



Balancing powers

Barbara Burton

Every few years the issue surfaces of whether New Zealand should have a written constitution.

It's one of the perennial issues - like becoming a republic or merging with Australia – that achieves a bit of enthusiasm before being kicked for touch in wider debate.

The latest bid for a written 'constitution for Aotearoa New Zealand' serves as a useful reminder of what our current constitutional arrangements are, and the strengths they bring for business and for New Zealand generally.

New Zealand's current constitution is fragmented and not all in one place.

Our constitutional arrangements are found in a variety of Acts of Parliament including the Bill of Rights Act, the current Constitution Act, the Electoral Act and increasingly the Treaty of Waitangi.

This is similar to Britain's constitutional approach and is based on the principle of *balancing powers* – a principle established in England when the Magna Carta reduced the power of the king and shared it among other political powers of the kingdom.

These days the balancing of power is between Parliamentary law-makers, Executive Government, and the Courts.

The fact that our constitution is not written in a single document helps retain the balance between these three powers.

In contrast, a written constitution in a single document would tilt the balance towards the Courts.

This is because a single written document would bear the burden of interpretation. If any part of the document were challenged – as constitutions invariably are - the Courts would have the last word on what the document meant.

The current bid for a written 'constitution for Aotearoa New Zealand' helpfully comes with a draft text that demonstrates the potential for argument over wording (and also shows some of the difficulties for business if a single written constitution were adopted).

For example the draft constitution says everyone has the right not to be deprived of their property 'except in pursuance of an Act of Parliament ... or in pursuit of a public purpose or public interest'. This would be a very broad exemption, and open to argument over what the public interest might be. Businesses would find it hard to live with the uncertainty this would produce. Secure property rights have long been recognised as essential to a country's economic wellbeing. Willingness to invest, grow a business and provide employment opportunities would be undermined if, by way of an entrenched constitution, property rights could be diminished by legislative intervention and judicial interpretation.

The draft constitution also says everyone has environmental rights, to be protected by reasonable legislative and other measures. But what is reasonable is always open to argument - endless litigation would seem inevitable.

The draft constitution also promises 'social and economic rights', raising the risk of even more argument over what such rights might be, and whether a government could even guarantee them.

No constitution is perfect. Written constitutions in many countries face ongoing challenge, litigation and division of opinion. It's been estimated that since 1789 and the French revolution, national constitutions have lasted an average of 17 years.

Our established constitutional arrangements may not have the tidiness of a single document, but they work, and they are not subject to the kind of litigation, argument and power plays seen in countries with a single written text.

It would be a backward step for business and society generally to upset the working balance of powers delivered by our current constitutional arrangements.

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