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Te Kaunihera Wahine O Aotearoa

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Submission on A Constitution for Aotearoa New Zealand by Sir Geoffrey Palmer and Dr Andrew Butler

1. Introduction

1.1. The National Council of Women of New Zealand, Te Kaunihera Wahine o Aotearoa (NCWNZ), is an umbrella group representing 258 organisations affiliated at either national level or to one of our 19 branches. In addition, about 380 people are individual members. Collectively, our reach is over 290,000, with many of our membership organisations representing all genders.

1.2. NCWNZ's vision is a gender equal New Zealand and research shows that New Zealand will be better off socially and economically if we were gender equal. Through research, discussion and action, NCWNZ, in partnership with others, seeks to realise its vision of gender equality because it is a basic human right. This submission has been prepared by the NCWNZ Public Issues Standing Committee and the Parliamentary Watch Committee after consultation with the membership of NCWNZ.

1.3. NCWNZ has been considering issues relating to constitutional arrangements in Aotearoa New Zealand for many years and has recently made submissions on constitutional matters.

1.3.1. In 2005 NCWNZ stated that any moves towards a single written constitution should involve significant public education and debate.[1] It argued for the importance of input from all members of the community and time to consider that pros and cons of any attempt to combine current constitutional documents into a single written constitution.

1.3.2. The 2013 NCWNZ Submission to the Constitutional Advisory Panel on The Constitutional Conversation indicated that there was a mixed response among members to a single written constitution and that, on balance, most respondents favoured the current constitutional framework.[2] Those who did not support a single constitutional document thought that it could not cover all eventualities, that there would have to be extensive consultation on its content, and that Te Tiriti o Waitangi/Treaty of Waitangi 1840, the Constitution Act 1986, the Bill of Rights 1990, the Electoral Act 1993, and the international covenants that New Zealand

[1] NCWNZ (2005) Submission to the Constitutional Arrangements Select Committee on the Inquiry to review New Zealand's existing constitutional arrangements, p. 4.
https://www.ncwnz.org.nz/wp-content/uploads/2013/06/S05.22-Inquiry-to-review-New-Zealands-existing-constitutional-arrangements.pdf

[2] NCWNZ (2013) Submission to the Constitutional Advisory Panel on The Constitutional Conversation, pp.2-3.
https://www.ncwnz.org.nz/wp-content/uploads/2013/06/S13.08-Constitution-Review-Sub-4-PI.pdf

had signed provided sufficient protections and ensured necessary flexibility. Members who supported a single constitutional document thought it would clearly identify what was fair and just in one place, be a clear reference point for the Courts and Parliament, and empower citizens to better challenge breaches of their constitutional rights.

1.4. NCWNZ welcomes the opportunity in 2017 to once again provide input into discussion of possible changes and improvements in constitutional arrangements. This submission draws on policy relating to constitutional matters and preceding submissions on constitutional issues, as well as recent consultation with NCWNZ Branches, affiliated organisations at national and local levels and the contributions of individual members of NCWNZ. Responses from throughout New Zealand were received to a specific set of questions, most of them representing NCWNZ Branches and affiliated organisations. The submission focuses on particular aspects of the proposal developed by Sir Geoffrey Palmer and Dr Andrew Butler for a Constitution for Aotearoa New Zealand and concludes with an assessment by NCWNZ of issues relating to this proposal and the organisation's core goal of a gender equal New Zealand.[3]

2. A single document written constitution – views on the proposal to codify New Zealand's constitution

NCWNZ Branches, affiliated organisations and individual members were asked for their views on whether New Zealand needed a single document written constitution that combines the principles and rights currently included in the following constitutional documents:

> Te Tiriti o Waitangi/Treaty of Waitangi 1840, the Constitution Act 1986, the Bill of Rights 1990, the Human Rights Act 1993, the Electoral Act 1993, and a range of international human rights covenants that New Zealand has ratified.

2.1. The majority of members were cautious about the option of a single written constitution for New Zealand. They saw the advantages of a single document that provided a clear statement of the rights of citizens that were above any particular law of the country. They also recognised the value of articulating and elevating some general principles relating to people's rights and what were the legitimate practices of those with political power. A single document constitution could put everything in the one place and potentially assist citizens in challenging the actions of those in power and asserting their rights. But the majority of responses received from members identified some problems with the proposal to have a single constitutional document. They raised a number of critical questions relating to this proposal.

2.2. Problems identified by NCWNZ Branches, affiliated organisations and individuals who responded to questions relating to a single document constitution:

2.2.1. How will it be developed? Who will make the decisions about its content? Will ordinary citizens have a real voice? Will it just provide a lot of consultative work for lawyers and

[3] https://www.ncwnz.org.nz/wp-content/uploads/2015/11/EnablingWomensPotential_OnlineViewing-1.pdf https://www.facebook.com/GenderEqualNZ/

constitutional specialists? And will ordinary New Zealanders have the time to have input into this? A number of NCWNZ members were sceptical about the extent to which people who were not professional specialists in law and policy would have the time, energy and expertise to have input into a new single document constitution.

2.2.2. Those critical of the proposal also argued that "there is no assurance that the legal difficulties we currently have with the combination of domestic and international covenants would be eliminated by a single document as there can never be a perfect, completely watertight constitutional document, no matter how well it is drafted." Some members considered that the Westminster model had some advantages because it required ongoing debate and discussion about the application of constitutional principles.

2.2.3. There was also concern among many NCWNZ members who provided responses on this proposal that a single document could potentially diminish the place of Te Tiriti o Waitangi/Treaty of Waitangi. Te Tiriti o Waitangi was seen as having a status different to other constitutional documents. It is a founding document and incorporating it into a single written constitution, even one that recognised it special status, could diminish its unique position as a document relevant to all other constitutional commitments, whether New Zealand law or international human rights covenants ratified by New Zealand.

2.2.4. NCWNZ members also asked whether people can be confident about getting a constitution that will provide improved protections for the rights of citizens. In a neo-liberal political environment, would this constitution improve the lives of some citizens? There might not be equitable outcomes and human rights could be undermined or threatened. There may be misinterpretations of constitutional rights such "the right of people to keep and bear arms" which is enshrined in the Second Amendment to the United States Constitution. In the view of many responding, debate about the meaning of the Second Amendment and its interpretation as the absolute right of individuals to keep and bear arms was one of the hazards of a written constitution.[4] The power of the Judiciary in the USA to undermine the power of State and Federal Government to control the use of firearms was cited as problematic. Other members were concerned that combining current constitutional documents in a single document could mean changing or excluding some current constitutional rights, such as those included in the Bill of Rights which they thought was a useful document.

2.2.5. A number of members argued that creating such a constitution, and assessing all our legislation in terms of its consistency with the constitution, could be very time consuming, costly, and require massive re-codification of all legal documents. Some members asked: Is this really necessary? Is the time, money and work involved important relative to work on other matters confronting New Zealand such as poverty, housing affordability and environmental pollution? This is the way one member expressed these concerns: "Holding this conversation just now seems like a big ask. We seem confronted with many issues of a

[4] https://www.law.cornell.edu/wex/second_amendment

very practical nature. I'm not sure that the public at large will want to engage with a constitutional debate as well and it may distract from other matters that require attention."

2.3. Those who supported a single written constitution did so for the following reasons:

2.3.1. New Zealand needs a comprehensive "go to" document similar to most countries in the world. One NCWNZ Branch stated: "… the average New Zealander almost needs a law degree to find out what their rights are and whether the Government in power is taking heed of them."

2.3.2. A single document constitution protects individual freedom, limits the power of government and establishes a system of checks and balances. It is binding on everyone, Parliament, Ministers, the public service, and the people.

2.3.3. As a legal contract between the State and citizens, it can provide the strongest legal means for protecting and promoting gender equality. One member stated strongly that "Constitutions matter for women" and are important ways of "placing a wide range of demands on the State and restrictions on state power."

2.3.4. Those advocating a single comprehensive constitution for Aotearoa considered that it should be the outcome of extensive consultation and become entrenched so that it could not easily be changed by a simple majority decision in Parliament. Advocates of a single document constitution also argued that participation in the constitution-building process would provide "an extraordinary opportunity for women and gender-equality advocates to participate in the framing of democratic governance. This would be consistent with the Convention on the Elimination of All Forms of Discrimination Against Women.[5]

2.3.5. Some of those who supported a single written constitution considered that it should be agreed to via a referendum and, once in place, should only be modified by a 75% majority in Parliament. Whatever means were used to decide on the details of a single constitution, those supporting this innovation considered that a 75% majority was needed before any changes to the constitution. One member commented: "The current constitutional arrangements are incomplete, obscure, fragmentary and too flexible… New Zealand is exposed to the whim of majority rule that even the Constitution Act 1986 and the Bill of Rights Act 1990 could be repealed by Parliament in a single sitting of the House of Representatives under urgency. Those who favoured a single constitutional document sometimes reflected on the consequences for Aotearoa New Zealand of not having an Upper House. Since all key decisions are made by the House of Representatives, it is important that the judiciary could provide checks and balances. For this reason, it is important for the Supreme Court to decide on whether a law passed by Parliament is unconstitutional. Some members agreed that such a Supreme Court judgement should only be reversed by a 75% majority in the House of Representatives. This would achieve a necessary balance in the

[5] http://www.un.org/womenwatch/daw/cedaw/cedaw.htm

powers of the Judiciary and the Legislature. Arguments presented by NCWNZ members for a balance of power between the Judiciary and Parliament and the necessity of ongoing constitutional debate (whether there is a multiple document or a single constitution), were consistent with arguments advanced by Hon Justice Matthew Palmer at the Constitutional Dialogue Conference, Hong Kong University, in December 2016.[6] (See 8. below - The constitutional jurisdiction of the judiciary)

2.4. On balance, NCWNZ considers that there is a need to recognise the risks as well as the benefits of developing a single codified constitutional document. The successful development of such a document would need to be a lengthy and well-resourced process that involved many different sections of the population. More than half of members responding to this proposal thought that the time, effort, costs and the risks involved at the moment outweighed the benefits. This position is consistent with the submission that NCWNZ made to the Constitutional Advisory Panel on The Constitutional Conversation in 2013.[7]

3. Te Tiriti o Waitangi/Treaty of Waitangi – its place in a single document constitution that codifies the democratic principles and rights in existing constitutional documents

3.1. Te Tiriti o Waitangi/Treaty of Waitangi was seen as central to any constitutional document for Aotearoa New Zealand. And it was seen as sitting above, providing an overarching framework for all other rights and responsibilities. NCWNZ members asked whether incorporating the Treaty into a single document would mean a more fundamental rethinking of how New Zealand institutions work. Would it not mean that all existing institutions and laws would have to be consistent with Te Tiriti o Waitangi/Treaty of Waitangi if an integrated constitution was developed? The process of assessing this would be worthwhile, but potentially very time consuming. Some members raised the question as to which language version of the Treaty would be included in the constitution and how different interpretations of the Treaty would be resolved and the Māori version honoured. A number of members were convinced that Te Tiriti o Waitangi should remain a standalone document. Some members were very strongly convinced that resolution of these issues should be led by tangata whenua.

3.2. A smaller number considered that the Te Tiriti o Waitangi/Treaty of Waitangi should be incorporated as it stands into any Constitution as it was a unique document, specific to Aotearoa New Zealand and it was unthinkable that it would not be at the heart of any comprehensive constitution. For those who supported the concept of a single constitution, Te Tiriti o Waitangi had to be recognised as the foundation stone, the core and the overarching set of constitutional principles for Aotearoa New Zealand.

3.3. Some of those responding considered that that the Treaty was written with very different agendas to those of contemporary constitutions. They argued that it was more about governance and

[6] Palmer, Hon. Justice Matthew, 2016. Constitutional Dialogue and the Rule of Law, the Constitutional Dialogue Conference, Hong Kong University.
https://www.courtsofnz.govt.nz/speechpapers/CDRL.pdf/?searchterm=Constitutional%20issues

[7] https://www.ncwnz.org.nz/wp-content/uploads/2013/06/S13.08-Constitution-Review-Sub-4-PI.pdf

partnership between sets of people, while a Constitution is more about the rights of people living as citizens of a nation state.

3.4. Some members commented that a constitution should also acknowledge New Zealand's increasing ethnic, economic and social diversity. As well as including the commitments in the Te Tiriti o Waitangi, it would need to recognise the importance of multiculturalism while at the same time acknowledging tangata whenua. There was some support for what The New Zealand Federation of Multicultural Councils (NZFMC) has identified as "Treaty-based multiculturalism." [8]

4. Inclusion of 'gender' as well as 'sex' as prohibited grounds for discrimination in a single document constitution, the Bill of Rights and the Human Rights Act

4.1. The majority of members considered that both 'sex' and 'gender' should be included as prohibited grounds for discrimination. They argued that the terms referred to different things – 'sex' to physiological differences and 'gender' to social identity and cultural practices.[9] Some NCWNZ members who provided input into this submission favoured reference as well to 'sexual orientation'[10] and others considered that any reference to 'sex' was outdated.

4.2. Members recognised a wide spectrum of gender identities and argued that there was increasing awareness of gender diversity, diversity in sexual identities and a need for transgender, intersexual, gay, lesbian, queer and bi-sexual people to enjoy the same rights and support structures as everyone else in Aotearoa New Zealand. They considered that the language used in key constitutional documents (whether or not they were included in a single constitution) should refer to this gender and sexual diversity.

5. The State – reference to "the State" rather than "the Crown"

5.1. The feedback regarding this question was divided with a slight majority against the change principally because they considered this question related to whether or not New Zealand became a republic. In the absence of discussion and collective decision-making about this (possibly through a referendum) and a definite decision to association with the Queen and the British Monarchy, they considered it preferable to refer to "the Crown". They were critical of a change in language from "the Crown" to "the State" that might signal republicanism "by stealth".

5.2. Some members, however, thought that in the medium and long-term New Zealand should look at the issue of New Zealand becoming a republic and should consider issues concerning the country's relationship with the United Kingdom and the British Monarchy. They argued that it was appropriate over time to move away from recognising the power of "the Crown" and considered referring to "the State" would assist this shift. Others thought that "the State" should replace "the Crown" because the powers of the State in Aotearoa New Zealand are derived from the people and not from the British Monarchy.

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[8] The New Zealand Federation of Multicultural Councils (NZFMC), Treaty-Based Multicultural New Zealand https://multiculturalnz.org.nz/uploads/sites/multiculturalnz/files/pdfs/2014/Multicultural-NZFMC-broch-A4-print.pdf

[9] Gender and Genetics, World Health Organisation http://www.who.int/genomics/gender/en/index1.html

[10] What is sexual orientation? American Psychological Association http://www.apa.org/topics/lgbt/orientation.aspx

5.3. A number of members who provided feedback on the proposal for a Constitution for Aotearoa New Zealand commented that the use of the term "the Crown" aligns with the Te Tiriti o Waitangi/Treaty of Waitangi. They considered that, since the Treaty was the founding constitutional document for Aotearoa New Zealand and it refers to the relationship between Māori and "the Crown", the use of this term should continue.

6. A "Head of State" rather than a "Governor General"

6.1. Most members who commented on this proposal argued that the appointment of the Governor General by the Queen (on the recommendation of the Prime Minister) contributed to these appointments being apolitical rather than party political appointments. This was valued. Whatever the term used for the Head of State, this position was seen as ideally someone who had achieved and contributed to the country and not someone who "played a particular political drum".

6.2. Crown responsibilities were also seen as important for the implementation of Te Tiriti Waitangi/Treaty of Waitangi. These commitments meant that it is important that legislators and government agencies meet their obligations under the Treaty. The Governor General as the representative of "the Crown" was a way of recognising these responsibilities, even if they have not been adhered to in practice.

7. Parliament - A four-year parliamentary term

7.1. This has been NCWNZ policy since 1976. Resolution 2.5.4 was passed at the NCWNZ Conference in 1976. It states that: "NCWNZ ask the Government to consider once more the extension of the Parliamentary term from three to four years".[11]

7.2. The NCWNZ submission to the Constitutional Advisory Panel on The Constitutional Conversation in 2013 noted that a number of respondents considered 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 or to produce well considered bills that do not immediately need to be fixed up because they have been too hastily passed".[12]

8. The constitutional jurisdiction of the Judiciary

8.1. In 2013 NCWNZ's Submission to the Constitutional Advisory Panel on the Constitutional Conversation stated that nearly all NCWNZ members responding to questions on this issue thought that the highest court in New Zealand, the Supreme Court, should have the power to decide whether legislation is consistent with the Constitution. This was seen as an important check on Government when there is no Upper House. The majority of NCWNZ members who responded to questions relating to a Constitution for Aotearoa New Zealand in 2017 agreed with this position. Members also

[11] NCWNZ Inc. Te Kaunihera Wahine o Aotearoa, 2012. *115 Years of Resolution 1896-2010*, p. 19. https://www.ncwnz.org.nz/wp-content/uploads/2013/06/115-years-Register-everything-2.pdf

[12] NCWNZ (2013) S13.08 Submission to the Constitutional Advisory Panel on The Constitutional Conversation, pp.10. https://www.ncwnz.org.nz/wp-content/uploads/2013/06/S13.08-Constitution-Review-Sub-4-PI.pdf

considered that the electoral system should not be changed except through a referendum or a 75% majority in Parliament.

8.2. A significant number of NCWNZ members supported the proposal that the Judiciary (in the form of the Supreme Court) should be able to override Acts of Parliament that are inconsistent with the New Zealand Constitution, regardless of whether it is a single written document or the current set of constitutional documents. They considered that it was acceptable for a 75% majority in Parliament to override a Supreme Court decision as it was important to sustain a balance between Judicial and Parliamentary Power and specific contextual factors were important in considering these matters. (See 1.4 above)

9. The Bill of Rights Act 1990 – extensions to the Bill of Rights

9.1. Some members' responses indicated that the Bill of Rights should be extended to include rights identified in international conventions and ratified by the New Zealand Government. It should recognise social and economic rights as well as the care and protection of children and older citizens. These extensions should be implemented regardless of whether a single document written constitution was developed.

9.2. The argument was also made that the Bill of Rights as it stands has not really been tested. It lists a great set of principles that are not always applied. Some NCWNZ members thought that rights in our current set of constitutional documents should be practised before we pursued the development of a single constitution.

9.3. Some members reflected critically on rights to property. The comment was made that, whilst we should have the right to property, this should not mean "unlimited property" as this could have implications with regard to equity issues. The defence of some people's rights to own and use property was seen as potentially inhibiting the development of policies that addressed social inequality in New Zealand.

9.4. Those advocating for a single document constitution argued that all current rights and freedoms included in the Bill of Rights would need to be reaffirmed and adopted in the constitution and that there should be the opportunity to include other rights recognised in international law since 1990 and by international conventions to which New Zealand was a signatory.

10. Gender equality and a single document constitution for Aotearoa New Zealand

10.1. Most NCWNZ Branches, affiliated organisations and individual members who responded to this proposal for a single written constitution thought that gender equality would be enhanced if it meant that the Bill of Rights Act (BORA) was more effectively applied in the assessment of legislation and its impact. If legislation had to be rigorously vetted for its contribution to gender equality, this could encourage public servants and politicians to embed measures to enhance gender equality in the design phase of legislation. This would require, however, a stronger BORA vetting process than is currently practiced. It is also possible that gender equality would be enhanced if the Supreme Court had the power to strike down legislation that threatened gender equality.

10.2. Those who supported a single document constitution argued that 'it is the strongest legal means of protecting and promoting gender equality through entrenching the fundamental rights and freedoms of women, including their right to freedom and non-discrimination." They argued that "the comprehensive guarantees of women's human rights set out in international law only become real when they are embraced, and made actionable at the local level."

10.3. Those advocating a single document constitution argued that this was an opportunity to advocate for their participation in the drafting of this constitution. This would involve "holding strategy sessions and producing documents on goals for the new constitution; and learning about the kinds of constitutional provisions that will most impact women". This conversation should occur with a robust knowledge and understanding of what constitutional provisions exist, and what laws are on the ground to advance women's rights. One NCWNZ member advocated attention to UN Women's revised Global Gender Equality Constitutional Database (GECD)) – a repository of gender equality related provisions extracted from 195 constitutions from around the world.[13]

10.4. A number of NCWNZ members argued that a single document constitution would not in itself deliver gender equality. They argued that many other things needed attention at a societal level if gender equality was to be achieved; for example, socio-economic disparities between women and men and gendered interpersonal violence. A change in attitudes and understandings of gender equality were most important. These changes would not inevitably follow by legally prohibiting discrimination on the grounds of sex, gender, sexual orientation, disability, ethnicity or religious affiliation, or by articulating the rights of diverse citizens in constitutional documents. They require action at the level of national government, local government, business, the courts, communities, sporting organisations, families and households. The need for action in these fields is the focus of NCWNZ's work for gender equality across social, economic and political sectors.

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[13] http://constitutions.unwomen.org/en/about