the monarch. But the transition is not blunt or unsympathetic. The text of the clause providing for the transition records and acknowledges the historical linkages to the United Kingdom, as well New Zealand's independent status and important role in the Asia-Pacific region.<sup>33</sup>

Thirdly, the suite of human and other rights protected by the constitution is enhanced beyond those currently protected in the New Zealand Bill of Rights Act 1990.<sup>34</sup> Socio-economic rights are added (although resourcing limitations are acknowledged). Anti-discrimination on the basis of gender identity is directly prohibited. The government's responsibility to protect children and other vulnerable people is recognised. State transparency and academic freedom are embraced. And environmental rights and responsibilities are acknowledged through the incorporation of the principles of *kaitiakitanga*.

Fourthly, the participants grappled with operational aspects of the constitution, from adoption to review to entrenchment. The *Draft Constitution* acknowledged a need for democratic legitimacy in its adoption, through a Citizens' Assembly process and 60 per cent majority in a public referendum.<sup>35</sup> Regular review is provided for, with a representative constitutional assembly being charged with reviewing the constitutional text every 20 years.<sup>36</sup> And, while the constitution as a whole is not supreme law, process restrictions are imposed on the repeal or amendment of provisions establishing the organs of government (75 per cent majority vote in the House of Representatives or a majority in a public referendum).<sup>37</sup>

Finally, the form of the *Draft Constitution* is striking. Graphic devices, consistent with the themes of the constitution and New Zealand culture and identity, frame the narrative text. Chapter headings are expressed first in Te Reo Māori and then in English. Each chapter has a short preamble statement which sets out its essence. The language used throughout is simple and clear. Participants

---

31 *Draft Constitution*, cl 3.18.

32 *Draft Constitution*, cl 1.1-3.4.

33 *Draft Constitution*, cl 3.1.

34 *Draft Constitution*, cls 1.1 and 1.2.

35 *Draft Constitution*, cl 5.1.

36 *Draft Constitution*, cl 5.2.

37 *Draft Constitution*, cl 5.3.



were adamant that the *Draft Constitution* should not be a dusty and dull document, accessible only to a knowledgeable few. The constitution needed to be something that spoke to all New Zealanders; something unique to New Zealand; something that could sustain a greater public profile. The text, form and style of the constitution were critical in achieving this.<sup>38</sup>

## V REFLECTIONS

Looking back on the exercise, we offer a few reflections from the perspectives of a facilitator and youth participant respectively.

First, the project was challenging from the outset. The goal was to produce a substantive constitutional document. In the end, time constraints dictated that we could only manage a draft constitution which, admittedly, still had a number of rough edges and a few inconsistencies (for example, chapter 3 declared New Zealand a republic but the title to chapter 2 still spoke of Crown-Māori relations). But the document itself was ostensibly complete, with content provided for each chapter. At the commencement of the second morning session, participants were offered a number of alternatives: conceding the task was too much in the time available or deliberately leaving gaps where matters could not be resolved in time. However, all participants worked hard and trusted each other to produce a complete document – albeit without being able to secure consensus with respect to all of the content, or being able to fully work through the relationships between the different chapters. The draft nature of the constitution and any remaining flaws in it can be attributed to time constraints and the related practicalities of working in separate work streams on different chapters. Inevitably, this fragmentation, and difficulties in coordinating between the work streams in the time available, made it difficult to polish the constitution to the extent the participants would have liked.

Secondly, though, these reservations about the final document are not an admission of failure, far from it. The participants were all extremely proud of the constitution they produced – as particularly evident in the pride exhibited in the finale when the document was showcased to gathered guests. And the real value of the exercise was the process itself. The process illustrated that there are youth in this country that are hungry to engage in discussion about New Zealand's constitution. It was an extremely valuable and thought-provoking experience for the participants. It improved the participants' constitutional literacy and gave them hands-on experience in civic deliberations. It also highlighted some of the major issues that need to be faced in the construction of a constitution and gave participants an opportunity to engage in debate about those issues.

Thirdly, the process of attempting to build consensus was valuable in its own right. There were hurdles along the way. Participants were all driven to produce a substantive product that, at the very least, reflected the core elements that gained group consensus. However, reaching consensus itself

---

<sup>38</sup> One of the participants translated the documentary form of the constitution into a webpage containing the text, imagery and video-clips of the participants explaining each chapter: see <[www.empowernzconstitution.org](http://www.empowernzconstitution.org)>.

presented one of the biggest issues to overcome. Each group had a multiplicity of views. And this was amplified in the wider plenary group. Should we take a conservative or bold approach? Should we attempt to overturn the status quo? For example, there was a significant minority who pushed for more radical changes including entrenching the Bill of Rights, the Treaty and the newly generated constitutional text itself. However, there proved to be insufficient time to delve deeply into these suggestions, and attempting to reach consensus on these more contentious points was simply not practicable. At other points, political ideology – and views about the size, nature and purpose of government – bubbled under the surface. Participants came to the workshop with political colours of all different hues. In the end, though, the desire to be constructive and a willingness to compromise avoided the politics of the participants fuelling intractable disputes.

It was in the smaller, facilitated groups of around seven or eight participants that general consensus was easier to reach. Working with smaller numbers enabled greater participation and extensive discussions. While each group was left to determine their own approach, many groups reached consensus through discussion and majority agreement (although rarely by formal votes). Each group prepared a summary of outcomes to bring to the whole group to discuss. At the level of the plenary group there was, perhaps surprisingly, general agreement on what should be included in the constitution. The challenges came when working out the detail and trying to fit it all together. As a collective, the participants worked to form a basic constitutional skeleton. Where there was disagreement on specific details, such as constitutional supremacy and the place of the Treaty, the participants delegated responsibility to smaller groups to flesh out different chapters of the constitution. They reported back and liaised as much as they could on their general approach but the process was largely dependent on a large doses of trust.

As an illustration, one of the major hurdles participants faced was in reaching consensus over the Treaty of Waitangi. The mood in the room undoubtedly supported the recognition of the Treaty, but it could not be said that there was universal agreement on the means and depth of that recognition. A number of questions arose. Where did these "same but different" pieces of Aotearoa New Zealand's history fit within this new constitution we were attempting to create? Should the Treaty be entrenched? Te Tiriti *and* the Treaty? Which one prevails? Should we include both texts in our written constitution or recognise them as together forming a constitutional document that stands alone? Should we recognise the Treaty as the founding document of New Zealand? Should we define, and thus limit, its principles and its constitutional effect? If we incorporate the Treaty into our constitution, what is the extent and nature of that incorporation? Is it a theme that should run through the entire document? Or a discrete chapter? Or both?

Ultimately, the discussion surrounding the Treaty was left primarily to the group in charge of chapter 2, dedicated to the "Māori-Crown Relationship". This group was responsible for ironing out some of these points of contention, while also seeking to represent the Treaty throughout the constitution. In the end, a two-tiered approach was adopted. First, in terms of the recognition of the Treaty, a compromise of sorts was made. The Treaty would not be entrenched; instead it is

recognised as the founding document of New Zealand. It was hoped that this acknowledgement would impliedly elevate the Treaty's importance and that this, in theory, should offer some protection from repeal. Beyond this, chapter 2 addresses the role of the Treaty and, by default, Māori–Crown/State relations. The aim was also to reflect the Treaty throughout the constitution as a whole but, again, time constraints and the difficulties of coordinating between work streams meant this was not realised to the extent originally intended. That said, a commitment to embracing the Treaty and Māori values is evident in the *Draft Constitution* through the prominent and liberal use of Te Reo throughout the text and the fact that two of the agreed values – mana and kaitiakitanga – are drawn from Māoridom.

Fourthly, one of the real tensions in the process was idealism versus realism. On the one hand, many participants had bold ideas about what could be drawn on the blank canvas. On the other hand, there was also a desire to produce something that was for the most part palatable to all New Zealanders. Parts of the *Draft Constitution* borrowed heavily from the status quo – perhaps favouring pragmatic familiarity and avoiding too much controversy. Parliamentary sovereignty was endorsed; existing electoral arrangements largely preserved; the Treaty left un-entrenched. But other aspects demonstrated a more innovative spirit. The commitment to producing a workable document was strong and resulted in a balance between boldness and pragmatism. Indeed, "workability" was identified early on as a core value – not explicitly in terms of the document itself, but more as part of the kaupapa or spirit of the workshop process.

Finally, an oft-heard lament during the workshop was the inadequacy of civics education in New Zealand. The practicalities of the workshop meant that, by and large, it brought together youth who were already civically engaged and constitutionally savvy. But, despite the best efforts, the product of the 50 youth who participated in the workshop obviously cannot capture all the thoughts and ideals of young New Zealanders – particularly those for whom matters constitutional are somewhat foreign. But how do we get a broader range of youth involved in this constitutional conversation, when many New Zealanders concede they know little about our nation's constitutional arrangements? The official constitutional review faces many challenges engaging the wider public in this constitutional conversation – especially youth. The lack of foundational education is worrying. There is also perhaps some nervousness about opening a constitutional can of worms – nervousness which holds some back from seeking to renovate our nation's rules. But, on the bright side, the experience in the workshop demonstrates that we need not be so shy or reticent. Engaging in a kōrero or conversation about our constitutional fabric and framework is possible; indeed, it can be constructive, rich and rewarding. And, as a result of the workshop, our country now has an additional team of 50 young ambassadors who are willing and ready to enkindle those conversations. Hopefully, those ambassadors will be able to encourage their friends, colleagues, family and whānau to also contribute to the discussion about our nation's most important rules.

## **VI CONCLUSION**

The experiment and exercise is arguably the most important output of the workshop. The experience shows that a number of young people have the appetite for discussion about our nation's constitutional scaffolding. No doubt the 50 participants are much better placed to actively and consciously engage in the formal constitutional review process that will soon commence.

The *Draft Constitution* itself represents an interesting and perhaps provocative model for a new constitution. While the pressures of time meant the document had some rough edges and general agreement was not able to be reached on every detail, it represents a credible statement of constitutional principles and rules for our country. The participants demonstrated great courage and wisdom in generating a draft constitution that was both adventurous and workable – one that could speak to all New Zealanders. Their *Draft Constitution* is a starting point for a conversation about what our constitution could be.

