

INTRODUCTION & APPROACH

1. The Crown provides this statement for the wānanga ā-rohe phase of Tomokia ngā tatau o Matangireia – the Constitutional Kaupapa Inquiry. The Tribunal has directed that the parties file statements of position on tikanga principles or principles of constitutionality prior to the wānanga. The Crown acknowledges the statements of position filed by the claimants to date.
2. The Tribunal has also directed that:¹

... the Crown should file its own statement of response with the principles of constitutionalism it relies on and which the Crown considers underpins the unwritten constitution of New Zealand.
3. Accordingly, this memorandum sketches some of the broad principles which the Crown considers underpin New Zealand’s constitution. It does not set out all the features of our constitutional arrangements. It does not address the challenges which will be canvassed in this inquiry, or comment on propositions for constitutional evolution and change outlined in claimant statements. It is a preliminary contribution to the Tribunal’s broad inquiry and has been prepared to help inform discussions in the wānanga ā-rohe phase of the Inquiry.

NEW ZEALAND’S CONSTITUTION

4. A constitution is about power of the state. A constitution describes and establishes the major institutions of government, states their principal powers, and broadly regulates the exercise of those powers. All constitutions share these general characteristics, but each constitution is affected by the national character of the state it services.²
5. New Zealand’s constitution is located in various sources rather than in a single document. These sources include the Treaty of Waitangi, legislation, the common law, constitutional conventions, and Parliamentary customs.

¹ Wai 3300, #2.6.19, at [19].

² Sir Kenneth Keith ‘On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government’, in the Cabinet Manual (2023), at p 1.

6. Sir Kenneth Keith's essay, which introduces the Cabinet Manual, while strictly not a part of the Manual, sets out a useful summary of constitutional construction and principles. The essay and Manual set out a range of significant aspects of New Zealand's constitutional arrangements, including constitutional principles, the sources of the constitution, and the Treaty of Waitangi; inquiry bodies such as the Ombudsmen and Commissions of Inquiry, including this Tribunal; and also the role of the public service. The context of international law is referenced. The essay and Manual were last updated in 2023 and the relevant extract from Sir Kenneth is attached in full.

The Treaty of Waitangi/te Tiriti o Waitangi

7. The Treaty of Waitangi | te Tiriti o Waitangi is a founding document of the government in New Zealand and one of the sources of New Zealand's constitution.³
8. The Treaty affects, in various ways and to varying extents, how public power is exercised in New Zealand. It is a major thread in modern day civic discourse. It is reflected in the establishment of the Waitangi Tribunal and its jurisdiction to look at how Crown actions are consistent with the Treaty principles, with regard to the two texts of the Treaty.⁴ It is also reflected in Treaty settlements and the governance arrangements established in connection with them.
9. The Treaty established a dynamic, on-going relationship between the Crown and Māori, with mutuality and reciprocity at its core. In the words of the Waitangi Tribunal in its Motunui-Waitara report, since adopted by Justice Casey, the Treaty:⁵

...was not intended to fossilise a status quo but to provide a direction for future growth and development. The broad and general nature of

³ Sir Kenneth Keith 'On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government', in the Cabinet Manual (2023), at 1; the Cabinet Manual (2023) Appendix A: The Treaty of Waitangi/Te Tiriti o Waitangi at 155.

⁴ Treaty of Waitangi Act 1975, ss 5(2) and 6.

⁵ Waitangi Tribunal *Motunui-Waitara Report* (Wai 6, 1983) at p 61, cited in *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA), per Casey J at 715. See also the more recent Supreme Court citation of *Lands* in *Paki v Attorney-General* [2014] NZSC 118.

its words indicates that it was not intended as a finite contract but as the foundation for a developing social contract.

10. The Treaty is not itself directly justiciable in the Courts, but the Treaty and in particular Treaty principles are now prominent in a range of legislation, and in that way is justiciable.

CONSTITUTIONAL PRINCIPLES

The principle of representative government – democracy

11. Democracy is the underlying principle of New Zealand’s key constitutional conventions.⁶ Parliament’s legitimacy, and its power to make laws, stems directly from its democratic credentials. The government’s power to make Executive decisions is also connected to New Zealand’s periodic free and fair elections in at least three ways:

11.1 the government is responsible to Parliament (discussed below);

11.2 the Ministers in charge of the government are part of Parliament and are therefore democratically elected; and

11.3 much of the power exercised by government ministers and officials is sourced in statutes enacted by Parliament.

12. An important example of this constitutional operation is accountability in relation to public finances. The Crown may not tax, borrow or spend public money, except under an Act of Parliament.⁷ This unites concepts of state power and democratic accountability.

The principle of responsible government

13. New Zealand is a constitutional monarchy with a parliamentary system of government. Parliament comprises the House of Representatives (the elected Members of Parliament) and the Sovereign in right of New Zealand.⁸

⁶ Sir Kenneth Keith ‘On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government’, in the Cabinet Manual, at p 3.

⁷ Constitution Act 1986, s 22.

⁸ Constitution Act 1986, s 14(1).

On a day-to-day basis, the Governor-General represents and carries out the functions of the Sovereign in right of New Zealand.

14. The Executive branch of government is “the part people usually mean when they refer to ‘the government’”.⁹ It is also referred to as the Crown, although this term is sometimes used more broadly. As explained above, most of the government’s powers are sourced in statute, passed by Parliament. The courts enforce Executive compliance with the relevant controlling statute through judicial review, thereby maintaining Parliamentary sovereignty. Other sources of Executive power include the prerogative, the exercise of which is also generally subject to judicial review¹⁰.
15. The role of the Executive is to govern (or administer) the country. The Executive also develops proposals for law reform and provides public services generally through government departments or certain statutory bodies. The Executive is responsible for negotiating international agreements/treaties. However, these only have direct legal effect domestically to the extent they are incorporated into statute by Parliament.
16. The principle of responsible government is reflected in the fact that the Executive government can be made up only of Members of Parliament.¹¹ The Executive must retain sufficient support in Parliament to remain in office. This is known as having the confidence of the House.¹² The Executive government is accountable (i.e. responsible) to the House, which in turn is accountable to the electorate through a range of mechanisms, including parliamentary questions, parliamentary debate, select committees, and periodic general elections. And as discussed below under the rule of law, the Executive must act within the laws set by Parliament. This principle of

⁹ Matthew Palmer and Dean Knight *The Constitution of New Zealand* (Bloomsbury, London, 2022) at p 76.

¹⁰ The prerogative, or “royal prerogative” is what remains of the Sovereign’s power, “so far as it has not been superseded by statute, eroded by judicial decision, or atrophied by neglect or disuse”: Philip Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at p 713.

¹¹ Constitution Act 1986, s 6.

¹² Confidence of the House requires at least a majority of the members of Parliament to support the Government on a vote of no-confidence.

responsible government is a key accountability mechanism within New Zealand's constitutional framework.¹³

The rule of law

17. The rule of law is one of New Zealand's key constitutional principles. It has been described as the sentinel of constitutional government.¹⁴ While the exact scope and form of the rule of law is subject to debate, at its core are the following key principles:¹⁵

17.1 *Everyone is subject to the law, including the Government:* People and institutions that exercise power must do so within legal limits, and be accountable for their actions; everybody is equal before the law and is subject to it.

17.2 *The law should be clear and clearly enforceable:* Everyone should have access to justice and be able to pursue their legal rights. Rights and obligations need to be matched with enforcement mechanisms (civil or criminal) and remedies so that people and/or the State (the government) can enforce them.

17.3 *There should be an independent, impartial judiciary:* Certain decisions must be made by judges who are independent of the government, although they are appointed by it.

18. The rule of law is not comprehensively codified in any one place in our constitution, but notions of the rule of law can be seen across various constitutional sources. The Crown does not attempt here to canvas the full range of these sources. Instead, the Crown only highlights the deep and longstanding significance of the rule of law by reference to a select few

¹³ See also David McGee *Parliamentary Practice in New Zealand* (5th ed, Clerk of the House of Representative, Wellington, 2023) at 5.1.

¹⁴ Philip Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at p 197.

¹⁵ As identified by the Legislation Design and Advisory Committee: [Legislation Design and Advisory Committee Legislation Guidelines](#) (2021 ed) <[LDAC-Legislation-Guidelines-2021-edition.pdf](#)> at 4.1.

sources. Longstanding Imperial enactments still in force in New Zealand demonstrate the depth of the rule of law's history, such as:

18.1 The 1275 Statutes of Westminster, which states "that common right be done to all, as well poor as rich, without respect of persons";¹⁶ and

18.2 The Magna Carta 1297's prohibition on imprisonment, etc, if contrary to the law:¹⁷

NO freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any other wise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.

19. The rule of law's enduring significance is demonstrated in more recent New Zealand sources, such as:

19.1 The Constitution Act 1986, which protects judges from removal from office but for reasons of misbehaviour or incapacity,¹⁸ and prohibits the reduction of their salaries during their commission.¹⁹

19.2 The Cabinet Manual, which recognises both the Attorney-General's particular responsibility for maintaining the rule of law,²⁰ and the Legislation Design and Advisory Committee's mandate to identify potential rule of law issues in legislative development.²¹

Fundamental human rights

20. Fundamental human rights uphold the inherent dignity of people as human beings. They help define the acceptable limits of public power and the core

¹⁶ (1275) 3 Edw 1, c 1, in Imperial Laws Application Act 1988, sch 1.

¹⁷ Magna Carta 1297, c 29.

¹⁸ Constitution Act 1986, s 23.

¹⁹ Constitution Act 1986, s 24.

²⁰ Cabinet Manual, at 4.3.

²¹ Cabinet Manual, at 7.40. See also [Legislation Design and Advisory Committee Legislation Guidelines \(2021 ed\)](#) <[LDAC-Legislation-Guidelines-2021-edition.pdf](#)> at 4.1.

functions of the state. In New Zealand, human rights are affirmed by the common law and legislation such as the New Zealand Bill of Rights Act 1990 (NZBORA). Human rights obligations are also found in international instruments, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.

The separation of powers – principle of non-interference

21. Three branches of government have distinct roles:
 - 21.1 The Legislature’s role includes making laws.
 - 21.2 The Executive’s role includes governing within the law.
 - 21.3 The Judiciary’s roles include interpreting and applying statutory law and applying and developing the common law (i.e. judge-made law).

22. In performing those roles, the three branches provide a set of checks and balances. The “principle of non-interference” serves to preserve this balance – each branch of government should as far as possible avoid interfering with, or intruding on, the functions of the others. For example:
 - 22.1 The courts do not intrude on Parliamentary process and cannot invalidate legislation.
 - 22.2 The Executive acts within the laws set by Parliament or the courts.
 - 22.3 The courts determine the lawfulness of Executive action, assessing whether decision-makers have acted within the scope of their powers, in accordance with legal principle.
 - 22.4 The Executive complies with court decisions and directions but has the same rights of review and appeal as citizens.

23. The relation between the courts and Parliament is sometimes explained as a dialogue. For example, the important role of the NZBORA provides that

courts can declare legislation inconsistent with NZBORA (this in addition to the deployment of NZBORA in challenges to Executive action). If the courts make such a declaration of inconsistency, NZBORA provides a pathway for reporting to Parliament. An obligation rests on Parliament to consider the courts' views in re-assessing the relevant legislation.

Power of Parliament to make laws

24. As set out above under the principles of separation of powers and non-interference, one of Parliament's functions is to legislate. This is recognised in the Constitution Act 1986 which provides that the Parliament of New Zealand has full power to make laws.²²
25. Parliament has the exclusive power to regulate its own procedures. One Parliament cannot prevent a subsequent Parliament from repealing or amending existing legislation, or from passing new legislation. However, Parliament has enacted a number of constitutional laws which require a higher threshold of votes to amend or repeal (all of which relate to electoral issues). The courts can neither invalidate legislation passed by Parliament nor interfere with the legislative process.
26. As explained above, the power of Parliament to legislate, and the mandate of the Government to govern, are both grounded in the principle of democracy - that is, the democratic support of the electorate. There are also constitutional principles which guide the legislature in terms of responsible and appropriate use of its powers.²³ Some of these are set out in constitutional statutes such as the Constitution Act 1986 and the New Zealand Bill of Rights Act 1990 and are discussed briefly above.

FINAL REMARKS

27. The Crown acknowledges challenges to constitutional arrangements and constitutional legitimacy. The Crown is conscious too of academic commentary which addresses the concept of Parliamentary sovereignty and

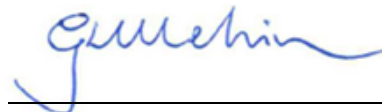
²² Constitution Act 1986, s 15(1).

²³ Matthew Palmer and Dean Knight *The Constitution of New Zealand* (Bloomsbury, London, 2022) at p 132.

potential limits on that concept. As stated in the introduction, this statement does not address those challenges, but the Crown notes that our constitutional arrangements may evolve.

28. The laws establishing our constitutional framework can change over time so that they remain effective and credible, but those changes need broad support so that they are seen to be legitimate. Constitutional change is often preceded by broad public discussion about the reasons for change and the possible alternatives. What is described above is the Crown's outline of important high-level principles of the New Zealand constitution which any recommendations from the Tribunal about reform will need to consider, alongside other issues outlined in the claimants' statements of position.

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TO: The Registrar, Waitangi Tribunal

AND TO: Claimant Counsel