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Submission to the Constitutional Arrangements Committee Secretariat on the Inquiry to review New Zealand's existing constitutional arrangements

The National Council of Women of New Zealand (NCWNZ) is an umbrella organisation representing 41 nationally organised societies. It has 33 branches throughout the country attended by representatives of those societies and some 150 other societies. NCWNZ also represents a number of individual women. The Council's function is to serve women, the family and the community at local, national and international levels through research, study, discussion and action.

Consultation Process

The New Zealand Constitution is defined in the Constitution Act of 1986, the Electoral Act of 1993 and the New Zealand Bill of Rights 1990, combined with Common Law (i.e the decisions of the Courts) and constitutional conventions (i.e. long-standing and recognised practices).

NCWNZ has made comment over many years to each of these aspects through submissions to parliamentary select committees, and policy statements based on resolutions passed by its membership.

In order to gauge the views of members on this current review, clauses (b) and (c) of the terms of reference established by the Parliamentary Constitutional arrangements Committee were circulated for comment.

It appeared that members did not find it easy to respond to the clauses because they were so broadly-based, but 6 individual respondents and 2 branches took the opportunity to make comment on specific areas of the debate which concerned them. Five members of the NCWNZ Public Issues nucleus committee researched the issues and additional informed opinion was also sought from 3 lawyers affiliated to 2 of our branches.

The strongest message from all respondents was that if changes are proposed then greater and longer consultation with the public, combined with sufficient education about the issues, is essential.

This submission has been based on written comments from the sources named above, and has been organised under the following headings:

- 1. Concerns about the justification for conducting this review and for doing it within this time framework:**
 - The present flexible systems which define our Constitution were felt by our membership to be working reasonably well in most reasonable situations, so the need to change, and





whether any alternative would be better than what we have today, was vigorously questioned.

- One expert opinion we received also stated that the current constitution works well, and that any ambiguities or contradictions which arise are able to be resolved within the system, as long as people challenge perceived breaches.
- The work being done on constitutional matters was interpreted by some as an intention to move New Zealand towards a Republican form of government, but this move would be without sufficient mandate from the people. NCWNZ does not have a policy about whether New Zealand should become a republic, but it is anticipated that the views of the organisation would be as divided as the views of the general population currently are.
- It was felt that this review was initiated by a United Future MP and so was implemented as a political response to ensure ongoing harmony in the Government's coalition.
- Alternatively, it was suggested by one respondent, that, rather than addressing the issue in this wide-ranging review, it would be more helpful to identify real aspects of the micro-systems that do not work as well as they could, and work towards remedying these.
- It was noted that the NZ Law Society is holding seminars on the topic in late May, after submissions close, and it is hoped that the Parliamentary Committee will extend the submission deadline date to accommodate feedback from these seminars.

2. Identification of the key elements in New Zealand's constitutional structure and those which are helpful/useful/obscure:

It was generally agreed that the following elements are seen as identifying features of our constitution:

- The Treaty of Waitangi.
- The British heritage of government, constitutionalism, the rule of law, and the Monarchy - but with the rider that the relationship to the Monarchy perhaps needs to be clarified.
- Membership of the Commonwealth which was seen as essential in view of the pressure of for social and financial allies.
- The separation of Church and State, with no state religion.
- Universal suffrage.
- Proportional representation in Parliament - with the comment that the effect has been to give some control over the unlimited power of one political party. However, concern was also raised about the unbalanced composition of select committees reviewing legislation and the need for more independent expert input.
- The Bill of Rights - concern was expressed that the Bill of Rights Act does not restrict the power of the Executive who can legislate over it. The populace, therefore, needs to be vigilant and aware of the rights that they need to safeguard.
- The unwritten constitutional conventions and principles e.g. independence of the judiciary, independent bar, and lawyers' self regulation rather than being subject to executive control.
- The statutes that include constitutional elements
- The rules of Parliamentary procedure and operation



3. Priorities

a) It was agreed that the absolute key to New Zealand's constitutional arrangements is the rule of law: the principle that nobody is above the law, that the government is subject to the law, and that everyone has access to the law. A lawyer who is the secretary for one of our branches strongly endorsed the concept of the "attitude of legality" as expressed by Geoffrey de Q Walker, *The Rule of Law: Foundation of Constitutional Democracy* (1988). 'The health and strength of the rule of law does not ultimately depend on the efforts of lawyers, judges or police, but on the attitudes of the people. There must be a legal *Geist*, an attitude of legality.' (page 41)

It was felt that without the rule of law, we cannot rely on (a) electoral laws being implemented properly; (b) laws passed by MPs being implemented properly; (c) the executive being required to do its job impartially and according to the governing statutes and the rules of natural justice; (d) crime and unlawful exploitation being discouraged; (e) contracts, business commitments, and property rights being upheld; (f) rules being applied fairly and honestly. Democracy becomes anarchy or a sham if it is not backed by the rule of law.

It was recognised that the administrators of the law have an extra burden, because if they are less than diligent, - they fail in their job; and if they fail in their job - the public's faith in the system deteriorates; and if the public's faith in the system deteriorates - the public will either be exploited (by malefactors who know the system will let them get away with it) or will take the law into their own hands.

b) Any consideration of constitutional reform is of particular concern to Maori, and all respondents stated that The Treaty of Waitangi as the founding document of this country should always be a key consideration in our constitutional arrangements. However, our research into recent debate on the topic has shown that opinions differ among Maori leaders as to whether the Treaty should be included in a written constitution. Some suggested that the Treaty could be included in its entirety as an historical document, whereas others suggested that just the principles should be written in. This would, however, extend the debate about accurate translation of some concepts, such as "customary rights". It was noted that major hui held by Maori, particularly the Hirangi Hui in the 1990s, called for dialogue between Maori and the Crown to look at constitutional issues and a way forward that acknowledges the place of Maori in the decisions that are made about how this country is governed. Ngai Tahu also has a strong commitment to this dialogue. Two respondents commented that the passage of the Foreshore and Seabed Act showed a serious flaw in our current piecemeal constitutional arrangements.

c) A representative from one of our Nationally Organised Societies felt that, since the abolition of the Legislative Council, there are fewer checks on the House and particularly on the Executive. The respondent quoted from Lord John Russell: "Every political Constitution in which different bodies share political power is only enabled to exist by the forbearance of those among whom this power is distributed".

d) The essential constitutional role of the NZ Archives Act was emphasised because of the way it ensures efficient public administration and accountability by requiring all public records to be retained. It was felt that it must be made very clear that it is illegal for government agencies and their employees to destroy records without the permission of NZ Archives.



4. General comments

To consult and then to write a constitution is a major undertaking with wide ramifications as it is a topic that is the subject of hundreds of years of careful law-making, jurisprudence, constitutional theory, and worldwide consideration.

Any discussion must only take place after public education, and must avoid a confrontational structure. The consultation process must be long enough for people to be able to debate major topics and reach equitable solutions. In the words of one of our branches “This would be a document of such importance for the future of all New Zealanders that a select committee could not and should not be the way to go”.

It was suggested that the next stages in the discussion should not be under political control to avoid undue influence. It was also recommended that the constitutions of nations with similar attitudes to democracy and race, creed and class should be studied. The process involved in writing the South African Constitution, which was signed in to law in 1996, was given as an example of effective large scale public participation.

Thank you for the opportunity to comment on this document.

Christine Low
National President

Mary Gavin
Convener, Public Issues Standing Committee