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Reconstituting the Constitution

 Springer

organisations, which lie between formal political engagement and non-engagement.⁴³ A political system which only seeks to engage citizens at predetermined intervals is losing relevance amongst a generation which is “accustomed to empowerment, open discussion, and immediacy – all antithetical to the disempowerment and myopic discussion of bureaucratic government processes”.⁴⁴ Engagement with traditional ideology, hierarchical political parties, and formal, process-oriented representative democracy is being replaced by involvement in social organisations characterised by their fluid and horizontal relationships, and direct action on single issues, which now play a much greater role in the formation of their identity than formal politics.⁴⁵ These fluid affinities require more, over and above the right to vote; they require space for deliberation. Currently constitutions provide for the exercise of the legal right to vote, but do not provide for the social activity of discussion. The constitutional framework of the nation-state needs to catch up with the social sphere in which citizens are interacting. This realignment requires both institutional and behavioural changes. Institutionally the constitution needs to provide for deliberation, behaviourally it needs to socialise citizens for effective deliberation.

28.5 Deliberative Democracy: Engaging Civic Incompetence

28.5.1 *A Threat to Stability*

Generally current day democracies lack the space for “proactive, self-informing, experimentally based, socially inclusive, democratically moderated but autonomous deliberation”.⁴⁶ Today the advent of ICT means that the barrier to participation lies not in physical space, but in the lack of constitutional space. In part this is because the use of more direct deliberative activities in the decision making process, previously reserved entirely to elected representatives, is often seen as a threat to stability. The dichotomy between representative and more direct democracy tends to be too rigidly constructed.⁴⁷ Further, it is important to critique how representative our democracy really is when the ability for some sectors of society to genuinely participate is severely curtailed by a disparity in access to information and tools for participation. Utilising more direct forms of democracy does not preclude a representative system, but rather reinforces democratic ideals by expanding opportunities for meaningful participation.

⁴³ Cammaerts and Van Audenhove (2005), p. 182.

⁴⁴ Ferdinand (2000), p. 181.

⁴⁵ Hannon (2008); Dahlgren (2005), p. 154.

⁴⁶ Coleman (1999), p. 20.

⁴⁷ Coleman (1999), p. 18.

Deliberative democracy necessitates intervention to avoid the threat of populist plebiscitary democracy; it necessitates education, facilitation, and mediation to facilitate the participation of citizens who may indeed be ‘rationally ignorant’ on many policy issues. But as Thomas Jefferson articulated, “civic incompetence [is] not a reason to disempower citizens, but empowerment a remedy to redress incompetence”.⁴⁸ Engagement in participatory activities has a cumulative effect on civic competency. James S Fishkin attests to the apparently “galvanizing effect on the participant’s interest in public affairs” of participation in deliberative activities.⁴⁹ The educative nature of participation make participatory systems less of threat to stability and self-sustaining.⁵⁰

28.5.2 (De)Stabilising Inequalities

In light of the move away from more rigid traditional forms of association, documented in Putnam’s *Bowling Alone*, it is argued that we are forming networks of multiple, overlapping, and shifting allegiances around various affinities. Michael Vlahos has used a business model to explore the nature of the interaction between communities of affinity in a network society. In business the network works to more efficiently match buyer and seller, and as a result reduce transaction costs. Civic affinity is good for “business” as it provides a strong bloc of “consumers”. The enhancement of the network is good for citizens as it works to unite them with the appropriate communities.⁵¹ One of the concerns aired in relation to this shift from nation-state based identity to ‘identity-through-conscious-affinity’ is the fragmentation of society and the loss of community or social capital that leads to civic engagement.⁵² The fear is that in this new communication environment in which citizens have a greater ability to select what information they are exposed to, and a greater quantity and diversity of information from which to choose, producers of information are able to tailor the information they disseminate to the individual – matching buyer and seller – and as a result citizens are increasingly exposed to the same information. Different sectors of society will be given different information and the interactive capacity of ICT will be used for deliberation between like-minded people.⁵³

⁴⁸ Barber (1998–1999), p. 584.

⁴⁹ Fishkin (2003), p. 27.

⁵⁰ Pateman (2003), p. 47.

⁵¹ Vlahos (2003), p. 192.

⁵² Vlahos (2003), p. 194.

⁵³ Delli Carpini and Keeter (2003), p. 145; Oates and Gibson (2006), p. 12.

As Shirky notes, the Internet has helped destabilise inequalities that prevailed in civil society offline, helping form and maintain groups that lacked “socially supported advantages of coordination”.⁵⁴ While traditional social groups may develop an online presence there are many groups which have formed as a result of the Internet; these groups exist because there is a demand for them even if they lack general social approval. Shirky argues that the Internet, like other technological developments before it, is changing society precisely because no one has ultimate control of how it is used and who uses it.⁵⁵ These new technologies have the potential both to create new and exciting avenues for civic engagement, but also to further entrench existing inequalities in access to participatory opportunities, knowledge and, ultimately, power.⁵⁶ As Michael Sandel points out: “[c]onverting networks of communication and interdependence into a public life worth affirming is a moral and political matter, not a technological one.”⁵⁷

The future role of ICT in political participation depends in large part on three factors – access to resources; technical skills; and mobilisation. If ICT are to provide a useful sphere for conducting democratic activities it is important that all citizens irrespective of their position in society have the ability to access the Internet. However, engagement in civic activities online does not depend solely on having an internet connection. The Internet has the potential to provide access like never before to a quantity, diversity, and depth of information, however, those lacking the technical training, even if they have the hardware, may still only gain access to highly mediated and superficial meaning. Jefferson’s ideal participatory democracy revolved around an informed public, requiring not only information, but also thought, wisdom, and discernment.⁵⁸ Today information is commonly talked about as a ‘thing’ in its most physical sense – a product. However, in the Jeffersonian sense information should be considered to be a process: the generation of meaning from raw material.⁵⁹ How this process is conducted determines the framing of issues and how the debate around issues develops. If traditional intermediaries are taken out of the equation citizens will have to represent the raw material and perform the *process* of information themselves in order to gain access to meaning. This is a complex process and citizens must possess certain capabilities if they are going to perform it effectively.⁶⁰ If citizens are equipped with the skills to conduct this process they will be able to frame issues in a way which reflects the value they place on certain considerations. Thus the degree to which ICT become a democratising force, used to support communities of

⁵⁴ Shirky (2008), p. 198.

⁵⁵ Shirky (2008), p. 295.

⁵⁶ Norris (2001), pp. 235–237.

⁵⁷ Sandel (1996), p. 340.

⁵⁸ Yankelovich et al. (2005).

⁵⁹ Mulder (1999), p. 555.

⁶⁰ Mulder (1999), p. 555.

efficacious political participation and destabilise inequalities in participation, will depend on the political culture which surrounds its use.⁶¹

28.5.3 Accelerated Pluralism: Beyond the Common Good to Cooperation and Coordination

The potential for participation through ICT to destabilise inequalities could have important repercussions in terms of the effect of interest groups on political decisions. One of the challenges Diamond identifies for humankind trying to deal with complex environmental issues is the continuance of ‘irrational behaviour’, of which there are proven harms, because a particular use of a resource is linked to identity.⁶² In New Zealand the narrative of being a farming nation has meant that the demands of groups such as Federated Farmers, based on their calculations of the short-term costs for farmers, have had held more sway in the debate over managing our emissions than they deserve given the magnitude of the long-term costs of not reducing emissions effectively. Bruce Bimber postulates that the increasing prevalence of ICT has eventuated in a form of “accelerated pluralism” in which “the Internet contributes to the on-going fragmentation of the present system of interest-based group politics and a shift toward a more fluid, issue-based group politics with less institutional coherence.”⁶³ In this context, processes of deliberative democracy have the potential to capitalise on this fluidity of affinity and prevent interest-group politics monopolised by particular groups. A strong deliberative democracy requires “spontaneous and voluntary association”⁶⁴ of free and equal citizens who have the opportunity to participate in deliberative exchanges with peers and those in power. ICT have the potential to facilitate such spontaneous and voluntary association due to their decentralised and unregulated nature, as noted in relation to Wikipedia, which can work to reduce the influence of state power and the mass media on the deliberation process.⁶⁵

If we assess political participation in this context in terms of civic culture, as Dahlgren does, taking citizens as social agents and enquiring into the cultural origins of agency,⁶⁶ the significance of political participation lies in the *process* of developing the person into the citizen. In the context of ICT and accelerated pluralism this process involves the taking up and casting off of multiple identities. This facilitates the appreciation of the diversity of interests implicated in any given

⁶¹ Coleman (1999), p. 17.

⁶² Diamond (2005).

⁶³ Bimber (1998), p. 133.

⁶⁴ Bimber (1998), p. 153.

⁶⁵ Bimber (1998), p. 153, footnote 62.

⁶⁶ Dahlgren (2005), p. 157.

issue and thus the development of civic culture, which demands citizens who do not seek purely self-interested solutions and have “the capacity to see beyond the immediate interests of one’s own group”.⁶⁷ The benefit of deliberative processes carried out in this context lies not wholly in reaching a consensus or revealing the common good, but rather the participation of a multitude of parties in the deliberative process.

Most political decisions are cooperation or coordination problems, rather than cognition problems of revealing a common good. The solution to cooperation and coordination problems emerge from below, they are not imposed from above.⁶⁸ As James Surowiecki asserts, the smaller the size of the group making the decisions the less likely the decision will be “right”.⁶⁹ Therefore, if a representative group of inevitably self-interested citizens are sufficiently informed, and able to discuss issues with their equally self-interested peers they are able to deal with complex issues and arrive at some working concept of the common good, reflecting the acceptance, rejection, and expression of core societal values. As Surowiecki articulates, a strong democracy “inculcates the virtues of compromise”;⁷⁰ through participation in the democratic process citizens develop the capacity to see beyond their immediate self-interest as it involves not always getting what one hoped for. The accommodation is imbued with legitimacy on the basis of the process of decision-making, rather than the proximity of the substantive decision to some objective concept of the common good.

28.6 Re-valuing Decision-Making: Suggestions for the Future

I have argued that developments in ICT provide the possibility for citizens to have much more direct access to the process of extracting meaning from information, and consequently an awareness of the values that act on this process. Such an awareness, combined with the increasing fluidity, multiplicity, and overlap of association in the ICT context provide a fertile ground for effective deliberative participation. Decision-making through such a process must still be underpinned by a set of core values, but what these values are and the expressing of these values in each decision-making moment must be determined through a process of on-going democratic debate.

⁶⁷ Dahlgren (2005), p. 158.

⁶⁸ Surowiecki (2004), pp. 270–271.

⁶⁹ Surowiecki (2004), p. 267.

⁷⁰ Surowiecki (2004), p. 271.

Reflecting the theme of protecting future generations, the value of intergenerational justice has featured throughout this paper. Under the umbrella of this overarching value is the idea of guardianship. This would involve an understanding that humans should act as guardians or trustees of the Earth for future generations and, as articulated by Boston, this would invoke “all the connotations usually associated with a fiduciary duty . . . good faith, a high standard of care, prudent oversight and wise management.”⁷¹ As future generations have no political or financial power there is no accountability for our current actions and they are wholly reliant on us embracing a sense of responsibility toward them.⁷² Often concern is expressed over the representativeness of more direct forms of democracy, however, this concern is turned on its head not only when we consider the current voting statistics and the poor turnout of the young, the impoverished, and the uneducated, but also when we consider the absence of the voice of future generations. 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. The actualisation of the youth voice is important in terms of combating presentist approaches to decision-making. Accompanied by a political socialisation of the wider populace to deal with knowledge more appropriately the goal should be to reform voters’ environmental understanding, and consequently their time preferences.⁷³ As has been argued, deliberative democracy in the ICT milieu has the potential to engage the marginalised, but also to extend our frames of reference beyond the short-termism of the nation-state electoral cycle.

The predominance of traditional notions of the indivisible sovereignty of the nation-state is inconsistent with the global nature of issues which affect future generations. While reconceptualisations of sovereignty should not undermine democracy, for as Boston explained, “there is no point . . . ‘protecting the unborn from the consequences of our short-sightedness’ only to weaken ‘the power of future people to protect themselves’ or ‘rule themselves effectively’,”⁷⁴ in light of the development of unbounded notions of citizenship the legitimacy of governments will rest in their capacity to engage with the issues citizens are engaging with that stretch beyond the borders of the state and beyond the three year electoral cycle. In practice this may mean that the sovereignty of governments is limited by, for example, a requirement that legislation considers the rights of future generations, and the ability to judicially review executive action which fails to take these rights into consideration.⁷⁵ Our reticence to impinge upon democratic institutions should be tempered by an awareness that these institutions cannot be

⁷¹ Boston (2009), p. 3.

⁷² Boston (2009), p. 11.

⁷³ Boston (2009).

⁷⁴ Boston (2009), p. 15.

⁷⁵ For an interesting exploration of possible options, see Boston (2009).

severed from the natural world. The consequences of our failure to deal with transnational issues which extend increasingly far across time and space, such as catastrophic climate change, will impair or even preclude the functioning of these very institutions.⁷⁶

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⁷⁶ Boston (2009), p. 15.

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Appendix

Cabinet

CONSIDERATION OF CONSTITUTIONAL ISSUES

Proposal

1. We seek approval to establish a framework for the Consideration of Constitutional Issues agreed to in the Relationship and Confidence and Supply Agreement between the National and Māori parties.

Executive Summary

2. The 2008 Relationship and Confidence and Supply Agreement between the Māori Party and the National Party includes an agreement to establish a group to consider constitutional issues, including Māori representation. We propose that the purpose of the Consideration of Constitutional Issues is to:
 - stimulate public debate and awareness of New Zealand's constitutional arrangements and issues arising;
 - 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;
 - understand New Zealanders' perspectives on our constitutional arrangements, including the range of topical issues requiring further discussion, debate and policy consideration; and then
 - identify whether any further consideration of the issues is desirable, and if so, which issues.
3. We propose to jointly lead the Consideration of Constitutional Issues, in consultation with a reference group of members of Parliament (MPs) from across the House. The proposed terms of reference for the Consideration of Constitutional Issues, including membership of the reference group and the issues to be considered, is attached as Appendix 2.
4. We propose that the process will be in stages, with a hiatus between stages during the second half of 2011, to avoid compromising the 2011 General Election and MMP referendum.
5. We will report to Cabinet on a six monthly basis. The first report will seek agreement on a number of matters, including the establishment of the Constitutional Advisory Panel to support the Consideration of Constitutional Issues, a detailed proposal for stage one of the engagement process, and strategies for managing risks, including the interaction with other government projects that have a constitutional dimension.

6. We will issue a final report by the end of 2013 summarising the views of New Zealanders on constitutional issues. The Government will be required to respond to that final report within six months.

Background

7. The 2008 Relationship and Confidence and Supply Agreement between the Māori Party and the National Party includes an agreement to establish a group to consider constitutional issues. The Agreement states:

"Both parties agree to the establishment (including its composition and terms of reference) by no later than early 2010 of a group to consider constitutional issues including Māori representation. The Māori Party will be consulted on membership and the choice of Chairperson, and will be represented on the group."

8. Previous large scale constitutional related exercises in recent history include the 1986 Royal Commission into the Electoral System and the 2004 Inquiry to review New Zealand's existing constitutional arrangements.
9. The 1986 Royal Commission into the Electoral System made wide ranging recommendations to change the electoral system, including the term of parliament, the size of parliament, Māori representation and introduction of the Mixed Member Proportional (MMP) voting system. This report led to the 1990 referendum on a four year term of Parliament and the 1992 and 1993 referenda on the First Past the Post (FPP) and MMP voting systems.
10. In 2004/5 the Constitutional Arrangements Committee undertook a stock-take exercise that traced historical milestones in the development of New Zealand's current constitutional arrangements. The Committee reported back to the House of Representatives in August 2005. The report identified and described:
 - New Zealand's constitutional development since 1840;
 - the key elements in New Zealand's constitutional structure, and the relationships between those elements;
 - the sources of New Zealand's constitution;
 - the process other countries have followed in undertaking a range of constitutional reforms; and
 - the processes that it would be appropriate for New Zealand to follow if significant constitutional reforms were considered in the future, including specific processes for facilitating discussion within Māori communities.

Overseas experience

11. As considered by the 2004/05 Constitutional Arrangements Committee, it is important to draw on experience from relevant overseas constitutional review processes, such as:

- The 1986-1988 Australian Constitutional Commission tasked with reviewing the Australian Constitution¹;
- The 1998 Australian Constitutional Convention on the Republic²; and
- The Canadian 1990-1992 exercise in which the federal and provincial governments sought to engage with the public on a set of proposed constitutional reforms³.

Process lessons for this consideration of constitutional issues

12. Drawing on previous New Zealand constitutional exercises and the lessons learnt from the recent Australian and Canadian experiences, we propose that the Consideration of Constitutional Issues process include:
 - a generous amount of time – giving the community sufficient time to absorb and debate the information, issues and options;
 - fostering more widespread understanding of the implications of current arrangements, and the implications of change;
 - specific processes for facilitating discussion within Māori communities on constitutional issues; and
 - accurate, neutral and accessible public information, with non-partisan mechanisms to facilitate ongoing local and public discussion.
13. Any process also needs to recognise that New Zealand has a long history of incremental constitutional change, dealing with issues as they arise. Like many systems, our constitutional arrangements tend toward stability and significant change is not undertaken lightly.
14. The lessons from overseas reinforce that enduring constitutional changes tend to be those that come from a broad base of support. For instance, the introduction of the MMP voting system received popular support for change across the spectrum of electors.

Context

15. A number of current government projects have, or may have, constitutional implications (see **Appendix 1**).
16. Significant electoral change is being considered through the amalgamation of electoral agencies and reform of the Electoral Finance rules. Other electoral events include:
 - the 2011 General Election, along with an indicative referendum on MMP; and

¹ In September 1988, based on the Commission's interim report, a referendum was held on four constitutional issues. The topics were: shifting parliamentary terms, ensuring fair elections, including local government in the constitution and including a set of civil rights in the constitution.

² This led to a referendum in 1999 on whether Australia should become a republic.

³ This engagement covered a wide of matters, including reform of Canada's federal institutions, a rebalancing of the federal-provincial distribution of powers and a constitutional articulation of shared values and unifying beliefs. The engagement included discussion documents, television debates, a Citizens' Forum of 400,000 people, and negotiations between federal and provincial leaders. In October 1992 a referendum on a negotiated package of constitutional reforms resulted.

- in 2012, the Māori Electoral option and review of electoral boundaries will take place.
17. The Crown–Māori relationship is also developing through work programmes such as the review of the Foreshore and Seabed Act 2004 and development of the Marine and Coastal Area (Takutai Moana) Bill, freshwater policy reform and the Treaty settlement process. Significant Waitangi Tribunal reports on matters such as the WAI 262 claim on indigenous flora and fauna are also likely to be released in the short term.
 18. Other existing Government projects may have constitutional implications, such as consideration of a Regulatory Responsibility Bill, the implementation of Auckland Governance reform, and the “Smarter Government - Stronger Communities” project led by the Minister of Local Government.

Consideration of Constitutional Issues

19. We seek Cabinet agreement that the purpose of the Consideration of Constitutional Issues is to:
 - stimulate public debate and awareness of New Zealand's constitutional arrangements and issues arising;
 - seek the views of all New Zealanders (individuals, groups and organisations), including those of Māori (iwi, hapū, whānau) in ways that reflect the partnership model and are responsive to Māori consultation preferences;
 - understand New Zealanders' perspectives on our constitutional arrangements, including the range of topical issues requiring further discussion, debate and policy consideration; and then
 - identify whether any further consideration of the issues is desirable, and if so, which issues.

Ministerial responsibility for the Consideration of Constitutional Issues

20. We propose to jointly guide the development of a programme to inform and engage with New Zealanders on constitutional issues and consider matters arising from that engagement.
21. In carrying out this role, we will consult with a reference group of MPs from all parties across the House, including the National Party and the Māori Party, on major findings and reports before reports are made to Cabinet. With the agreement of Cabinet, we will write to each political party represented in Parliament, inviting them to nominate one representative to join the reference group.
22. A proposed Terms of Reference is attached as **Appendix 2**.

Constitutional Issues to be considered

23. The Consideration of Constitutional Issues will consider, but is not limited to, the following matters:

<i>Electoral Issues</i>
<ul style="list-style-type: none"> • The size of Parliament • The length of the term of Parliament and whether or not the term should be fixed • The size and number of electorates, including the method for calculating size • Electoral integrity legislation
<i>Crown / Māori Issues</i>
<ul style="list-style-type: none"> • Māori representation, including the Māori Electoral Option, Māori electoral participation, Māori seats in Parliament and local government • The role of the Treaty of Waitangi within our constitutional arrangements
<i>Other constitutional issues</i>
<ul style="list-style-type: none"> • Bill of Rights issues (eg property rights, entrenchment) • A written constitution

24. Overseas experience shows that any public consideration of constitutional issues will result in other topical issues being raised. For example, this may include public interest in whether or not New Zealand should move to a republic, or the relationship between central and local government.

Developing the Engagement Process

25. We propose a staged process. There will be a hiatus between stages during the second half of 2011, to avoid compromising the 2011 General Election and MMP referendum.

Stage One: clarifying the issues and developing strategy for engagement

26. In the first six months we will focus on:
- clarifying the constitutional issues for consideration (including setting the scope of the issues, assembling background materials and assessing international comparators); and then
 - preparing the strategy for public engagement on those issues (including identifying key messages for communication with the public and possible methods of engagement).
27. We will seek agreement to the strategy as part of our scheduled reporting to Cabinet in 2011.

Election hiatus

28. It will be important to ensure the Consideration of Constitutional Issues does not compromise the 2011 General Election and referendum on MMP. Preparation for these events includes a significant public education and advertising component, which could lead to public confusion if combined with a parallel public engagement on constitutional issues. We propose that stage one should conclude no later than June 2011, with further stages commencing after Government formation is complete.

Further stages: engagement with the public

29. Following the 2011 General Election, we will prepare for public engagement. The engagement will involve two sequential programmes:
- an Information and Education programme - to stimulate public debate and awareness of New Zealand's constitutional arrangements and issues arising; and
 - a Public Discussion programme – to seek the views of New Zealanders (individuals, groups and organisations), including seeking the views of Māori in a manner that is reflective of the Treaty of Waitangi relationship.
30. While the strategy for the engagement is yet to be developed, we envisage that the engagement will take a variety of forms, using different forums and media. It will be a wide consultation with all New Zealanders, using methods appropriate to our diverse communities, including ethnic and religious groups. In particular, consultation with Māori will be reflective of the Treaty relationship.

Determining next steps

31. After the public discussion stage we expect to have an understanding of New Zealanders' perspectives on our constitutional arrangements, including the range of topical issues requiring further discussion, debate and policy consideration.
32. We will then identify and recommend to Cabinet whether further consideration of particular issues is desirable. This recommendation will include the nature of any further consideration, for example specific legislative or non-legislative projects. This report will be completed by the end of 2013 and the Government will be required to respond to the report within six months.
33. In keeping with New Zealand's constitutional history, any proposals to reform elements of the constitutional framework should only be decided after securing broad cross-party agreement in the House or the majority support of voters at a referendum.

Constitutional Advisory Panel

34. We will be supported by a Constitutional Advisory Panel (CAP). The CAP will provide advice and will report to us, and provide regular updates to the cross-party reference group of MPs. The CAP:
- will be nominated by us, and will be subject to Cabinet approval, following consultation with the cross-party reference group of MPs;
 - will have co-chairing arrangements reflective of the leadership of the Consideration of Constitutional Issues, a membership drawn from across New Zealand; and
 - within the broader process agreed by Cabinet, the Māori co-chair of the panel will be responsible for the consultation process with Māori, and will report to us with regard to that process on an ongoing basis.

Establishing the Constitutional Advisory Panel

35. Within the first six months, after consulting with the cross-party reference group of MPs, we will report to Cabinet seeking agreement to:
- the CAP's role, responsibilities and the specific matters on which the panel shall provide advice;
 - the size of the CAP;
 - the skills and experience sought in panel membership; and
 - the appointment of members to the CAP.
36. We will consider what the appropriate balance of skills would be for this exercise, such as whether the CAP should include academic and/or judicial perspectives, and how community perspectives will be represented. We will also consider whether the CAP will require any additional assistance, such as research or focus groups, to inform it in its advisory role.

Risks

Managing risks

37. The Consideration of Constitutional Issues faces a number of risks that will require careful management. These include:
- confusion in the public mind between the issues under discussion in the Consideration of Constitutional Issues and other activities that have constitutional implications, such as the various electoral reform projects and Auckland Governance reform;
 - conveying to the public that the Consideration of Constitutional Issues is an open process where a wide range of views are actively being sought, and that its outcome is not predetermined; and
 - possible lack of public engagement due to uncertainty over what will happen after public discussion: whether people may be less willing to participate in a discussion exercise if they perceive it is unlikely to result in any firm recommendations.

38. We consider that the requirement for the government to respond to the 2013 report will mitigate the final concern to some degree. However, we will consider all of these issues and risks, and report to Cabinet on an approach for managing them.

Managing Interaction with other government projects

39. As noted above, a number of current government projects link with the Consideration of Constitutional Issues (see **Appendix 1**). The individual or cumulative effect of decisions made in these projects could impact on the Consideration of Constitutional Issues.
40. We will have responsibility for identifying the interaction with other government projects. We will identify related projects and work with the Ministers responsible for those projects. This process will ensure the relevant issues are dealt with in a coherent and time-appropriate manner.
41. As part of the first Cabinet report we will include an up-to-date list of all projects that have a link with the Consideration of Constitutional Issues. The list will also specify what the overlapping issues are, and explain how the issues will be dealt with in a coherent manner.
42. In some circumstances it may be appropriate for an overlapping issue to be addressed on a longer timeframe as part of the Consideration of Constitutional Issues. In other circumstances it may be necessary to remove the overlapping issue from the Consideration of Constitutional Issues, to allow it to be addressed in a shorter timeframe.

Possible MMP review

43. One example of a linking project is the possible MMP review in 2012. The Electoral Referendum Bill provides that if the 2011 MMP referendum results in a vote to retain MMP, an Independent Review of MMP will be undertaken by the Electoral Commission. That Review would begin soon after the referendum and report back to the Minister of Justice by 31 October 2012. The Review would include a public consultation element.
44. The Bill includes a non-exhaustive list of matters that must be reviewed.⁴ The Bill specifically prohibits the Review from considering Māori Representation and the total number of members of Parliament. The Electoral Commission might, however, decide to review other aspects of the MMP system that link to the Consideration of Constitutional Issues, such as the size and calculation of electorates.

Reporting

45. We will report to Cabinet on a six monthly basis. The first report to Cabinet shall seek agreement to:
- the matters required to establish the Constitutional Advisory Panel;

⁴ Clause 56 of the Electoral Referendum Bill requires the Electoral Commission to review: the thresholds for list seats, overhang, dual candidacy, order of candidates on party lists, and the effect of population change on the ratio of electorate seats to list seats and the maintenance of proportionality.

- the proposed approach to stage one of the engagement process: clarifying the issues and developing the strategy for engagement;
- a list of all projects that have a link with the Consideration of Constitutional Issues, specifying what the overlapping issues are and explaining how those issues will be dealt with in a coherent manner;
- strategies for minimising public confusion where other government projects and processes have constitutional implications, e.g. electoral referendum; and
- strategies for managing public expectations over the purpose for, and results of, the consideration of constitutional issues.

46. We will submit our final report to Cabinet by the end of 2013, summarising the views of New Zealanders on constitutional issues. The Government will respond to this report within six months.

Departmental Support

47. The Consideration of Constitutional Issues and Constitutional Advisory Panel will be supported by a core group of senior officials from the Ministry of Justice (secretariat), Te Puni Kōkiri, Department of the Prime Minister and Cabinet, and Crown Law. Other departments will be involved and provide specialist advice as appropriate.

Consultation

48. The Treasury, Crown Law and the Cabinet Office were consulted in the development of the paper. The Department of the Prime Minister and Cabinet and the State Services Commission were informed of the contents of the paper.

Financial implications

49. The funding needs for this programme will be identified in our first report to Cabinet.

Human rights

50. There are no human rights implications from the proposals in this paper. The paper does, however, seek agreement to a programme of engagement that will include the discussion of civil and political rights, which will likely have implications for New Zealand's international human rights obligations and domestic obligations under the New Zealand Bill of Rights Act.

Legislative implications

51. There are no legislative implications at this point.

Regulatory impact analysis

52. An exemption from the regulatory impact analysis requirements applies as the proposals have no impact on business or not-for-profit entities.

Gender implications

53. There are no gender implications.

Disability perspective

54. There are no disability implications.

Publicity

55. A joint statement and announcement will be made following Cabinet agreement, including an invitation to all political parties represented in the House to nominate a member to join the reference group. The Cabinet paper will be published on the Beehive website. Further announcements may be made as subsequent milestones are achieved.

RECOMMENDATIONS

56. We recommend that Cabinet:

1. **note** that the 2008 Relationship and Confidence and Supply Agreement between the National Party and the Māori Party includes agreement to the establishment of a group to consider constitutional issues;
2. **note** that New Zealand has a long history of incremental constitutional change, with constitutional arrangements that tend toward stability;
3. **note** that experience from overseas constitutional review exercises is that enduring constitutional changes tend to be those that have come from a broad base of support;

Purpose of Consideration of Constitutional Issues

4. **agree** that the purpose of the Consideration of Constitutional Issues is to:
 - 4.1. stimulate public debate and awareness of New Zealand's constitutional arrangements and issues arising;
 - 4.2. seek the views of all New Zealanders (individuals, groups and organisations), including those of Māori (iwi, hapū, whānau) in ways that reflect the partnership model and are responsive to Māori consultation preferences;
 - 4.3. understand New Zealanders' perspectives on our constitutional arrangements, including the range of topical issues requiring further discussion, debate and policy consideration; and then
 - 4.4. recommend what further consideration of the issues, if any, is desirable;

Ministerial responsibility for the Consideration of Constitutional Issues

5. **agree** that the Deputy Prime Minister and Minister of Māori Affairs will jointly lead the development of a programme to inform and engage with New Zealanders on constitutional issues and consider matters arising from that engagement;

6. **agree** that the Deputy Prime Minister and the Minister of Māori Affairs will consult with a reference group of members of Parliament from all parties across the House, including the National Party and the Māori Party, on major findings and reports before reports are made to Cabinet;
7. **agree** that the Deputy Prime Minister and Minister of Māori Affairs will write to each party represented in Parliament inviting them to nominate one representative to join the reference group of members of Parliament;
8. **note** the Proposed Terms of Reference for the Consideration of Constitutional Issues are attached as Appendix 2;

Issues for consideration

9. **agree** that the constitutional issues to be considered are:
 - 9.1. the size of Parliament;
 - 9.2. the length of the term of Parliament and whether or not the term should be fixed;
 - 9.3. the size and number of electorates, including the method for calculating size;
 - 9.4. Electoral integrity legislation;
 - 9.5. Māori representation, including the Māori electoral option, Māori electoral participation, Māori seats in Parliament and local government;
 - 9.6. the role of the Treaty of Waitangi within our constitutional arrangements;
 - 9.7. Bill of Rights issues (e.g. property rights, entrenchment);
 - 9.8. a written constitution;
10. **note** that other constitutional issues, such as a move towards a republic or the relationship between central and local government, may arise during public engagement;

Process for public engagement

11. **agree** that in the first six months, the focus will be on clarifying the constitutional issues for consideration and then preparing the strategy for public engagement on those issues;
12. **agree** that public engagement will not begin until after the formation of a new government following the 2011 general election, and that it will involve two sequential programmes:
 - 12.1. an Information and Education programme - to stimulate public debate and awareness of New Zealand's constitutional arrangements and issues arising;
 - 12.2. a Public Discussion programme – to seek the views of all New Zealanders (individuals, groups and organisations), including seeking the views of Māori in a manner that is reflective of the Treaty of Waitangi relationship;

13. **agree** that at the conclusion of the public engagement, the Deputy Prime Minister and Minister of Māori Affairs will prepare a final report to Cabinet on whether any further consideration of particular issues is desirable;
14. **agree** that the Government will be required to respond to the final report within six months of receipt;

Constitutional Advisory Panel

15. **agree** that the Deputy Prime Minister and Minister of Māori Affairs will be supported by a Constitutional Advisory Panel that:
 - 15.1. will be nominated by the Deputy Prime Minister and Minister of Māori Affairs, and will be subject to Cabinet approval, following consultation with the cross-party reference group of MPs;
 - 15.2. will have a membership drawn from across New Zealand, following consultation with the cross-party reference group of members of Parliament;
 - 15.3. will have co-chairing arrangements reflective of the leadership of the Consideration of Constitutional Issues;
 - 15.4. will provide regular updates to the cross-party reference group of members of Parliament; and
 - 15.5. within the broad process agreed by Cabinet, the Māori co-chair of the Constitutional Advisory Panel will have responsibility for the Māori consultation process agreed by the Deputy Prime Minister and Minister of Māori Affairs, and will report to the Deputy Prime Minister and Minister of Māori Affairs with regard to that process on an ongoing basis;

Risks

16. **note** that the Consideration of Constitutional Issues faces a number of risks that will require careful management, including:
 - 16.1. Communication risks – public confusion over the nature and purpose of the public engagement exercise, and its linkages with other activities that have constitutional implications;
 - 16.2. Interaction with other government projects, including a possible review of the MMP electoral system as a result of the 2011 MMP referendum;
17. **agree** that the Deputy Prime Minister and Minister of Māori Affairs will consider the issues and risks associated with the Consideration of Constitutional Issues and report to Cabinet on an approach for managing them;

Reporting

18. **agree** that the Deputy Prime Minister and Minister of Māori Affairs will report to Cabinet at six monthly intervals;
19. **agree** that, after consultation with the cross-party reference group of members of Parliament, the first report to Cabinet will seek Cabinet agreement to:

- 19.1. the matters required to establish the Constitutional Advisory Panel;
 - 19.2. the proposed approach to stage one of the engagement process: clarifying the issues and developing strategy for engagement;
 - 19.3. a list of all projects that link with the Consideration of Constitutional Issues, specifying what the overlapping issues are and explaining how those issues will be dealt with in a coherent manner;
 - 19.4. strategies for minimising public confusion where other government projects and processes have constitutional implications, e.g. electoral referendum; and
 - 19.5. strategies for managing public expectations over the purpose for, and results of, the consideration of constitutional issues;
20. **agree** that the Deputy Prime Minister and Minister of Māori Affairs will submit a final report to Cabinet by the end of 2013, summarising the views of New Zealanders on constitutional issues;

Departmental support for the Consideration of Constitutional Issues

21. **agree** that the Consideration of Constitutional Issues and Constitutional Advisory Panel will be supported by a core group of senior officials from the Ministry of Justice (secretariat), the Department of the Prime Minister and Cabinet, Te Puni Kōkiri and Crown Law, with other departments involved as appropriate;

Publicity

22. **note** that a joint statement and progress announcement, including an invitation for other parliamentary parties to join the cross-party reference group, will be made following Cabinet agreement. The Cabinet paper will be published on the Beehive website. Further announcements may be made as subsequent milestones are achieved.

Hon Bill English
Deputy Prime Minister

Date: ___ / ___ / ___

Hon Dr Pita Sharples
Minister of Māori Affairs

Date: ___ / ___ / ___

APPENDIX 2 – PROPOSED TERMS OF REFERENCE

Background

The Relationship and Confidence and Supply Agreement between the National Party and the Māori Party (16 November 2008) agreed to establish a group to consider constitutional issues, including Māori representation.

Constitutional Ministerial Group

The Deputy Prime Minister and the Minister of Māori Affairs will jointly lead a consideration of constitutional issues, in consultation with a reference group of members of Parliament from across the House on major findings and reports before reports are made to Cabinet.

The Deputy Prime Minister and the Minister of Māori Affairs will develop and oversee a programme of engagement with the public. That programme will include the appointment of one or more advisory panels to provide expert and community perspectives on matters of substance and process.

The Deputy Prime Minister and the Minister of Māori Affairs may also receive and consider research and recommendations from officials, experts and the public on New Zealand's current constitutional arrangements, and possible areas for reform.

The Deputy Prime Minister and the Minister of Māori Affairs will report six-monthly to the Cabinet. The Deputy Prime Minister and the Minister of Māori Affairs will be supported by an inter-departmental working group comprising the Ministry of Justice, the Department of the Prime Minister and Cabinet, Te Puni Kōkiri, and the Crown Law Office. Support will include secretariat services and policy advice.

The Deputy Prime Minister and the Minister of Māori Affairs will submit a final report to Cabinet by the end of 2013, summarising the views of New Zealanders on constitutional issues.

Programme of engagement

Engagement and information is an important precursor to any discussion of changes to New Zealand's constitutional arrangements. Public understanding and acceptance is needed for enduring constitutional arrangements that reflect the values and aspirations of New Zealand as a society.

To facilitate their consideration of constitutional issues the Deputy Prime Minister and the Minister of Māori Affairs will develop a programme of engagement with New Zealanders.

The purpose of the programme of engagement is to:

- (a) Inform and engage New Zealanders on constitutional issues, in particular, to stimulate public debate and awareness of constitutional issues by circulating information about New Zealand's constitutional arrangements, and ideas for reform;
- (b) Discuss constitutional issues, in particular to:
 - Seek the views of all New Zealanders, including individuals, groups and organisations; and

- Seek the views of Māori (iwi, hapū, whānau), in ways that reflect the partnership model and are responsive to Māori consultation preferences.

The process of information, education and discussion is intended to provide the Deputy Prime Minister and the Minister of Māori Affairs with an understanding of New Zealanders' perspectives on this country's constitutional arrangements, topical issues and areas where reform is considered desirable. The Deputy Prime Minister and the Minister of Māori Affairs will then recommend to Cabinet whether any further consideration of particular issues is desirable.

Subject matter of the programme of engagement

The programme of engagement will include the following topics:

Electoral matters

- Size of Parliament
- The length of the term of Parliament and whether or not the term should be fixed
- Size and number of electorates, including changing the method for calculating size
- Electoral integrity legislation

Crown-Māori relationship matters

- Māori representation, including Māori Electoral Option, Māori electoral participation, Māori seats in Parliament and local government
- The role of the Treaty of Waitangi within our constitutional arrangements

Other constitutional matters

- Bill of Rights issues (eg property rights, entrenchment)
- Written constitution

Other issues are likely to arise during public engagement. The Deputy Prime Minister and the Minister of Māori Affairs will report to Cabinet on these matters, advising whether the issue appears to be of widespread interest and merits consideration.

The Deputy Prime Minister and the Minister of Māori Affairs will be mindful of other Government initiatives with constitutional implications, and will aim not to duplicate or undermine these initiatives.