



NATIONAL COUNCIL OF WOMEN OF NEW ZEALAND

TE KAUNIHERA WAHINE O AOTEAROA

31 July 2013

S13.08

Submission to the Constitutional Advisory Panel on The Constitution Conversation

The National Council of Women of New Zealand (NCWNZ) is an umbrella organisation representing 47 organisations affiliated at national level and a further 41 organisations affiliated at branch level. It has 22 branches throughout the country attended by representatives of these organisations, as well as individual members. NCWNZ's function is to represent and promote the interests of New Zealand women through research, discussion and action.

This submission has been prepared by the NCWNZ Public Standing Committee and the Parliamentary Watch Committee after consultation with the membership of NCWNZ.

NCWNZ has long had an interest in constitutional arrangements, commenting in 2005 to the Constitutional Arrangements Committee Secretariatⁱ. Since 1976, NCWNZ has supported a four year parliamentary termⁱⁱ. As a statement of policy, NCWNZ:

- (i) acknowledges the Treaty of Waitangi as New Zealand's founding document which created a bicultural partnership with rights and responsibilities for both partners;
- (ii) recognises that many ethnic groups have contributed to the cultural diversity of Aotearoa New Zealand; and
- (iii) is committed to the development of an harmonious multicultural society.ⁱⁱⁱ

What are your aspirations for Aotearoa New Zealand?

There were a wide range of aspirations expressed by members of NCWNZ. These could be summarised as living in a united, democratic, egalitarian country where there is no racial prejudice and we are forward looking while acknowledging our history. The aspirations include:

- health and wellbeing of people is our first consideration through addressing the social, economic, health and education needs of all New Zealanders, especially the right of women and children to be safe in their homes
- gender equality, including that CEDAW be domesticated into New Zealand law as it has all the issues required to have the rights of women protected
- valuing women, their place in society, contribution, equality.

- acknowledging Maori as seeking a partnership on equal, non-discriminatory terms with all New Zealanders
- an end to the racial divide between Maori and Pakeha
- recognising that we are a multicultural society as diverse ethnicity increases with immigration and intermarriage
- no extremes of poverty
- caring about our weakest members
- economic and political sovereignty
- the justice system being consistent and fair to all
- equality of pay for equal work is not reduced because of gender or age
- the environment being preserved
- recognising our unique history and values/ uphold our values system which is part of our history
- land ownership being in New Zealand hands, or at least land and asset ownership should be for the benefit of New Zealand.

How do you want our country to be run in the future?

The strong preference was for New Zealand to remain a parliamentary democracy.

Comments included:

- holding binding (defined as 2/3rds majority)referenda on significant issues
- acknowledging the Treaty of Waitangi as a morally binding social contact, even Including the Declaration of Independence 1835 in discussions so the public can gain a full overview of how historically the relationship between the Crown and Maori started to evolve and why
- sensible and fair times for submissions to be presented to Select Committees
- New Zealanders should be able to exercise their right to freedom of speech – to disagree and voice their protest without recrimination
- there should be accountability and respect for other MPs in parliament, aiming for more consensus, less adversarial behaviour.

1. Do you think our constitution should be written in a single document? Why?

There was a mixed response to this question. About 75% did not favour, or gave a mixed response to having the constitution in a single document. These respondents liked the flexibility of the status quo. There was a feeling that setting a constitution into a single document would make it very difficult to change, and that society was changing faster and more dynamically than in the past. The reasons included:

- no written constitution can cover all eventualities
- a single document is not a priority without extensive consultation and independent input
- it is more flexible as it is currently

- there was a feeling that though a set of overriding principles is a good idea it was also noted that times change and it is easier to change laws relating to a specific issue than a whole constitution
- New Zealand already has a constitutional framework including the Bill of Rights, Treaty of Waitangi, Electoral Act, Constitution Act and international laws NZ has signed up to.
- a written constitution is 'set in stone' and difficult to change. Laws enacted can be changed by newly proposed legislation, though this is a plus and a minus, eg. the government changing the Law to protect rights about the right to 'spy on New Zealanders' is an example of a law being changed to suit the government's requirements
- a written constitution would need wide concepts and to incorporate both versions of the Treaty of Waitangi, and the NZ Bill of Rights.
- the current situation is working and does not seem to impede the way we operate the rules that govern our society
- many expressed concerns that if a mistake is made in the drafting of the constitution it would be difficult to change and might lead to less, rather than more, fairness for our society
- it could be hard to encapsulate in words everything that is likely to happen.

Those who favoured a single document for the constitution argued that:

- it could help to create a values-based standard of what is fair and just
- it would consolidate what is now written in many places and make the law more streamlined
- as one document it would become a National Reference Document for both Parliament and the Courts
- we can ensure much better checks and balances for the nation
- it will allow private citizens to challenge parliamentary decisions in court on the basis of breach of a constitutional right
- it would be more concise & should be binding.

Many of those in favour of a single document wanted it to be succinct, even a one-page document.

2 Do you think our constitution should have a higher legal status than other laws (supreme law)? Why?

Again there was a mixed opinion on whether the constitution should have a higher legal status than other laws. There were those who thought that the many parts of the existing constitution should be publicised more.

Those who didn't think the constitution should have higher status supported the existing three documents having equal status in law, and that the NZ Bill of Rights already affirms, protects and promotes human rights for all. It affirms New Zealand's commitment to the

International Convention on Civil and Political Rights on which the rights and freedoms it contains are based. If and when a written constitution is agreed and established it would have to be proven to be of equal advantage/benefit to all citizens and could not be manipulated to specific advantage/benefit of one over another.

If the constitution were in one document, many thought this should have a higher legal status, as it would be over-arching legislation that determines society's behaviour and is the basis for interpreting all other laws. It would be foundation document from which our laws emanate.

3 Who should have the power to decide whether legislation is consistent with the constitution: Parliament or the Courts? Why

Nearly all respondents believed that the Courts should have the power to decide whether legislation is consistent with the constitution.

- Parliament makes the law and the interpretation of the law takes place in the Courts
- the Courts should constitute a more independent and neutral body and parliament is always able to pass amending legislation if necessary
- the separation of powers between the executive, legislature and judiciary are distinct and exclusive. Parliament should stay the supreme law maker but checks for consistency should including consultation with the judiciary in case there are issues that they see could arise for them from the proposed legislation
- if there was a written constitution the Courts would have to decide if it is breached as it is the Court's job to interpret legislation
- the power to decide on legislation being consistent with the constitution should always reside with the highest Court in the land, because this is supposedly the most impartial justice
- because there needs to be a check on the government as we do not have an Upper House, or any other independent body to ensure that government is not usurping its powers
- there was a suggestion that the Courts would obtain advice from constitutional lawyers/experts, in conjunction with the Commissions (eg The Human Rights Commission and the office of the Health and Disabilities Commissioner) set up to protect human rights and an expert hapu and iwi appointed body, on the Treaty.

4 Does the Bill of Rights Act protect your rights enough? Why?

By a small majority, the respondents believed the Bill of Rights Act protected their rights. These respondents stated that the Bill of Rights Act:

- allows people to have their freedom and where the courts find discrepancies they can make recommendations to Parliament or at least draw Parliament's attention to any issues that arise through the courts
- there are enough accountability remedies
- there are the United Nations conventions and treaties also to be observed.

Those who did not believe that the Bill of Rights Act protected their rights argued:

- the Bill of Rights Act does not protect our human rights completely. It is designed to protect individuals (natural persons) and legal persons (such as corporations) from the actions of the State
- it does not protect all civil and political rights, including the right to a remedy for human rights violations, the right to privacy, the right to legal aid and the right to non-discrimination. It does not protect economic social and cultural rights, including the right to work and rights in work, to social security, to a reasonable standard of living, including housing, water and food, to healthcare, to education, to take part in cultural life, the right of self-determination and the right to own property individually and collectively, and not to be arbitrarily deprived of it
- the rights and freedoms contained in the Bill of Rights Act are not absolute, but other additional legislation is enacted to provide rights and freedoms not encompassed in it
- often one sector or the community seems to have more rights than another
- referenda are not always acted on.

5 What other things could be done to protect rights?

There are nine United Nations Treaties that if ratified by a government, provide additional mechanisms to protect human rights, as well as Optional Protocols that provide a mechanism for civil society to lay a claim of discrimination or denial of human rights directly with the appropriate UN Monitoring Committee such as for CEDAW. The New Zealand Government has ratified seven of the nine Treaties including Covenants, Conventions and Protocols which means that New Zealand has an obligation to enforce these international standards through its laws.

Most of our laws need reviewing over time and the Bill of Rights Act will be no exception especially with the changing demographics in New Zealand moving steadily towards a multi-cultural society. It is true that the fundamental principles should be such that it encompasses the basic needs of all people to attain fair and equal treatment, one would hope that remains a constant.

A number of respondents were aware that the Ministry of Justice checks proposed legislation against the Bill of Rights Act and the Attorney General provides a s7 report when there is potential for a breach. In spite of this advice legislation can still be passed without change. Breaches against other parts of our constitutional framework can also happen in the same way. There needs to be a body to which parliamentarians are accountable, with transparent processes available for public scrutiny.

A few respondents indicated that economic and property rights should be included in the Bill or Rights Act.

6 Do you think the Act should have a higher legal status than other laws (supreme law)? Why?

Reaction to this question was about equal in favour and against the Bill of Rights Act having higher legal status. It is clear that there needs to be much awareness raising on what legislation currently makes up our constitution.

Those who favoured it having higher status thought the protections in the Act were vitally important and should always be taken into account.

Those who were against the Bill or Rights Act having higher status did not want this Act to repeal, revoke or invalidate other legislation in the event of inconsistencies between the BORA and other Acts.

7 Who should have the power to decide whether legislation is consistent with the Act: Parliament or the Courts? Why?

There was a mixed response to this question, with some favouring Parliament, some the Courts, and some a mix of both.

Most respondents were aware that the Attorney-General is required to notify the House of Representatives if any provisions in a government Bill appear to be inconsistent with the Bill of Rights Act, but felt that this should be extended to all Bills on their introduction to the House.

Parliament already has to make this decision, but can (and does) choose to make laws that are not consistent with the Bill of Rights Act. The courts are better at upholding the mana of the Act.

Those who favoured the Courts as having the power to decide consistency against the Act commented on the impartiality of the Courts, and that the Courts are non-political.

There was also a suggestion that it should be the Courts in conjunction with the Human Rights Commission and the Office of the Health and Disabilities Commissioner because there must be some checks and balances on the power of the executive, cabinet and the government.

8 What additional rights, if any, could be added to the Act? Why?

The general consensus is that the Bill of Rights is so important that it should be published in an easy to read format for public consumption and publicised widely. Many were satisfied with the existing rights, but raised concerns about how evenly it was applied. The suggestions are:

- consideration should be given to making referenda binding if they reach a 75% threshold to any question put before the public
- the rights of the environment
- rights to clean water, health and education

- strong ties to the United Nations human rights conventions, eg with regard to the protection of the rights of women a way of achieving this would be that CEDAW be domesticated into New Zealand law
- merging the Human Rights Act with the Bill of Rights Act
- right to protest
- where there is serious doubt of the safety of a court case resulting in a jail sentence, the right of a prisoner to access police evidence and review police behaviour should be a right under the Bill of Rights
- the right to a remedy for human rights violations
- the right to privacy
- the right to legal aid
- the right to non-discrimination
- economic, social and cultural rights, including the right to work and rights in work, to social security, to a reasonable standard of living,
- the right of self-determination
- the right to own property individually and collectively, and not to be arbitrarily deprived of it.

A suggestion was made that there should be a cross-party Human Rights Select Committee to hold hearings and to check that all Bills are consistent with the Bill of Rights Act.

Rights are impinged upon by some government practices, eg the ability of central government to over-rule local government must be lessened. The closing down of a democratically elected body such as Environment Canterbury, and appointing a Commissioner for an extended period of time is one example of the problems caused by this and; the interference by the government in Auckland Council decisions.

9 Thinking of the future, what role do you think the Treaty of Waitangi could have in our constitution?

There was strong support for Te Tiriti o Waitangi (the Maori text) as the Treaty that was signed by the rangatira and Lieutenant Governor Hobson being recognised as the legitimate text and the founding document of our country. It was the first formal agreement guaranteeing the rights and responsibilities of the signatories and gave the newcomers the right to settle here. The process for determining our constitutional arrangements must be based on Te Tiriti o Waitangi rather than trying to fit the Treaty into a constitutional framework, by negotiation with hapu and iwi.

There were those who believe that while it remains as a founding document, the rights need to be translated into the context of the 21st century, and that this should be a negotiation between Maori and the Crown. The Treaty is about more than land settlement, and should not be seen as vehicle of grievance

The principles of the Treaty should be incorporated into and underpin legislation.

Some saw the Treaty as having the same status as the Magna Carta as a founding document.

Those few who did not support the Treaty as a founding document raised issues of misinterpretation, that it gave unequal rights to Maori, and that it belonged to a different era, whereas a constitution should be future looking.

10 Do you think that the Treaty should be made a formal part of the constitution? Why?

The response was evenly split on whether the Treaty should be made a formal part of the constitution or not.

Those favouring it stated:

- it is an important part of our heritage and must stand as a separate unchangeable section of any proposed constitution
- it is a founding document and something which NZ should be proud of when NZ's history is compared to the historic treatment of other indigenous peoples
- the decision about this should be made by negotiation with hapu and iwi. In the UN Declaration on the Rights of Indigenous Peoples, to which the New Zealand Government has given its support, indigenous peoples are guaranteed the right of self-determination and thus have the right to exercise it with regard to all decisions that affect them.

Those not in favour argued that:

- we should be one people - a multi-cultural society
- the Treaty's status should remain a stand-alone founding document.

11 How should Māori views be represented in Parliament?

The suggestions are:

- they should remain as they are now, with Maori seats and Maori standing in any seat
- Maori seats should be abolished, but consultation with relevant iwi should also continue
- Maori should decide when they no longer wish to have these seats guaranteed
- Maori are very good at advising/consulting their people over issues concerning Maori – other sectors of the community should learn from this
- population basis
- retain Maori seats until such time that Maori no longer see a need for them
- by standing candidates in ordinary electorates
- Maori seats and the Maori roll need to be retained to have guaranteed Maori representation in Parliament
- Maori views in Parliament should be represented in Parliament by Maori elected members, which leads to the idea that the possible way to do this and include them is to have the four Maori sets as at present, but we felt that this also excluded other racial groupings within this country, and could lead to non-representation of these groups in Parliament
- the decision about this should be made in consultation with hapu and iwi

12 How could Māori electoral participation be improved?

Many responses stressed the need for education, with civics taught at school, including the way our constitutional arrangements and the political process works.

Maori and all electoral participation would be improved if, like Australia, voting was made compulsory.

13 How should Māori views and perspectives be represented in local government?

While some felt there was sufficient representation at present, many supported a consultative approach. A few suggestions were made, including:

- genuine consultation and separate representation (if it is wanted)
- Maori could monitor the strategic plans for local government and put questions to their meetings
- More involvement of Council committees, issues, consultation and involved by allowing seats on committees
- there should be local iwi representation in local government
- there should be a requirement in the local Government Act for Councils to ensure their representation fits their population
- Maori views and perspectives should be represented in local government by councillors being fully versed in Maori protocol and being ready participants in listening to Iwi views of their local areas.
- to fully represent themselves, Maori should campaign and get elected to Councils
- there should be someone appointed to Council, if no Maori stood for election
- as a minimum there should be a set number of seats for Maori on local councils and boards as for example recommended by the Commission when the new Auckland Council was set up.
- Maori decision making in local government should be determined by negotiation with hapu and iwi

14 How many members of Parliament should we have? Why?

The responses were split between 100 and 120 members of Parliament.

Those favouring 100 believed this was adequate for our population base and should be split between 60 electorates and 40 list MPs.

Those favouring 120 MPs believed this to be the best distribution based on our current population and the need to adequately represent the people. The strength of Parliament is in the Select Committees which according to some experts are barely managing to be serviced with 120

There was also support for regular reviews of the number.

A few respondents felt there were too many list MPs.

15 How long should the term of Parliament be? Why?

Most respondents concurred with NCWNZ policy that there should be a four year term of Parliament.

A number of respondents commented that the government currently spends one year embedding themselves (or undoing what the last government did), one year doing things, and the next year planning for the upcoming election. In three years there is not enough time to give bills a considered discussion, to hear any submissions and produce well considered bills to enact, that don't immediately need to be fixed up because they have been too hastily passed.

16 How should the election date be decided? Why?

About half the responses supported the current mechanism. Those that did not stated:

- the Prime Minister should not be able to determine the time of elections as it gives him too much power. It should be set by Act of Parliament with enough detail to take account of unusual eventualities
- the Electoral Office should determine the timing of the election
- a set date every four years, using a formula, eg 1st Saturday in November
- one person suggested Waitangi Day should be the day we go to the polls
- some favoured the date being in spring, others commented that November was exam time for tertiary students.

17 What factors should be taken into account when the size and number of electorates are decided? Why?

All respondents wanted electorates to be based on population, with many supporting the current methodology, having electorates of a similar size.

The South Islanders who responded to this question firmly supported the current formula that guarantees a minimum of 16 seats for the South Island.

There was some comment that the geographic size of some electorates is too large. While representation for all people is important, pragmatism of access needs to be taken into account.

18 What should happen if a Member of Parliament parts ways with the party from which he or she was elected? Why?

The majority view was that any Member of Parliament who leaves their party should resign from Parliament, especially if that person is a list MP.

Candidates stand on party policy and are elected as representing that policy and representing a political party. If a member can no longer fulfil that obligation to the party and its policies, they should resign and a by-election should be held. Those MPs elected by an electorate can then stand as an independent or as a member of another party. List MPs

have gained a position as an MP because of “party voting” and should resign because they can no longer support party policy.

There was some support for constituency MPs who leave their party becoming an independent MP until the end of the particular term of parliament. They were elected, and as long as they do nothing criminal that would bar them from holding office, they should remain.

Barbara Arnold

Beryl Anderson

President

Convener, Public Issues Standing Committee

ⁱ NCWNZ submission S05.22 dated 14 April 2005.

ⁱⁱ NCWNZ. 2012. *115 years of resolution*. Resolution 2.5.4, 1976.

ⁱⁱⁱ ditto. Resolution 2.11.1, 1992.