

Preface

In mid 2000, academics, officials, business leaders and representatives of civil society gathered at New Zealand's Parliament in Wellington for a conference that was the first of its kind. Entitled "Building the Constitution" it was hosted by the Institute of Policy Studies (IPS) at Victoria University of Wellington. The aim of this event was to bring together a representative cross-section of New Zealand society, including people with a range of relevant expertise, to explore the foundations of the constitution, debate how it might be developed, and consider some of the critical issues that would need to be resolved if there were to be a new constitutional "settlement". At the time of the conference, New Zealand was undergoing a significant transition in terms of its identity and its sense of independence, and various long-standing political norms were being challenged. Debates about the role of the Treaty of Waitangi, our relationship with the international community and our identity within that community had led to calls for New Zealand to embrace a written, entrenched constitution. To the regret of many, the 2000 conference did not produce a roadmap for future constitutional development. It did identify, however, a range of important issues that would need to be addressed if significant constitutional changes were to be seriously contemplated. These issues were enunciated in an elegant and substantial volume – *Building the Constitution* – edited by Colin James and published by the IPS in late 2000.

To mark the tenth anniversary of the 2000 conference, the IPS and the New Zealand Centre for Public Law again brought together distinguished judges, academics, public officials, students and members of civil society, including several keynote speakers from overseas. The conference, entitled "Reconstituting the Constitution" held in August 2010 was generously sponsored by the New Zealand Law Foundation. As with the original event, the conference in 2010 traversed a diverse range of constitutional issues. This volume contains all of the papers presented there, introductions to the main discussions and a survey chapter by

Professor Elizabeth McLeay.* As the editors of this volume, we are greatly indebted to the many contributors, not least for the speed with which they have revised and amended their conference papers.

Understandably, the wider cultural, political and economic context surrounding the 2010 conference differed in many respects to that of its predecessor. Whereas the 2000 conference was held during the early stages of a Labour-led minority government and in relatively buoyant economic circumstances, the 2010 event occurred within the first term of a National-led minority government and in the wake of the global financial crisis. New Zealand's constitution, too, had witnessed some significant changes, not all of which had been expected at the time of the 2000 conference. The Supreme Court had replaced the Privy Council as the country's highest court. The controversial Foreshore and Seabed Act 2004 had been enacted, dividing community opinion and spurring the establishment of the Māori party. Almost as controversial had been the Labour-led government's changes to the regulation of electoral finance in 2008. The latter changes were criticized in the run-up to the 2008 general election by the Electoral Commission for their "chilling" impact on democracy, and spurred further reforms during 2009–2011.

Unsurprisingly, various issues that were contentious at the time of the 2000 conference remain so more than a decade later. Amongst these are the design of the electoral system, not least the merits (or otherwise) of proportional representation and the question of separate Māori representation. Other constitutional issues, too, remain the subject of periodic debate: the nature, powers and appointment of the head of state, the term of Parliament, the protection of indigenous (and other) rights, the governance of major cities, such as Auckland, and New Zealand's relationship with Australia.

The question of electoral reform will be the subject of a further referendum in 2011, held in conjunction with the general election. Whether this will resolve the matter remains to be seen. If a majority of voters favour a further change in the electoral system, a second referendum will be held at the time of the next general election, expected in 2014. This will pit the current Mixed Member Proportional (MMP) system against the option most favoured at the 2011 referendum. But even if a majority of voters support the retention of MMP (whether in 2011 or 2014), there is bound to be continuing pressure for adjustments to some of the details of the current electoral system (for example, the number of constituency seats, the size of the party-vote threshold, and the waiver to this threshold where a party wins at least one constituency seat). In short, continuing debate over electoral system design can be expected for some years to come, irrespective of the outcome of the electoral referendum.

But broader constitutional changes are also in the offing. In late 2008, the National and Māori Parties signed a "relationship and confidence and supply agreement". This included a provision requiring the establishment of a group to review various constitutional matters, including Māori representation. Two years

*The papers published include discussions and the law as it stood at 30 November 2010.

later, the National-led government announced how this “consideration of constitutional issues” would be conducted. In short, the agreed constitutional review process has four aims (see Appendix 1 of this volume):

- To stimulate public debate and awareness of New Zealand’s constitutional arrangements and issues arising;
- To seek the views of all New Zealanders (individuals, groups and organisations) including those of Māori (iwi, hapū and whānau) in ways that reflect the Treaty relationship;
- To understand New Zealanders’ perspectives on the country’s constitutional arrangements, including the range of topical issues requiring further discussion, debate and policy consideration; and
- To identify whether any further consideration of the issues is desirable, and if so, on which issues.

The process, which is expected to take several years, is being co-led by the Deputy Prime Minister (Bill English) and the Minister of Māori Affairs (Dr. Pita Sharples). They will consult with a reference group made up of MPs from across all the parliamentary parties, and will be supported by a Constitutional Advisory Panel. Given the nature and duration of the agreed process, there will be an opportunity for extensive public consultation and debate. This is welcome. Indeed, one of the important themes of the 2010 conference was the desirability of facilitating greater public engagement on constitutional issues. To this end, several of the invited keynote speakers provided first-hand experience of the process of constitutional change in various jurisdictions. Professor Klug discussed the role of civil society in the making of the South African constitution; Father Brennan outlined the work of the Australian National Human Rights Consultative Committee (2008–2009), which he chaired and its consultative process; and Professor Hazell discussed the process and outcome of constitutional change in the United Kingdom since the mid-1990s. A general presumption underlying their presentations was that no major constitutional reforms should be undertaken without widespread and vigorous public debate.

In addition to a focus on the process of reforming constitutions, the 2010 conference had seven main themes: whether New Zealand should become a republic; whether the country needs a written constitution and (as part of this) a strengthened Bill of Rights Act; the future of electoral law; the influence of international treaties on the constitution; the evolution of the relationship between Australia and New Zealand; the role and governance of sub-national government; and the protection of future generations. The chapters in this volume cover each of these themes. While it is of course uncertain how New Zealand’s constitution will evolve over the coming decades, we trust that this publication will contribute to a deeper understanding of constitutional issues amongst citizens and a more informed debate about the options for reform.

We would like to thank all those who contributed to the production of this book: the authors of the 28 chapters for their diligent and rapid re-crafting of their conference papers (or related contributions); the peer reviewers for their helpful comments on

earlier versions of many of the current chapters; Alec Mladenovic for his assistance in coordinating the peer reviewing process; James Gilbert and David Bullock for their assistance with the editing process; and Victoria University of Wellington for their financial support for this publication; the Minister of Justice, Hon Simon Power, and the staff of his Ministry for their support for the conference; Grant Robertson for his assistance in securing the venue; and the staff and students, especially Rachel Hyde, of the Institute of Policy Studies and the New Zealand Centre for Public Law for their competent and efficient organisation of the conference.

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Reconstituting the Constitution

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