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Petra Butler *Editors*

# Reconstituting the Constitution

 Springer

also see the issue of the flag as being more important. It is certainly odd to find people who are strongly republican but want to keep the current flag which symbolises a relationship with Britain which no longer exists in reality. This, along with the confusion with the Australian flag and the lack of any uniquely New Zealand feature surely means that sooner or later the calls for a new flag must be heeded. I hanker after an adaptation of the Tino Rangatiratanga flag with the black changed to blue. The red, white, and blue colours would give a sense of continuity. The red can represent our part of the Pacific Plate on which we sit, the white Aotearoa, and the blue the sky, on which a Southern Cross could be superimposed. The original red, white and black flag would of course remain for its original purpose and meaning.

#### ***6.2.4 Economic Sovereignty***

But there is a deeper set of issues which need addressing if what we want is a greater sense of our independence and uniqueness. These particularly revolve around the weakness of our economic sovereignty and the kinds of policies required to address that. In the end constitutional change within a context of economic dependency seems to me to be like making the icing without the cake. Obviously this is not the forum to discuss the best policies though in order to avoid misunderstanding I would simply note that economic sovereignty is not to be confused with economic isolationism.

#### ***6.2.5 Other Constitutional Reforms***

Where I do believe it is important to limit the debate at this stage is in relation to the matter of a republic. As I said before, there is no need for this to turn into a Trojan horse for other constitutional changes. Issues such as a second chamber or a written constitution have no necessary relationship to the way in which we choose a head of state. Even more, moving to a republic does not require moving away from the sovereignty of Parliament and endowing the Supreme Court with the power to declare laws unconstitutional. In fact, there is no need to change the current powers of the Governor-General at all. As a ceremonial position in a small and active democracy it has served us well.

One of the virtues of the current arrangements is that arguably they lead to a higher level of political participation than in many countries with formal constitutions and powerful judiciaries simply because the political process is the means whereby change can be achieved. The politicisation of the courts and the police is scarcely something to admire or emulate.

Moreover, the introduction of Mixed Member Proportional (MMP) voting system, whatever its other faults and virtues, has removed many of the objections which have been made to our system. In particular, we have not seen a one party majority government since MMP's introduction, a fact which significantly weakens the argument for a chamber of review. Under MMP the select committees have grown more powerful. Parliament has also become more broadly representative of the people at large. I have to observe that often when people make calls for change to this system it is because they disagree with the outcomes of the process. They seem wish to change it so that the outcomes can somehow or another be influenced in an undemocratic way to be closer to their personal preferences. As I can personally assure you, the nature of democracy is that you lose a lot of the time. That does not make the system wrong even if you are right!

Of course there is much about our Parliament which is redolent of that at Westminster. Even in the United States Congress there are more than faint echoes in that regard. But while there is a core commonality of procedures which comes from long experience the fact is that, especially over the last 25 years, the New Zealand Parliament has developed in ways significantly different from that of its numerous Westminster-sourced cousins in many respects, including cultural ones.

### 6.3 Becoming a Republic

I come back then to the central question: should we become a republic? I hope I have at least done enough to suggest there is no need for haste in this matter and that it scarcely goes to the heart of who we are as a nation. But there does seem to be an inevitability about some kind of change occurring at some time though it is probably a close contest between this and raising the age for New Zealand Superannuation as to which our political leaders can run away from the longest. It is inevitable in part for something I said earlier about young people – the monarchy in Britain seems less and less relevant to us as time goes on. And as more and more of our population originates in countries such as China and India that is only likely to become truer.

Moreover, there are specific aspects of the current rules around the choice of the monarch which are simply inconsistent with our other values. The very notion of inherited rights may be one, though in a country with once again growing inequality and no death duties it cannot be taken as too powerful an argument. But the notions that male children always take precedence and that Roman Catholics are automatically disqualified are surely inconsistent with modern New Zealand values.

And if New Zealand over time has become more distant from the monarchy it is arguable that the reverse is also true – the monarchy has become more distant from New Zealand. Since the conference was held the Canterbury earthquake has perhaps highlighted that fact. Undoubtedly some such comparable event in the United Kingdom would have seen senior members of the Royal Family visiting the area at a very early opportunity. But the Canterbury earthquake elicited no such

response despite the fact that we are barely more than a day's travel time apart which underlines the drift apart which has occurred.<sup>1</sup>

One thing that does seem to be largely accepted is that the current incumbent should be allowed to live out her time as Queen of New Zealand. Her dogged sense of duty and determination to do what is right may seem quaintly old-fashioned to some but is perhaps what continues to lead a small majority of New Zealanders to favour the retention of the monarchy and a bigger majority to support no change until she dies. This does not mean that nothing should be done until that happens since that would obviously lead to an unnecessarily pressured situation at that time since the British would have declared Charles III king immediately on her death. That is particularly so because under our present laws he would become King in right of New Zealand at the same time.

### ***6.3.1 Suggestions for Change***

Thus my suggestion for modest change is to legislate in the not too distant future to hold a referendum in conjunction with a general election to decide whether an election of a new head of state should occur on the death or incapacity of the Queen. The new head of state should have the same powers as those currently exercised by the Governor-General. The Governor-General at the time of the Queen's death should continue in that role until the choice of a new head of state has occurred. And perhaps we could do better than our decimal currency exercise and think of a more Kiwi name than president.

The one problem is who chooses. It seems to me the answer to that question is really determined by what powers it is decided the new head of state should have. If those powers are significant executive ones that are exercised independently then election must be by the public at large. But if, as I suggest, those powers are the ones currently exercised by the Governor-General and also, therefore, exercised on the advice of Ministers, then the appropriate method would be by some kind of super majority of Parliament. This change could occur irrespective of the move to a republic. We may even turn the argument back to front. If the head of state is elected then inevitably they possess a separate mandate from that held by Parliament and, by extension, the Cabinet. In that case it is arguably illogical for the head of state to have no independent powers. But that then does start to shift us more in the direction of the American constitution which, as I have argued above, is neither necessary nor desirable.

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<sup>1</sup> Editors' note: Dr. Cullen is referring here to the September 2010 earthquake. After the February 2011 Christchurch earthquake which claimed more than 180 lives, the Queen expressed her shock and sent her condolences. Prince William attended a memorial service for the victims held in Christchurch on 18 March 2011.

The issue of the Treaty can be simply dealt with by a clause in the empowering legislation stating that, in the event of a change in the nature of the head of state, then, for the avoidance of doubt, this change does not in any way affect the duties and obligations imposed by the Treaty.

I suspect that my modest proposal for change has a low chance of success simply because too many of those who favour republicanism carry with them a large amount of other constitutional baggage. The result may well be like the Australian experience of a few years ago. There, ironically, the republican purists managed to achieve a stalemate around a monarchical status quo which, in Australia's case, was not even supported by a majority of the people. In New Zealand, where support for a republic is significantly weaker, and where the status of the Treaty is a further complicating factor, that is even more likely to be the outcome.

Perhaps there is an even more modest proposal inherent in what I have just said. That is to legislate to provide that the choice of Governor-General (strictly speaking constitutionally the nomination) should henceforth be made by a supermajority of Parliament, say 75%. The same legislation could then provide for a referendum to be held at the next general election on the question that, on the death of the Queen, the Governor-General would become head of state. If the referendum supports such a change New Zealand would thereby become a republic-in-waiting. All the other issues that people wish to deal with can be dealt with at some leisure as there is every indication that the Queen has a fair number of years yet to live. But then again that suggestion may just be too simple for those whose life and living revolve around being complicated. In which case we old traditionalists can carry on in peace for a while longer and the monarchy may yet see out at least another generation of its opponents.

# Chapter 7

## Patriating Our Head of State: A Simpler Path?

Dean R Knight

### 7.1 Introduction

The debate about whether New Zealand should become a republic risks becoming a mare's nest. The idea of cutting ties with the monarchy is engrafted with a myriad of other constitutional reforms from budding constitutional architects: a codified constitution; codification – or removal – of the reserve powers; an entrenched Bill of Rights; resolving the status of the Treaty of Waitangi; sorting out the flag, the national anthem. The list goes on. It is no wonder therefore that little progress has been made on this front since the time of the last conference, *Building the Constitution*, in 2000, despite the fact that three of our most recent Prime Ministers have all described moving to a republic as being “inevitable”.<sup>1</sup>

Like one of the speakers at the earlier conference, I suggest the republican project is much simpler.<sup>2</sup> At its heart, it involves changing our Head of State from a hereditary monarch based abroad to a local, chosen by us. The only consequential change also needed is the substitution of a new collective entity representing the state, government and people of New Zealand for the present

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<sup>1</sup> For example, Bolger (1994); Clark, reported in *The Dominion* (2002); Clark (2009b); and Key, reported in Smith (2008).

<sup>2</sup> Ladley (2000).

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Crown. Two changes. No more. No less. The minimum change necessary in order to patriate – or, rather, to complete the patriation of our Head of State.

This task is even easier because New Zealand is presently, as Professor Brookfield described us, a “de facto” republic.<sup>3</sup> It might even be appropriate to describe the Governor-General as our “de facto Head of State” (although I nervously note the grief that recently arose in Canada when similar language was deployed).<sup>4</sup> We need look no further than the office of the Governor-General, and people who have and will occupy it, for our new indigenous Head of State.

We can simply promote the Governor-General from the Sovereign’s delegate to the people’s representative in his or her own right. This move would do no more than reflect who, in reality, exercises the day-to-day functions of the Head of State. Nor do we need to invent a new title or style. It is not essential that the new Head of State assume the mantle of “President”. The title of Governor-General could continue – or an alternative title could be adopted.

It will be obvious that I am a fan of “soft republicanism”.<sup>5</sup> My commitment is to patriating the office of the Head of State, that is, cutting ties with the monarchy. We should pursue that passionately, but in a way that does not upset or alter the other constitutional structures and delicate power balances. I remain agnostic about other constitution reforms, even those touching the powers and functions of the Head of State. I do not detect strong dissatisfaction with the other arrangements and see little need to pursue a broader full republican agenda that would fundamentally change the nature and powers of the Head of State, Parliament or government. While the status and influence of the Treaty in our constitutional dynamic continues to be debated, settling the place of the Treaty is not an essential pre-condition to changing our Head of State. The existing status quo can be preserved in a way that allows the *kōrero* about the legal and constitutional place of the Treaty to continue to develop. The significance of the Treaty in our constitutional fabric needs to be recognised in any transition from the Crown to a republic. But its significance is relational, not static. In my view, the novation of Treaty rights and responsibilities (something that has occurred several times already) does not affect the fulfilment of those rights and responsibilities.

At the end of the day, trying to do too much and attempting to fix every potential constitutional gremlin or pursuing a “Rolls Royce” constitution is an impossible and unnecessary task. It is merely an excuse for delaying an important step in the evolution of the New Zealand identity and nationhood. It is inconsistent with the Kiwi approach to constitutional reform.<sup>6</sup> Our approach to constitutional reform has been described as “ad hoc pragmatism”<sup>7</sup> or “pragmatic

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<sup>3</sup> Brookfield (1995), p. 317.

<sup>4</sup> Canada’s Governor-General, Michaëlle Jean, once described herself as the “Head of State”, and was later rebuked by Canadian Prime Minister Stephen Harper: Clark (2009a).

<sup>5</sup> Ladley (2000), p. 268.

<sup>6</sup> The more colloquial term “Kiwi” sometimes better conveys the sentiment in this context.

<sup>7</sup> Palmer (2007), p. 571.

evolution”.<sup>8</sup> The soft republicanism approach to reform of the office of Head of State is therefore consistent with how we have made and moulded our customary constitution to date.

Armed with a minimalist vision of the republican question, the usual questions – why? who? what? when? how? – become less intimidating and less contentious. I explore in more detail the approach outlined above, looking at these questions through the eyes of a soft republican.

## 7.2 Why?

In some respects, the *why* arguments are the least interesting element of this debate. At their extremes, they are trite and well-rehearsed.<sup>9</sup> Like the recent Battle for Kelburn Park between Alf’s Imperial Army and New Zealand Republic@Vic,<sup>10</sup> recital of the arguments may create an amusing dogfight with many sparks and much barracking but it is unlikely to lead to a concession, consensus or constructive advancement of the issue.

For the record, the arguments for a republic are usually centred on the following:

- Independence (New Zealand is an independent country and should have a Head of State of its own);
- Nationhood (our Head of State should reflect our unique sense of nationhood and royal linkages are out-dated); and
- Democratic evolution (our constitutional arrangements should be more democratic).

In contrast, the monarchists defend the status quo by pointing to the following:

- The Head of State has already been patriated (the Queen is the Queen of New Zealand);
- There are dangers in changing (concerns that republics are unstable; viz, “if it aint’ broke, don’t fix it”); and
- The continuing benefits of royal links (British linkages and protection).

Proponents of full republicanism will also proclaim that our constitution is broken and needs to be fixed. More democracy, more certainty, more codification. That is why we should reform our constitution and become a republic. But the *why* question is harder for proponents of soft republicanism, who are perhaps less visible in the royalists-modernists debate. Soft republicans are not willing to concede that the existing legal structures and processes are defective. The model of the *de facto*

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<sup>8</sup> Constitutional Arrangements Committee (2005), para 26 and Joseph (2007), p. 139.

<sup>9</sup> Hayward (2000), p. 261; Stockley (1996a), p. 61. See also [www.republic.org.nz/reasonsforarepublic](http://www.republic.org.nz/reasonsforarepublic) and [www.monarchy.org.nz/modern.html](http://www.monarchy.org.nz/modern.html).

<sup>10</sup> [www.republic.org.nz/node/1419](http://www.republic.org.nz/node/1419).



republic *is* generally working well, save for the incongruous symbolism that cloaks it.

But symbols and identity matter. As a symbol, the monarchy sits uncomfortably with the vision of ourselves as a progressive, egalitarian South Pacific nation. The monarchy operates as a significant constraint on our ability to develop further our sense of nationhood. The British anchor has served us well in the past, but we are now communities with different demographics, different cultural mixes, and different aspirations. While Governors-General are charged with cultivating some of this symbolism,<sup>11</sup> their ability to present the office of Head of State as a mirror of the values and aspirations of peoples of New Zealand is dampened by their subordinate status as a representative of the Royals.

It is significant that the role of the de facto Head of State has evolved significantly over time.<sup>12</sup> Every Governor-General since 1967 has been a New Zealander. Women have occupied the post. Greater ethnic diversity has been evident of late, with Māori and Pacific appointees. Governors-General now regularly represent New Zealand internationally. The current Governor-General regularly expresses greetings in Te Reo Māori and New Zealand Sign Language. Sir Anand Satyanand also now issues a “New Year’s Day” message, with content which seems much more relevant to New Zealanders than the Queen’s Christmas message. In many ways, the evolution of the office tracks our own evolution as a nation. But there are limits to the extent to which the office can continue to develop when it is anchored by a foreign pedigree. Radical change is not needed, but continual evolution will allow the office-holders to ensure that the role continues to represent and reflect the values and expectations of a modern-day New Zealand.

I should also record that the evolution of the symbols of the office and nationhood do not require us to expunge the symbols of our British heritage. Here, I may cause some angst for some more militant republicans. In my view, the path to the republic and beyond is one of blending our heritage with our modernity. Over time the now will probably become more dominant than the past as we reinvent and recast our symbols.

### 7.3 Who?

The question of who should be the Head of State under a republic also seems to attract a lot of interest. Again, soft republicans say there is little need to deviate from the recent pattern of Governors-General. They have served us well when discharging the ceremonial, community and constitutional functions of the office.<sup>13</sup>

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<sup>11</sup> Satyanand (2010a).

<sup>12</sup> Tizard (1993); Cartwright (2001); McLean (2006); and Satyanand (2010b).

<sup>13</sup> Palmer and Palmer (2004), pp. 54–55.

Former judicial appointment is less important than it was in the formative days of our Mixed Member Proportional electoral system (MMP). The conventions around government formation and the role of the *de facto* Head of State are now quite sophisticated and readily understood. While the constitutional functions remain significant, a senior civil servant or leader of a non-government organisation who is familiar with the constitutional landscape and capable of receiving and acting on advice is well-placed to discharge these functions. The Prime Minister has already signalled that, for the appointment of a new Governor-General in 2011, we may see a departure from the practice of appointing someone with judicial background.<sup>14</sup>

While the identity of potential office-holders makes headlines, the means of appointment is the more important question: *direct election* of the Head of State by the public or *indirect appointment* by the Parliament. It is this issue, and the polarised debate about it, that probably killed the Australian republican debate and plebiscite in 1999.<sup>15</sup>

What is clear is that the present status quo for selection of the Sovereign is obviously unsatisfactory. As noted earlier, the hereditary and discriminatory appointment process for the monarch is an anathema to New Zealanders. It is biased towards males and is antipathetic towards Catholics.<sup>16</sup> We will almost certainly never see a Kiwi fill the role of monarch. That is a shame for New Zealanders generally. But it must be a major disappointment for Māoridom; under the present arrangements, there is no real prospect of the New Zealand Head of State being someone Māori.

The appointment process for the Sovereign's delegate, the Governor-General, is also too loose. The Governor-General is formally appointed by the monarch under the Letters Patent.<sup>17</sup> In reality, the selection of the Governor-General is the responsibility of the government of the day and the Prime Minister.<sup>18</sup> Under our cardinal constitutional convention, the Monarch is expected to act on the advice of her responsible advisors – although, as a courtesy, the proposed appointee is canvassed with Her Majesty first. There remains some uncertainty about cross-party involvement in the selection process. Some observers suggest there is a constitutional convention of consultation, at least with the Leader of the Opposition.<sup>19</sup> However, whether this convention exists and/or has been honoured remains something of a mystery. There have been instances where it appears some parties were not consulted and did not favour the appointment of the candidate.<sup>20</sup>

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<sup>14</sup> Radio New Zealand (2011).

<sup>15</sup> Higley and Evans Case (2000); Stockley (1998).

<sup>16</sup> Act of Settlement 1701 and Royal Marriages Act 1772. See Feldman (2004), para 3.87.

<sup>17</sup> Letters Patent Constituting the Office of Governor-General 1983, cl 2.

<sup>18</sup> Cabinet Office (2008), para 2.5.

<sup>19</sup> Palmer and Palmer (2004), p. 53.

<sup>20</sup> It is understood that the convention was not followed for the appointments of Sir Keith Holyoake (1977), Sir Paul Reeves (1985) and Sir Michael Hardie-Boys (1996).

The present appointment process model for the Governor-General could simply be rolled over. But the looseness of the appointment process and possibility for contentious appointments risks undermining the essential apolitical and unifying elements of the office. I favour minor tweaks to the appointment process to avoid this, specifically, through the formalisation of the present best practice around appointments. Indeed, the Republican Movement recently proposed similar changes to the Governor-General's appointment as it stands now,<sup>21</sup> and the ideas were raised in recent debates on the Governor-General Bill.<sup>22</sup> The nature of the functions of the Governor-General as a guardian of the political and parliamentary process suggest there should be broad acceptance amongst the political players. That is, there should be practical consensus amongst the parliamentarians about the appointment of the Governor-General. I favour a model based on a resolution supported by a super majority within the House.

The 75% majority found in s 268 of the Electoral Act 1993 is an obvious template for appointment. But I worry it is a remnant of the two-party first-past-the-post (FPP) days. If we are serious about the appointment having a widespread parliamentary support, then the super majority needs to recognise the role of minor third parties too. One option is to adopt the 75% MPs/50% parties super-super-majority approach already found on the statute book.<sup>23</sup> That is, a provision such as this:

## Appointment of the Governor-General

- (1) The Governor-General is appointed by resolution of the House of Representatives.
- (2) No resolution may be made by the House of Representative under subsection (1) unless:
  - (a) the resolution is agreed by at least half of the parliamentary leaders of all political parties represented in Parliament; and
  - (b) the members of Parliament of the political parties whose parliamentary leaders agree with the resolution comprise at least 75 per cent of all members of Parliament.

Concerns about minor parties holding the process to ransom are, I think, misplaced. But I would not quibble too much about the nature of the super majority provision. The principle of widespread parliamentary support is more important.

Of course, more dramatic change to the selection process is also possible, whether it be formalised voting systems in the House or some form of public involvement in the nomination process. But, for a soft republican, these are an unnecessary complication. Direct election, through a popular poll, is another possibility – and one of the options posed in Keith Locke's recently defeated Head of State Referenda Bill. While experience abroad shows that this is a workable mechanism for appointment of a Head of State,<sup>24</sup> one wonders if it is a

<sup>21</sup> Republican Movement of Aotearoa New Zealand (2010).

<sup>22</sup> Ultimately, questions of appointment were ruled to be out of scope of the Bill: Government Administration Committee (2010).

<sup>23</sup> Electoral Finance Act, s 146(1)(c) (now repealed).

<sup>24</sup> For an excellent discussion of the Irish President and direct election, see Harris (2009b).

step too far for pragmatic New Zealanders and risks providing false hope for the electorate of some massively revamped – and politicised – Head of State role. Again, soft republicans see this as an unnecessary complication and risk.

The final element of the *who* question is the brand: what should be the name or style for new Head of State? As mentioned earlier, many assume the mantle of President is inevitable. But the constitution reformer's brush is not so limited. We can call them whatever we want. The language of President would seem to be awkward and connotes more dramatic reform.

A truly soft republican might therefore suggest that “new” title for the Head of State continue to be the same as the old title: Governor-General. While unprecedented, retaining the title of Governor-General minimises any change and is consistent with the brief of merely entrenching the reality of our Head of State role. Some might, though, worry that the retention of the title implicitly retains links to the Royals and does not do enough to repudiate the Governors-General's now subordinate status.

Another option might be adopting the generic title “Head of State”. While perhaps lacking in grandeur, such a label would not be objectionable. Our Samoan cousins adopted this Head of State style in their constitution, but have also adorned it with the indigenous title “O le Ao o le Malo”.<sup>25</sup> That approach seems sensible. One might expect over time the office of Head of State or Governor-General might be gifted a Te Reo title by Māoridom that may capture the essence of the revitalised role.<sup>26</sup>

## 7.4 What?

The *what* question – the question of the powers, functions and duties of the Head of State – is easy for the soft republicans. The new Head of State will be imbued with exactly the same functions, powers and duties as the monarch. Reforming legislation can make this clear with a generic statement detailing the transfer of power on these terms. The prerogative powers of the monarchal Head of State will continue with the new indigenous Head of State. This is the most modest and efficient approach. A more complex and time-consuming task is to create a catalogue of all the monarch's powers and to provide for specific transfer in each and every case.<sup>27</sup> At least in the first instance, I think this is an unnecessary and

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<sup>25</sup> Samoan Constitution, s 16.

<sup>26</sup> The current Te Reo translation of the Governor-General's position is Te Kāwana Tianara o Aotearoa.

<sup>27</sup> See, for example, the present Law Foundation-funded project being undertaken by Dame Alison Quentin-Baxter and Professor Janet McLean (Law Foundation (2009)) to identify all the powers and functions of the monarch.