Caroline Morris · Jonathan Boston
Petra Butler *Editors*

Reconstituting the Constitution

Springer

Chapter 8
The Advantages and Disadvantages of a Supreme Constitution for New Zealand: The Problem with Pragmatic Constitutional Evolution

Mai Chen

8.1 What Is the Real Constitutional Issue for New Zealand?

My assigned topic of the advantages and disadvantages of a supreme constitution for New Zealand caused me some unease for although it may be of interest to constitutional lawyers and academics, this question is not one that most New Zealanders are asking, even though New Zealand is one of only three democratic countries in the world without a supreme or codified constitution.[1]

As the Hon Tony Ryall said during the debate establishing the Constitutional Arrangements Committee in 2004:

> [T]he one thing that came out of the constitutional conference [held at Parliament in 2000, entitled "Building the Constitution"] was the fact that there is no desire amongst the people of New Zealand for the sort of constitutional changes that this cabal known as a select committee will be discussing. As I travel around the country, no one asks me about the constitution. No one asks me about the role of the monarchy [or] . . . about the matters that this select committee will look at. People do ask me . . . about more police . . . about less red tape in the community . . .[2]

As the Chief Justice said, New Zealanders have been "notoriously indifferent throughout our history about our constitutional arrangements . . . [and] remarkably

Mai Chen is a Partner, Chen Palmer New Zealand Public Law Specialists.

[1] Although it is arguable that the United Kingdom is subject to the European Convention on Human Rights which is supra-national supreme law. The European Convention has been incorporated into United Kingdom law through the Human Rights Act 1998.

[2] Ryall (2004).

M. Chen (✉)
Chen Palmer, PO Box 2160, Wellington 6015 New Zealand
e-mail: Mai.Chen@chenpalmer.com

C. Morris et al. (eds.), *Reconstituting the Constitution*,
DOI 10.1007/978-3-642-21572-8_8,

uncurious about the limits of our constitution."[3] Sir Geoffrey Palmer also wrote that "New Zealanders must be amongst the most constitutionally underdeveloped people in the developed world."[4]

8.2 Thesis

It is unlikely that a majority of New Zealanders would currently support an immediate change to a supreme constitution for New Zealand. However, there is arguably widespread support for more limited constitutional reform, such as a special process to be followed before the government can make certain constitutional changes.

A recent significant ShapeNZ research survey of 2,261 New Zealanders, commissioned by the New Zealand Business Council for Sustainable Development, regarding constitutional arrangements and voting systems reveals New Zealanders' increasing awareness about constitutional issues. The survey found that 60% of New Zealanders wanted more information about the alternatives to the Mixed Member Proportional (MMP) voting system, and more New Zealanders support than oppose extending the term of Parliament beyond its current 3 years.[5] This reinforces the finding of the 2005 Inquiry to Review New Zealand's Constitutional Arrangements (Constitutional Review) that "there was a clear message on what people thought is appropriate in processes of constitutional change for New Zealand."[6] The public want an education campaign, widespread public support, a majority at a plebiscite or an extraordinary parliamentary majority.[7]

To take the next step in this debate, New Zealanders need to discuss the following constitutional issues:

(a) What matters are sufficiently important to warrant protection under a special constitutional change process?;
(b) What should that special process be?; and
(c) How should we protect that process itself from being changed?

8.3 New Zealand's Constitution

Sir Kenneth Keith defines a constitution in the 2008 Cabinet Manual as:

> . . . about public power, the power of the state. It describes and establishes the major institutions of government, states their principal powers, and regulates the exercise of those powers in a broad way. . . .

[3] Elias (2004), p. 475.

[4] Palmer (1992), p. 56.

[5] See http://www.nzbcsd.org.nz for a full report on the survey.

[6] Constitutional Arrangements Committee (2005), pp. 23–24.

[7] Ibid (2005), p. 24.

> The New Zealand constitution is to be found in formal legal documents, in decisions of the courts, and in practices (some of which are described as conventions). It reflects and establishes that New Zealand is a monarchy, that it has a parliamentary system of government, and that it is a democracy. It increasingly reflects the fact that the Treaty of Waitangi is regarded as a founding document of government in New Zealand. The constitution must also be seen in its international context, because New Zealand governmental institutions must increasingly have regard to international obligations and standards.[8]

The New Zealand constitution is partly written and not codified.[9] It does not have the status of higher law like the United States and Australian constitutions. The laws and practices making up New Zealand's constitution can be amended by simple majority (except certain reserved provisions under section 268 of the Electoral Act 1993) and Parliament does not need to utilise any unique mechanisms of constitutional reform or satisfy any codified procedures.[10]

8.4 Options for Reform

A supreme constitution for New Zealand could take the form of either:

(a) A supreme law New Zealand Bill of Rights Act 1990 (NZBORA) with a constitutional monarchy, like Canada, which made the Charter of Rights and Freedoms supreme law in 1983, but remained a constitutional monarchy; or
(b) A supreme law constitution, which turns New Zealand into a Republic.

Lesser constitutional reform options include:

(a) An ordinary NZBORA with more economic or/and social rights protected or/and the addition of the Treaty of Waitangi (as originally proposed in the 1985 White Paper[11]); or
(b) An extended ordinary constitution utilising the current Constitution Act 1986, the NZBORA, and the Electoral Act, with greater entrenchment of important provisions than those currently entrenched in the Electoral Act. Changes could then only be made by a majority at a plebiscite or a 75% majority of MPs.

[8] Cabinet Office (2008), p. 1.

[9] See Elizabeth McLeay's comments in Chap. 1 of this volume at p. [x] that "there had been considerable legislative and bureaucratic codification of New Zealand's constitution"; and Rhodes et al.'s (2009) comments that "the codification of conventions and practices blur the distinction between written (codified) constitutions and unwritten constitutions" (p. 88).

[10] Note that even section 268 of the Electoral Act 1993 can itself be amended by simple majority.

[11] Minister of Justice (Palmer G) 1985 (the 1985 White Paper). I have not dealt with the status of the Treaty in any supreme Constitution as that was dealt at the same session of the *Reconstituting the Constitution* conference by Justice Joe Williams.

> Double entrenchment (requiring the provision setting out the unique process for change to itself be changed only by meeting a special procedure) should also be considered.[12]

Given New Zealand's pragmatic evolutionary approach to constitutional matters, protections may best be implemented by an extended ordinary constitution utilising the current Constitution Act, the NZBORA, and the Electoral Act, with greater use of entrenchment (and potentially double entrenchment) of important provisions. This has the potential to work well, provided these ordinary statutes include all of the matters New Zealanders think should not be changed without public debate and public agreement.

In considering whether or not this is the case, New Zealanders will be taking steps towards a supreme Constitution for New Zealand, particularly if double entrenchment is considered. Double entrenchment, especially of substantive provisions concerning values and rights and freedoms, is contrary to the notion that a sovereign Parliament cannot bind its successors.

8.5 Impetus for Reform

Currently, any government can make significant changes to New Zealand's constitution without public agreement, and without even signalling to the public that a change could have constitutional consequences. With the exception of the entrenched provisions in the Electoral Act, legislation having constitutional effect is ordinary legislation, and can be enacted or amended without public consent or special requirements in Parliament. The government may consider public opinion, but is not bound by it. Ultimately government may decide otherwise.

Further, some constitutional change may be noticed only by experts, since change can occur as a result of a series of smaller amendments rather than a "big bang". There may only be the usual process for law reform of a discussion paper at the policy formation stage, and a select committee process when the bill is going through Parliament (provided the government does not decide to take urgency). New Zealanders tend to be either uninterested in constitutional issues because they lack knowledge of the constitution's importance, or are knowledgeable about constitutional issues but want to let sleeping dogs lie.[13] Even the latter group of New Zealanders may find out too late that subtle but significant changes have been made without any public education programme or a plebiscite.

There are political sanctions for not involving the public in "authorising" constitutional change, or not implementing its clear opinion on an issue, but only if the public realise that constitutional change has taken place. The Constitutional

[12] See Joseph (2007), section 1.5.14.

[13] Constitutional Arrangements Committee (2005), p. 21.

Review said that "[s]ome members [of the Committee] consider that the 3-year term of Parliament is itself a constraint on major change, as it limits the ability of a government to promote constitutional change without sufficient popular support."[14] But with no prior demarcation of what changes would have constitutional effect, nor special processes to amend such provisions, politicians may not realise the significance of the changes they are making. The lack of special procedures also makes a public debate about the demarcation line being crossed by some proposed legislative change less likely. Thus, there may be inadequate checks on "constitutional" reforms, which increases the likelihood of constitutional changes that are not supported by a majority of New Zealanders.

It would be difficult to argue that there is an established convention in New Zealand that constitutional changes will only be made on a binding referendum. Even if this were true, a convention is arguably the wrong instrument choice for restricting significant constitutional change, given the imprecise nature of conventions, which depend on practice and usage. We need a stronger, clearer mechanism to prevent constitutional change slipping under the radar.

Any consideration of the matters that should be constitutionally protected should include a review of whether further rights and freedoms should be included in the NZBORA, given the changes that have occurred in public opinion in the 20 years since its enactment.

8.6 The Disadvantages of a Supreme Constitution

8.6.1 No Problem Warranting a Topshelf Solution

There is currently no crisis or problem that would trigger a debate about the need for a dramatic change to a supreme Constitution. New Zealand is not trying to build a new state from scratch, which was the case with the United States Constitution, or become a full democracy after nearly half a century of apartheid, which was the case with the South African Constitution. Nor are we moving from the status of a colony to that of an independent nation, which resulted in the Mauritius Constitution.[15]

The lack of political crisis in New Zealand is arguably similar to the political landscape in Australia and Canada when those nations adopted their supreme constitutions. But the Constitutional Review notes that proposals for further, more extensive constitutional reform in both Canada (in the 1980s–1990s) and in Australia (in the 1990s) failed to proceed, partly as a result of the difficulty in

[14] Constitutional Arrangements Committee (2005), p. 21.

[15] In New Zealand, we adopted the Statute of Westminster in the 1947 Statute of Westminster Adoption Act. This is an ordinary statute and no special constitutional process was used.

generating the level of public engagement required by the formal processes for change in each country's constitution.

I think there is currently little likelihood of a majority of New Zealanders voting for fundamental constitutional change, like a supreme constitution, in the short term given our tradition of pragmatic constitutional evolution.[16] As the Constitutional Review concluded "there are no urgent problems with New Zealand's constitutional arrangements."[17] It cited Lord Cooke of Thorndon's submission that "it isn't broken:"

> Given acknowledgement that checks and balances are always necessary to rule out absolute power, it would seem that by and large the present New Zealand constitutional arrangements work reasonably well. On a comparison with those of other countries for which I have served judicially . . . I see nothing disadvantageous to New Zealand in these respects.[18]

The Constitutional Review talked about the difficulty of creating sufficient public engagement on constitutional issues when a society is relatively settled,[19] and made recommendations to deal with "the difficulty of creating sufficient public engagement on constitutional issues when a society is relatively settled . . . [and] to respond to the difficulty of achieving public interest in constitutional matters."[20] The exception was Māori submitters who generally thought that "change was necessary and necessary now."[21]

A recent study by Richard Shaw shows that the advent of the internet has not demonstrably rejuvenated people's engagement with politics, but that "New Zealanders' relative disengagement with formal politics is being reproduced online."[22] Politically engaged citizens tend to use the internet to extend their engagement; unengaged citizens tend to go online for non-political reasons; and people tend to visit sites with content that is consistent with their own extant normative preferences. Although political parties have used websites to convey information to citizens, they have not sought to engage citizens in debate on substantive issues.[23] However, no studies have analysed the internet interactions

[16] Rishworth (2003), P. 119.

[17] Constitutional Arrangements Committee (2005), p. 14.

[18] Ibid (2005), p. 8, citing Lord Cooke of Thorndon's submission at p. 6.

[19] Ibid (2005), p. 20. Note that only the Labour, Green, ACT and United Future parties participated in the Committee, National and New Zealand First removing themselves from the Committee. See the speech of the Hon Dr. Michael Cullen as Leader of the House (Cullen 2004).

[20] Constitutional Arrangements Committee (2005), p. 20.

[21] Ibid (2005), p. 8.

[22] Shaw (2009), p. 15.

[23] Ibid (2009), pp. 15–17. See also a February 2011 research paper from the Parliamentary Library, "New Zealand Parliamentarians and Online Social Media," which found that 76% of all Members of Parliament had Facebook accounts as of 2 November 2010 and 43% of all Members of Parliament had a Twitter account. Most political parties now also regularly upload videos onto YouTube.

between New Zealand MPs and their constituents, or the way in which interest groups make political use of the internet to bring together a coalition of interested New Zealanders to more effectively lobby the government.

From my experience, there are increasing numbers of social media campaigns on Twitter or Facebook rallying New Zealanders' support for or against policy, legislative and government decisions, and the ability to bombard politicians directly through email campaigns does give those decision makers direct evidence of what the electorate is thinking.[24] Gaming should also be explored as a way of engaging the younger generation in constitutional issues.[25]

The last word on the electorate appeal of major constitutional change should go to Keith Locke's Head of State Referenda Bill 2010 that set out the options of the status quo, a New Zealand head of state determined by a 75% majority in the House, or a New Zealand head of state directly elected through a Single Transferable Voting ballot. The bill did not even pass its First Reading when it was debated on 21 April 2010[26] and was therefore not referred to a Select Committee, as MPs thought the electorate had no appetite for such constitutional reform. As National MP Simon Bridges said before National voted against the bill:

> This nation has so many more pressing and real issues to grapple with, such as government deficits in an age of ubiquitous entitlements; funding issues for schools, hospitals, fire stations, and libraries; job creation in the face of unemployment; safer communities—we have taxi drivers being killed for a few dollars, dairy owners being robbed for a packet of ciggies, and an elderly woman being badly assaulted in broad daylight for seemingly no reason at all—and a nation that deserves to be more prosperous than it is. Over time, New Zealand may look more seriously at becoming a republic, but many New Zealanders

[24] Examples include the recent campaign to stop section 92A of the Copyright Act 1994 (as amended by the Copyright (New Technologies) Amendment Act 2008) coming into force, and the online petition that swung support in favour of the Civil Union Bill in 2004. The campaign to support Allan and Margaret Hubbard who have personally been placed into statutory management under the Corporations (Investigation and Management) Act 1989 is another example. See also Kate Stone in Chap. 28 of this volume, pp. [493] and [498]: "Developments in ICT providing low-cost, two-way communication that is immediate and far reaching have opened the door to new possibilities for engagement both horizontally and vertically, and to participatory and deliberative modes of conducting public affairs. … [T]he internet has helped destabilise inequalities that prevailed in civil society offline, helping form and maintain groups that lacked 'socially supported advantages of coordination'."

[25] See Jane McGonigal's work on alternate reality games, which combine elements of fantasy with the chance to win or lose real contests. She is the Director of Games Research & Development, Institute for the Future, Palo Alto, California, and specialises in games that tackle real-world problems through planetary-scale collaboration. See also Kate Stone in Chap. 28 of this volume, p. [501] "Participatory activities facilitated by ICT are likely to be particularly effective in enhancing the genuine participation of young people given their greater level of interest and competence in the ICT milieu in which many of them have grown up."

[26] Ayes 53: Labour, Greens and United Future; Noes 68 National, ACT, Māori Party and Progressive.

> will share my view that now is not the time. Today our nation has so many pressing and, frankly, real issues to grapple with that a head of State debate may well be a divisive distraction.[27]

8.6.2 *Legacy of MMP and the New Zealand Bill of Rights Act 1990*

Arguably, if the purpose of a supreme constitution is to rein in executive power, then the adoption of MMP may have already gone a significant way to achieving this. The coalition governments that have resulted from MMP restrict the ability to embark on significant constitutional changes, given the need for minority governments to gain the support of coalition partners and other political parties.

However, the counter-argument is that MMP can enable significant constitutional reform, if it is favoured by the minor coalition partner and included in a coalition agreement. The Foreshore and Seabed Act 2004 was passed under MMP by a minority government, with support from other parties, and was replaced by the Marine and Coastal Area (Takutai Moana) Act 2011 which arose out of a review promised by another minority government's (National's) relationship and Confidence and Supply Agreement with the Māori Party.[28]

New Zealand's last attempt to enact a higher law constitution produced an ordinary status Bill of Rights, which is working well after 20 years. This has effectively taken the issue of a higher law constitution off the table. Janet Hiebert stated that "[t]he combined effects of vetting procedures [under section 7 of the NZBORA], statutory responsibilities to report inconsistencies with rights and exposure to judicial review" means that this Parliamentary Bill of rights model has had impact.[29]

Since the *Building the Constitution* conference in 2000, there is also now the remedy of a declaration of inconsistency between the NZBORA and another enactment,[30] and as Justice Blanchard wrote, citing *R* v *Pumako*[31] and *R* v

[27] Bridges (2010).

[28] National Party and Māori Party (2008), p. 2.

[29] Hiebert (2005), p. 64. Indeed the United Kingdom has considered the effectiveness of New Zealand's ordinary statute constitutional documents in determining the status to give its proposed new British Bill of Rights and Responsibilities, including entitlements to welfare, equal treatment, housing, children's welfare and the National Health System: House of Lords and House of Commons Joint Committee on Human Rights (2009); United Kingdom Ministry of Justice (2009); Wintour (2009).

[30] At the 2000 *Building the Constitution* conference, Paul Rishworth referred to the United Kingdom Human Rights Act permitting a judicial declaration of incompatibility where after trying to construe a statutory provision consistently with the European Convention on Human Rights, a court finds it is unable to do so, and commented that the NZBORA "lends itself to being applied in the same way" (Rishworth 2000, pp. 406–407).

[31] [2000] 2 NZLR 695 (CA).

Pora,[32] "the courts are not averse to sending a strong message about legislation that is regarded as constitutionally improper, whether or not that is manifested as a formal declaration (which will often be unnecessary)".[33]

The courts have also found remedies in the NZBORA for breaches despite the lack of express provision. These include damages,[34] the inadmissibility of evidence and the stay of proceedings, where infringements are found to have occurred.[35]

Two attempts to include a property protection clause in the NZBORA via a Member's bill have failed. This is despite neither of the bills seeking to entrench this provision. Gordon Copeland's New Zealand Bill of Rights (Private Property Rights) Amendment Bill 2005, which included the right to own property and the right not to be arbitrarily deprived of property, was voted down 107–12 at its second reading, after the Justice and Electoral Committee recommended that the bill not be passed.

Significantly, the National Party's minority view, which included that of the current Attorney-General, the Hon Chris Finlayson, who sat on the Committee reviewing this Member's Bill, says that:

> While strongly supporting property rights, we cannot support the passage of this bill for a number of reasons. First, the amendment will have far-reaching implications and could well be the cause of a great deal of litigation against the Crown. The ambit and scope of what is proposed is very unclear. As this is a Members' bill, the select committee has not had the benefit of Crown advice to the same extent as if it were a Government bill. **Much more research is required on the implications of this amendment**.
>
> . . .
>
> If there is to be any amendment of this nature to the New Zealand Bill of Rights Act, it can only be passed after exhaustive consideration. That exhaustive consideration has not occurred in this instance.[36]

An earlier attempt by Owen Jennings MP in 1998 was also unsuccessful. His New Zealand Bill of Rights (Property Rights) Amendment Bill was voted down 110–9 at the second reading, without being referred to Select Committee, (as was

[32] [2001] 2 NZLR 37 (CA).

[33] Blanchard (2008), p. 272.

[34] *Simpson v Attorney-General* (1994) 1 HRNZ 42 (CA); and *AG v PF Sugrue* (2003) 7 HRNZ 137 at [70].

[35] Examples include *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA); *R v Kirifi* [1992] 2 NZLR 8 at 12 (CA); and *Martin v Tauranga District Court* [1995] 2 NZLR 419.

[36] See Justice and Electoral Committee (2007), paras 9 and 12 (emphasis added). The Committee said in its report on the bill in para 6 that: "One of our major reservations is the potential costs resulting from the bill. We agree with submitters who argued that the proposed amendment could complicate the legal interpretation of property rights in New Zealand, especially in relation to the Resource Management Act 1991. Its provisions could have a profound impact on current legislation, especially the Resource Management Act, which would have to be read consistently with the bill and would therefore be interpreted as requiring compensation in certain instances. More generally, the right to compensation would have a considerable effect on the government and local authorities, of which the potential costs remain unknown. We consider that the bill could create outcomes and incur costs that were not necessarily intended."

the practice of the House at the time). The Hon Tony Ryall commenting at the time, said:

> [W]e have to be careful that we do not constitutionalise economic rights in such a way that the Courts start to involve themselves in questions of economic policy. Many of us in this House think that the Courts too frequently involve themselves in matters of social and community policy. I would not like to think that they were now going to involve themselves in matters of economic policy. . . .
>
> To sum up, the Government is opposed to this bill for a number of reasons. Firstly, we believe that it moves beyond the scope of what the New Zealand Bill of Rights was originally intentioned for. Secondly, the leading jurists who considered this issue in the late 1980s put a lot of time and thought into the issue of personal property rights and also recommended to the parliamentarians not to proceed on this issue. Thirdly, the bill is redundant because we have legislation on the statute books at this moment which achieves this. Fourthly, it would not achieve its goal even if it came into the New Zealand Bill of Rights, because this House has the right to override that piece of legislation in the interests of public policy.[37]

The concern evidenced by politicians about a property protection clause in a key constitutional document is understandable, given the implications for the Crown's ability to perform the business of government without significantly increasing its risks of being sued. There is also the Māori dimension, and how any property protection statute would affect Māori rights and interests in private property. The foreshore and seabed is once again topical, with the Government's decision to repeal the Foreshore and Seabed Act 2004 and the enactment of the Marine and Coastal Areas Act, which "recognises and provides for the association of Māori with the common marine and coastal area of New Zealand and ensures that the legitimate interests of all New Zealanders are protected."[38]

[37] Ryall (1998).

[38] The Attorney-General, Hon Chris Finlayson at the first reading of the Marine and Coastal Area (Takutai Moana) Bill (Finlayson 2010, p. 14002). The Attorney General went on to state that the bill "provides for the right to seek customary title to specific parts of the common marine and coastal area if the area has been used and occupied by a group according to tikanga without substantial interruption from 1840 to the present day. The Court of Appeal in the Ngāti Apa decision discussed the concept of customary title. It stated that it could range from use rights, or what it called usufructuary rights, to something similar to freehold title. This bill provides for the exercise of a number of valuable ownership rights because, once granted, such titles will have the following rights in the customary title area: the right to permit or not permit applications for new resource consents, with limited exceptions defined in the bill; the right to give or withhold permission for conservation activities; the protection of wāhi tapu; the ownership of minerals other than petroleum, uranium, silver, and gold; the right to create a planning document; and the presumed ownership of taonga tūturu, which are Māori cultural or historical objects … The scheme of the bill … guarantees the right of access in the common marine and coastal area." (Finlayson 2010, p. 14002) The test for proving customary marine title is set out in section 60 of the Marine and Coastal Area (Takutai Moana) Act 2011: (1) Customary marine title exists in a specified area of the common marine and coastal area if the applicant group – (a) holds the specified area in accordance with tikanga; and (b) has, in relation to the specified area, – (i) exclusively used and occupied it from 1840 to the present day without substantial interruption;

So should New Zealand now undertake the research into the implications of enacting supreme law, when there is no crisis, so the executive and parliamentary branches of government and the public have the analysis to take the decision in future, if they wish? Would New Zealanders benefit from a systematic analysis of how our constitutional system is operating and a more sophisticated and nuanced discussion of the full range of options for constitutional reform, than from ad hoc discussions of constitutional issues as they arise and if they grab the public's attention?

8.6.3 Pandora's Box[39]

The Constitutional Review noted that "embarking on a discussion of possible constitutional change may itself irretrievably unsettle the status quo without any widely agreed resolution being achievable."[40] As Lord Cooke of Thorndon submitted:

> . . . there is an arguable case on different grounds for constitutional change in two major respects . . .
>
> First, New Zealand does lag behind international standards and suffers by comparison with other developed democracies in the absence of a fully enforceable Bill of human rights. As against this, it may be said that the present partially enforceable Bill of Rights works tolerably well, and that in practice human rights are not in the main in serious jeopardy. Secondly, the principles of the founding document, the Treaty of Waitangi, are not incorporated and entrenched as part of a formal constitution. Against this it may be said that in about the last quarter of a century much greater public sensitivity to the importance of the Treaty has developed and that an attempt to constitutionalise it further would create (exploitable) discord and confusion. So, in both these two major respects, the status quo may be the wiser option at the present time.[41]

Considering a supreme constitution would also require New Zealanders and the government to confront head-on some very difficult and politically charged issues, including:

(a) The status of the Treaty of Waitangi;
(b) Māori sovereignty;
(c) Republicanism;
(d) Whether we should be protecting the right to property and against takings by the state;

---

or (ii) received it, at any time after 1840, through a customary transfer in accordance with subsection (3).

[39] See Watkins (2007): "Sure, it would open a Pandora's box of issues – republicanism, the flag, Māori sovereignty, the three-year parliamentary term and, most of all, the Treaty of Waitangi. There is risk. But there are also rewards."

[40] Constitutional Arrangements Committee (2005), p. 8.

[41] Cited in ibid (2005), p. 17 (emphasis added).