William Fussey

Submission to the New Zealand Constitutional Advisory Panel

Written or unwritten?

Whilst I acknowledge that the benefits of having a written constitution contained in a single document include making it easier to educate people about the existence of our constitution, potentially improving national unity and improving accessibility I believe the advantages of continuing with an unwritten constitution outweighs the negatives. What is great about our current constitutional arrangements is its flexibility. Essentially it allows the constitution to adapt in line with changing social realities and prevents us being encumbered with a document that constrains us or that due to its rigidity could be relegated in the minds of some to that of a historical anachronism that we still have to pay homage to – this is the problem afflicting the US constitution. I do not see it as a problem that only the UK and Israel share our lack of a written constitution; our flexible arrangements should rather be seen as a strength. I would not be averse to a document that links to all the relevant constitutional legislation along with a comment that the constitution also includes much more, such as our well-developed constitutional conventions. However this would be purely as an educative device that would engender a more full engagement of New Zealanders with our constitutional arrangements.

Legal status of the constitution: supreme law and parliament or the courts?

The main consequence of making the constitution supreme law is that it would allow the courts to strike down any legislation inconsistent with the constitution. This has both positives and negatives. The main positive is that it is a safeguard that prevents a future parliament from making law that abrogates from our constitution. The judiciary would have the experience and the education to be able to perform their task wisely as our top judges do now in their decision-making. The negatives include the worry that this would lead to high levels of politicisation of the judiciary and that it cuts to the core of parliamentary supremacy – a doctrine that reflects the fact that the people vote in parliament and rely on them to make responsible decisions. The trouble with relying on parliament to get things right is that some of our parliamentarians may have limited understanding of the issues as their only qualification for the job may be that they were voted in in a safe seat for their party where anyone with those colours would get the vote, or indeed that the public voted for the party and the party leaders had given them a winnable list position for no reason other than the fact they have been a sycophant to their party bosses. In other words trusting some of these parliamentarians over a judiciary who have had to demonstrate quality legal knowledge and application over their career could be questionable. Also, parliamentarians make decisions based on a number of things including appealing to certain sectors of the community they believe will enable them to remain in power at the next election whereas the judiciary could be expected to act in a more neutral way. Conversely many of the public don't trust the judiciary as they are often seen as middle class white men in an ivory tower that no-one has voted for who don't represent our diverse population and are out of touch with reality. However as soon as you allow politicians to make the ultimate decisions, such as how they can still pass human rights inconsistent legislation despite it having received a s 7 report from the Attorney-General, the constitution could be perceived as being devalued.

Ultimately, I consider making our constitution supreme law to be a step too far due to some of the concerns I have outlined above. However I am of the view that the legal status of our current constitutional arrangements should be strengthened. For me this involves doubly entrenching what is currently singly entrenched and also potentially entrenching the Bill of Rights Act 1990 (BORA). Whilst I have these beliefs I recognise that doing so will in reality change little. This is because although BORA can currently be repealed or amended by a simple majority and our singly entrenched provisions can be repealed with a simple majority, doing so would be so politically unpalatable that no government in its right mind would consider doing so. However, it certainly does not hurt to put these changes beyond the simple majority of an unscrupulous parliament and ensure any changes can only be done with a super-majority of 75% or a majority of the voters in a referendum.

As someone engaged in the Empower NZ submission, one of the interesting ideas that arose was the possibility of creating a constitutional commission. This would effectively be a quasi-judicial body that could have the ability to declare legislation inconsistent with the constitution and therefore invalid, takeover the Attorney General's current s7 BORA duties, be involved in judiciary appointments and contribute to civics education re the constitution. If preferred, instead of being able to invalidate legislation for its inconsistencies with the constitution they could instead be required to make a deferred invalidation and remit it back to parliament who would have the choice of reaffirming the legislation with a 75% majority or amending the statute to make it more consistent with the constitution, which would only require a normal majority. If the commission is a viable alternative there is also the difficulty of deciding how to structure any such commission with possibilities including requiring 75% of parliament to agree to the members (in a search for political neutrality) with representatives from parliament, the law society and constitutional experts largely making up the board. The advantage of such a commission would be that as it would focus purely on the constitution there may be greater room for in-depth analysis, co-ordinated responses and an interface with government. However, whether the cost of setting up such a body could be justified for what might only be minimal gains on the constitutional front is another matter entirely.

Bill of Rights Act (BORA):

BORA is of fundamental constitutional significance as it defines the rights of people in New Zealand. That everyone has certain rights is surely uncontroversial. However the legal status of the BORA and the rights contained within the Act, as well as how the Act operates in law are not easy questions.

I support entrenching the BORA because even though I don't believe subsequent governments will weaken the BORA I do believe the potential safeguard (and its symbolic effect) is of vital importance. My choice would be for it to doubly entrench the rights already enshrined. It is more problematic for me as to what the requirements should be for adding rights to the BORA. If, for example, social and economic rights were added to the BORA I would be against those having any entrenchment as I am against including them in any BORA at all. However if rights were able to be added but couldn't achieve the same entrenchment level as the original rights, advocates of those rights would be upset that they would be classified as subordinate or second tier rights. Perhaps if BORA in its current form were doubly entrenched as a whole this would be good because it would require a parliamentary support of 75% to add additional rights and thus if such a super-majority were to accept that right

then allowing the new right to be doubly entrenched automatically, by virtue of it being part of a doubly entrenched BORA, would be sensible. I do envisage one problem with such a scenario and that is, as society changes new rights that were never previously imagined will come to the forefront as something that should be contained within BORA. However, with a 75% majority requirement, adding the right would be more difficult and hence there may be situations where rights are not added which should be, due to the onerous super-majority requirement.

I personally do not see a problem with having so-called second tier rights. These rights could be limited to being those which are positive rights rather than negative rights. Or negative rights that as yet are only able to garner a 50% majority rather than a 75% majority. When I refer to negative rights I mean those rights which impose duties on others to leave people alone and let them do the things important to them. I place great emphasis on not violating the negative rights of other people as these hold great normative weight. The positive rights I refer to are those that confer some benefit on other people such as a right to an education. Positive rights less obviously correlate to identifiable duties for others and violating them is often seen as preferable to violating a person's negative rights.

Social and economic rights are too problematic. Defining what upholding social and economic rights means is difficult and could lead to increased unnecessary litigation. Also, a democratic constitution does not protect every right and interest that should be protected in a decent or just society. Ordinary politics in NZ can be trusted; and so there is no need for constitutional protection. Also, adding social and economic rights would have the court intervening too much on the policy prescription of a government. Surely it is not a good idea to have the courts oversee the budget and point out that they think not enough money is being spent in welfare for example. It is up to the government of the day to balance their spending decisions. It would also undermine democratic deliberation on crucial issues if governments are told the kinds of welfare and employment programs they need to implement.

A right to privacy would be one I would consider adding. In the age of the internet and in the light of recent development such as the UK proposal to introduce ISP filtering for pornography and the GCSB Bill in New Zealand which attempts to strike the right balance between the privacy of New Zealanders and the right for the State to collect information. I strongly believe private citizens should not be subject to 'big brother' watching one's every move but I also recognise that this shouldn't be a blanket right without the concomitant responsibility not to engage in any illegal activity. Perhaps the addition of any such right should make clear that in certain situations, when a high threshold is met, it might be appropriate to loosen the privacy right for certain individuals who are highly likely to be engaging in illegal behaviour. However that is perhaps already provided for in section 5 which states that "subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

Enshrining property rights in the constitution is also a good idea which prevents the government as being seen as the final arbiter of property, able to dispose of a person's bundle of rights at their whim. Whilst the concern of the State overriding an individual's bundle of rights in relation to property is not one that appears particularly pressing currently, the purpose of the constitution is to

present what is important to the citizens and so a statement that rejects any idea of the State retaining ownership could be a welcome one.

The protections currently around s 7 of the BORA appear to be too weak. A section 7 report can be left languishing if parliament so decides and additionally supplementary order papers can be used to circumvent anything a section 7 report might find distasteful. This is concerning and must be addressed by strengthening the powers of the Attorney General or by giving the role to another body like a constitutional commission as some previous Attorney Generals may have passed off BORA inconsistent legislation as rights consistent due to political pressure from their party.

Finally, I believe that courts should have the power to strike down legislation which is an egregious breach of the BORA. Giving courts this power allows them to be a safeguard on an unscrupulous future parliament which passes legislation that is a manifestly unjust breach of citizens' rights. Alternatively they could be given deferred invalidation powers as discussed above in the context of the constitutional commission reacting to potentially constitution inconsistent legislation.

Treaty of Waitangi

The Treaty of Waitangi is a vastly important document in the history of New Zealand. The relationship between Maori and the Crown is an important one which has culminated in the Treaty settlement process and over 30 pieces of legislation that must pay regard to or take account of the principles of the Treaty of Waitangi. Whilst some complain that these principles are nebulous their elucidation in the Lands case by Cooke and Richardson can deflect such criticism.

The question is: how to move forward as a nation? Should the treaty in its English form, its Maori form or an expression of the principles be included in our constitution or should the treaty be left as an important document sitting outside our constitution but still having an effect on some of the laws of NZ?

My belief is the latter. The many arguments surrounding the differing interpretations of the treaty based on the two versions and the fact that including the principles in the constitution would be divisive persuades me that it would be better to look forward and not backwards. It would not be helpful to make every piece of legislation go through a process determining its consistency with the Treaty when what is really desirable is New Zealanders to be one people, hampered less by the arguments of the past. Maori culture and autonomy over their own lands is desirable but its permeation into the fabric of everyday New Zealand decision making would slow down legislation for what would sometimes be spurious reasons.

The historical treaty process is moving towards a conclusion and this is perhaps symbolic of the fact we are moving forward as a nation that has accepted its colonial past and the legitimate grievances of Maori. However there comes a point when re-litigating the past and constantly harkening back to 170 years ago is undesirable. Maori and the Crown should continue the relationship they have in its current form and the relationship should be characterised by mana and respect but the current constitutional arrangements in relation to the Treaty are sufficient.

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Maori Representation

It is my view that it is desirable for the Maori seats to be eventually abolished. Under the First Past the Post system there was a good argument to retain them as it was much harder for Maori to win seats. This is because the only people who would be MPs would be those who won their electorate seat. Hence without Maori seats Maori people wishing to express their solidarity with their own people would have problems garnering a majority. In other words it would not be hard for a general election to go by and no-one of Maori heritage win a seat. Conversely however, it is likely that some Maori would have won seats as there are many talented Maori who the general population of New Zealanders in an electorate would vote in, usually because the candidate had transcended purely going after Maori voters, instead expressing views in tune with the whole electorate. However, there was at least a strong argument for Maori seats in a First Past the Post context.

Under an MMP environment I see no need for Maori seats. An MMP parliament is one that proportionately represents the wishes of the voters, therefore parties such as the Maori Party and Mana are able to push to get 5% of the vote (I support a 2.5% threshold as I explained in my MMP submission – in the Maori Representation context this would increase the chances of Maori based parties getting seats). Not only that but more importantly party lists are now highly diverse such that the approximate proportion of Maori MPs is actually higher than the approximate proportion of Maoris in the general population. Having additional Maori seats almost advantages Maori too far that it borders on discrimination.

The original Maori seats were important because they recognised the difference between Maori who collectively owned property and non-Maori who owned property privately. It allowed Maori access to democracy in a way that was right. But now these wrongs have been corrected it seems silly to allow an advantage that goes beyond what is proportionate. It is true that Maori founded New Zealand and it is important to recognise that but it is also important that in the current context where wrongs have been corrected that we don't go too far and disenfranchise non-Maori particularly of lower socio-economic status. The fact that seats can be added by encouraging more people to the Maori roll is another example of things going too far.

I think it is also important to define in law who is a Maori. I'm not sure that it is appropriate to say that a person is a Maori simply because they self-determine as a Maori. I believe there must be a minimum amount of Maori blood to qualify as a Maori, whatever amount that may be.

I don't know enough about local government to make a fully informed comment beyond the fact I would not support separate Maori wards because I believe if Maori candidates are good enough they will win seats anyway.

Electoral Matters

The current size of parliament and the way of deciding size and number etc. of electorates seems appropriate.

I support a 4 year term. This is because I feel that 3 years is too short to advance proper detailed policy. The first year can often be a bedding in stage and the final year is too geared up to making decisions to appease the electorate. A 4 year term should enhance decision-making and put us more in line with other jurisdictions.

I do not support an Upper House as I believe it would stymie the progress of legislation too easily. Other safeguards would be preferable.

In general I support a neutral body fixing the election date rather than giving the advantage to the incumbent Prime Minister. This should be at the same point in the election cycle each term with the proviso that this can be changed any term if it would be of manifest inconvenience. Of course if the government loses the confidence of the House then an early election would be called.

I agree with the Empower NZ submission on changes to urgency. I quote the next bit in entirety from there:

"Currently, Standing Order 54(3) only requires that a Minister "inform the House with some particularity why the motion is being moved". One option would be to follow the recommendations of Chen Palmer and the Urgency Project. This would mean that the House would have to agree that the Select Committee stage could be omitted and also that urgency would be reserved for situations where there are genuine reasons for expediting the passage of a law:

- To minimise the potential for speculative behaviour from market participants that might follow the announcement of a change to fiscal policy;

- To respond to an unexpected event such as a civil emergency, an economic crisis, the failure of a financial institution or an unexpected court decision;

- To correct a pressing anomaly, oversight or uncertainty in existing legislation; and

- To comply with a deadline created by, for example, a forthcoming event. (Geiringer, Higbee and McLeay (2011). What's the Hurry? Urgency in the New Zealand Legislative Process, 1987-2010, p144. Wellington: Victoria University Press).

In particular, we felt that where the Attorney-General reports a bill is inconsistent with the BORA under s7, then urgency should not be available, due to the importance of thorough legislative debate on that inconsistency."

In terms of electoral integrity I believe electorate MPs should stay in parliament even if they leave the party as they have been elected by the population, rather than indirectly through the party as list MPs have been.

Regarding List MPs there are two views – one is that the MP is only there because their party bosses gave them a winnable list position therefore if a List MP wishes to leave the party he must leave parliament as he does not have a mandate to stay. The other is that allowing party bosses to kick

MPs out of parliament if they decided to leave the party would give too much power to the party bosses and would stymie back bench list MPs from ever disagreeing with the party hierarchy. I tend towards the former view as I see the responsibility of a List MP to be beholden to the party more than beholden to the general public due to the way he or she has been indirectly elected. It also allows for proportionality to be upheld in the way that it was voted for at the election.

New Zealand should also look towards online voting in the future to encourage greater civic participation.

Issues potentially outside those of the terms of reference:

Republic or Monarchy:

If I were to vote now I would vote in favour of retaining the monarchy as I like the symbolism of the ties to Britain even if it has no real practical effect. However I am reasonably apathetic to this particular debate and recognise that moving towards a republic is both inevitable and ultimately desirable as it gives New Zealanders a chance to feel greater ownership over their own country. As to who would replace the governor-general it would probably be a presidential figure that is voted for at the same time as a general election.

Environment:

I think it is important the environment get some recognition in our constitution even as an aspirational statement. I don't support something as strong as the French Charter but if there is to be any sort of codified constitution, the inclusion of certain principles of environmental law in at least an aspirational way, such as the promotion of the precautionary principle, is necessary. The environment is something all present and future generations have a stake in so to ignore it would be unfortunate.

Education:

I support New Zealanders having a greater civics education at both primary and secondary school level as it is currently very limited. It is important for New Zealanders to understand that we have a constitution and what it means. Engagement in the democratic process is something to be encouraged. Civics should be an explicit and compulsory part of the NZ curriculum and teachers equipped to deliver the syllabus.

By William Fussey
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