

The NZ Constitutional Review



ENVIRONMENT AND CONSERVATION ORGANISATIONS OF NEW ZEALAND (INC.)

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Submission from Environment and Conservation Organizations (ECO)

Principles for Environmental and Conservation Interests, Ecological Integrity and The Treaty of Waitangi

Submission from ECO to the New Zealand Constitutional Review 2013

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Executive Summary

ECO submits that certain issues should be given strong consideration for inclusion in a written constitution, and, as there is a certain urgency for action on these issues, that more immediate protection should be given through the Bill of Rights, which should be entrenched.

The issues which ECO wishes to give Constitutional status to are

- The human right to a healthy natural environment
- The responsibility or obligation on the State to protect the environment - maintaining a healthy environment with ecological integrity – and principles for the obligation of environmental guardianship at all levels of responsibility
- The existential rights of the environment itself.
- The principles of ecological sustainable development

- the Treaty of Waitangi.

ECO further submits that the Principles of the Aarhus Convention should be entrenched in the Bill of Rights and there should be a positive obligation on the State to protect Open Government principles.

- This submission identifies principles of environmental responsibility as well as a right approach to environmental protections.
- Legal principles to support environmental principles in a Constitution are identified. These include notions of open government, ecological integrity, Public Trusteeship and the Common Heritage of Mankind
- Examples of State provisions for environmental rights and responsibilities are noted
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Introduction

ECO wishes to reflect on several questions posed by the Constitutional Advisory Panel in its submission on what might be included in the Consideration of Constitutional Issues. These questions include:

- Should the Bill of Rights Act include additional rights and if so which rights?
- Should the New Zealand Bill of Rights be entrenched or supreme law?
- Should we move to a written constitution or should our constitutional laws be entrenched or supreme laws?
- And what should be included in a written constitution?
- What should be the role of the Treaty of Waitangi within our constitutional arrangements? Should the Treaty be entrenched.

ECO is mindful of the time it would take to establish a written constitution, therefore while the discussion on a written constitution continues, the matters it believes should be included in the constitution should in any case be included in the Bill of Rights Act and this Act should be entrenched at, least until a written Constitution is finalised.

Background

Environment and Conservation Organisations of NZ Inc (ECO) is an umbrella for New Zealand organisations with a shared concern for the environment and conservation. ECO membership includes New Zealand branches of large international groups such as Greenpeace and Friends of the Earth, national groups including National Council of Women, as well as small local groups such as Kapiti Environmental Action and Save the Otago Peninsula, and issue oriented groups like the Yellow-eyed Penguin Trust.

During the more than four decades that ECO has been established, ECO has campaigned to protect habitats and species including native forests, lakes and rivers and marine areas and other ecosystems. We pressed for the reform of the Mining Act and Crown Minerals Act, and for the defeat of the National Development Act. We have since the 1970's championed sustainable energy policies and are active in opposition to climate damaging policies.

ECO participated in the major reform of New Zealand's environmental administration of the 1980s and supports the Resource Management Act, and its principles of Sustainable

Management and open public participation. We were active in the establishment of the Department of Conservation, the Ministry for the Environment and the Parliamentary Commissioner for the environment during the 1980s.

ECO continues active engagement in environmental campaigns on fisheries and marine management, both nationally and in the high seas, and environmental management. ECO is engaged in New Zealand's policy on marine and terrestrial resource governance and presses for policy to safeguard and enhance marine and land-based biodiversity. ECO organised a major conference on marine management and has promoted an Oceans Policy for New Zealand

Since 1982 ECO has been active on environmental protection in Antarctica, including the defeat of the Antarctic Minerals Regime and the adoption of conservation measures, the Protocol to the Antarctic Treaty on Environmental Protection, and is pressing with colleague organisations for the protection of a large network of protected areas in the Southern Ocean, including the Ross Sea.

Over many years ECO has also worked to promote the open society in New Zealand and internationally, and has pressed for public access to information, open government and due process.

We have pressed for the adoption of the ideas underpinning sustainable development, including strong sustainability, recognition of social and natural capital, social justice and other ethical underpinnings of sustainability. We have worked on the various Rio other sustainable development conferences.

We are an active member of the international community, via IUCN, the South Pacific Regional Fisheries Management Organisation, the Antarctic Treaty System, the UN climate change reporting processes and various other regional and international meetings and processes.

Rights and Responsibilities

1. First of all we note the strong development of a right based approach to environmental and conservation interests. For example Human Rights to a Healthy Environment are expressed in the Stockholm Declaration (1972):
 - Man has the fundamental right to freedom, equality and adequate conditions of life, [and] an environment of a quality that permits a life of dignity and well-being.
 - And in the UN Draft Principles (1994): All persons have the right to a secure, healthy and ecologically sound environment
2. While there is merit in rights, especially through the strong legal development of a rights approach to environmental justice, we further propose an approach which develops principles of responsibility and duties. This is in accordance with a building body of 'soft law' principles for environmental safeguards, such as through the Charter for Human Responsibility and the Earth Charter and the force of moral imperatives for environmental responsibility.
3. Harvard philosopher Michael Sandel has criticised the tendency among politicians to rely on economic rationales in forming policy in order to avoid moral arguments. In his calls for "a new politics of the common good" and his encouragement of a more morality based politics, he clearly means more than a discussion of "rights".
4. One of the most sophisticated accounts for the development of ecological integrity is found in Hans Jonas' *The Imperative of Responsibility: In Search of an Ethics for the Technological Age*.¹ In this book, Jonas argues that the great power which modern technological advances has brought humanity, has also brought with it a responsibility to contain that power and to protect both fellow human beings, and the environment. He goes on to argue that humanity or "human dignity" depends on the survival of nature beyond mankind's own needs. Humans are so much a part of nature that the destruction of the environment denies us the full experience of being human.²
5. An ethics of responsibility can also be found in indigenous cultures, which often emphasise humanity's custodial role in taking care of the land. Maori words such as kaitiakitanga, manaakitanga, tapu, whakapapa and aroha suggest some of the concepts central to this discussion.³
6. The ideas that these writers and groups are concerned with hint at a much broader constitutional framework than that of the traditionally narrow bills of rights, of which New Zealand's Bill of Rights Act is a good example. National health care is

¹ (University of Chicago Press, 1984)

² For further discussion of Jonas' book and these points see Prue Taylor "Ecological Integrity, Responsibilities and Rights: Insights from 'The Imperative of Responsibility' by Hans Jonas"

³ See Te Ahukaramu Charles Royal and Betsan Martin "Responsibility in Aotearoa-New Zealand" in Edith Sizoo (ed) *Responsibility and Cultures of the World* (Peter Lang, 2010).

important not just because people have a right to it, but because we have a duty to provide it. Belonging to a community brings responsibilities to care for others in that community. Any genuine constitutional conversation needs to include consideration of these responsibilities as well as individual rights.

Treaty of Waitangi and Indigenous Peoples

7. The lack of specific protection of tangata whenua in the Bill of Rights Act reflects the narrow focus of the Act on individual freedoms which the Crown must not invade. A more expansive conception of the Crown as having positive duties including to protect New Zealand's indigenous population fits better with New Zealand's constitutional history, based on a partnership between the Crown and Maori.

According Constitutional status to the treaty of Waitangi will provide confirm the Treaty as a founding document.

Recognising these fundamental duties and responsibilities in New Zealand's core written constitutional documents also formalises New Zealand's commitments to its obligations in the Declaration on the Rights of Indigenous People.

Legal Principles for Constitutional Recognition of Environmental Interests and Ecological Integrity

8. **Common Heritage of Mankind** is a concept used in the Law of the Sea and in Moon Treaties and therefore provides an precedent in international environmental law. Common heritage of mankind is an important ethical concept which has been given legal form; it is supported by academic literature and by UNESCO. This legal notion implies a trust element (eg states as trustees for humanity) and also is seen as an example of a ethical/legal concept that implies 'responsibility' (obligation both to do good and to do no harm). The obligation to do good (act with care and respect for nature) would link with the concept of resilience – which in many cases will need an approach of active restoration or enhancement (Taylor 2011)⁴
9. **Public Trusteeship** doctrine has been developed in the US, and other jurisdictions in particular for governance of water. This has potential for legal development in respect of state duties to address climate change through management of the commons throughn public trust principles (Taylor 2011)⁵

In the constitution of Hawaii water is a public trust. This provision has been overridden by the commercial interests in rights to water, especially for the sugar industry.

Indigenous Hawaiian lawyers led by Joanna Sproat are engaged in using the public trust doctrine to restore the of waters of Hawaii that were previously diverted for mass-scale agriculture, especially to one-time sugar plantations. Closely associated with this priority is the careful research and litigation in pursuit of constitutional

⁴ Taylor, P. (2011) 'Notes on responsibility and law'. Personal document.

⁵ Taylor, P. (2011) 'Notes on responsibility and law'. Personal document.

redress through the public trust doctrine (Martin 2010)⁶ This legal doctrine encompasses a traditional spiritual association which meant that water could not be commodified or reduced to physical ownership.

In ancient times, water was a public trust resource, which means that no one – not even ali'i – could own water. Instead, water was a resource managed for present and future generations. (Sproat 2009:4)⁷

9. Duties of Governments and States:

- France: an Environment Charter was amended to the constitution in 2005 (Forest and Bird 2013)⁸

Article 1 says that “everyone has the right to live in a stable environment which respects health”.

Article 2 relates to duties on individuals, “all persons have a duty to take part in the preservation and the improvement of the environment”.

Under article 6 “Public policies should promote sustainable development ... they should reconcile the protection and enrichment of the environment, with economic development and social progress.”

Article 5 addresses the precautionary principle, an important understanding at environmental international law, crucial in developing responses to, for example, climate change:

As soon as realisation of damage could affect the environment in a serious and irreversible manner, even though [its recognition] might be uncertain in the current state of the scientific knowledge, public authorities should monitor, by the application of the precautionary principle in their relevant domains, the implementation of risk assessment procedures and the adoption of proportionate, provisional measures in order to prevent the realisation of the damage.

- South African Bill of Rights:
 - Everyone has the right
 - to an environment that is not harmful to their health or well-being; and
 - to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation;
 - promote conservation; and
 - secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.
- Colombia: It is the duty of the State to protect the diversity and integrity of the

⁶ Martin, B. (2010) Water is Life. Case Studies of Water Issues in Pacific Countries.

Research paper from Winston Churchill Memorial Fellowship. www.response.org.nz

⁷ Sproat, D. Kapua'ala (2009) Olaika Wai: A legal primer for water use and management, Hawai'i. Ka Huli Ao Center for excellence in Native Hawaiian Law.

⁸ Forest and Bird Submission to NZ Constitutional Review 2013.

environment, to conserve the areas of special ecological importance, and to foster education for [this]

- Sweden:...it shall be incumbent upon the public administration to secure the right to work, housing and education, and to promote social care and social security and a good living environment (Iorns 2013)⁹
- In Ecuador, the 2008 constitution has a clause allowing citizens to take action to defend the rights of Mother Earth anywhere on the planet. This has been the basis for a court case filed in 2010 against BP, for the Deepwater Horizon oil spill in the Gulf of Mexico.
- The Law of Mother Earth, or 'Pachamama', creates 11 new rights for nature, like a whole separate bill of rights, including: the right to life and to exist; the right to continue vital cycles and processes free from human alteration; the right to pure water and clean air; the right to balance; the right not to be polluted; the right to not have cellular structure modified or genetically altered.

It goes further: the right of nature "to not be affected by mega - infrastructure and development projects that affect the balance of ecosystems and the local inhabitant communities".

Trade agreements threaten our environmental protection. In Canada the State of Ontario has outlawed fracking on Environmental grounds and is being sued for loss of prospective profits by mining companies through Investor State Dispute Resolution system - common to Trade agreements such as NAFTA and the Trans Pacific Partnership Agreement (TPPA) . The TPPA has the potential in New Zealand to undermine environmental standards and deter the Government from improving environmental standards e.g. for water. A stronger and entrenched Constitutional obligation to protect the environment could strengthen the New Zealand Government's resolve and ability to do just that.

International Initiatives for Environmental Ethics and Policy

- A Charter for Universal Responsibility is intended to address human interdependence with nature and to facilitate the introduction accountability for environmental ecosystems in national and international measures of economic development. It is hoped that it might provide an alternative to human rights as the controlling paradigm, as highlighted in the Charter of the United Nations and the Universal Declaration of Human Rights. (for a Charter for Universal Responsibility see www.response.org.nz)
- The Earth Charter is a similar international initiative, using a community of life orientation.¹¹ The Earth Charter creates an ethical framework for a just, sustainable and peaceful world for the community of all life. It sets out an ethical framework (a shared vision of basic values) and a range of interdependent principles for the realisation of these values. Although this document does not have legal status in international law, it is rapidly gaining international recognition and is influencing a growing number of

⁹ Iorns, C. (2013) 'Eco-constitutionalism: Recognising Environmental Rights and Values in a Constitution' VUW Seminar.

¹¹ See <http://www.earthcharterinaction.org/content/> (last accessed 4 June 2009).

declaratory and binding legal agreements.¹² Furthermore, it is an intention that nation states: “support the implementation of the Earth Charter principles with an international legally binding instrument on environment and development.”¹³

The Earth Charter is considered one of the most developed applications of trusteeship or fiduciary relationship in an environmental context, “and in that sense it represents a significant precedent (Taylor 2011)¹⁴

The Charter for Human Responsibility and the Earth Charter are based on the unity of human and non-human life, the shared destiny of all and universal responsibility to support the common good:

Responsibilities include ensuring the fulfilment of human potential, inclusive of material needs and non-material aspirations, as well as obligations to support the common good (Charter for Responsibility Article 3).

[W]e are one human family and on Earth community with a common destiny. We must join together to bring forth a sustainable global society founded on respect for nature, universal human rights, economic justice and a culture of peace. Towards this end, it is imperative that we, the peoples of Earth, declare our *responsibility to one another, to the greater community of life, and to future generations*. (Preamble, Earth Charter), (Taylor 2012).

- In 2008, Dr Gonzi, Prime Minister of Malta, introduced a draft Universal Declaration on Human Duties to the UN General Assembly. the Prime Minister of Malta stated that the declaration “emanates naturally from [the] doctrine of the common heritage of mankind...”. (Busuttill). The preamble notes that ignorance of human duties has been detrimental to human rights and caused irreversible damage to the natural and cultural environment.
- There is a need for institutional reform and rejuvenation to meet the needs of governance for Common Good. We are facing evidence of failure at the state level (such as at Rio+20 and in climate negotiations to address urgent common concerns of climate change and ecological governance).

And yet, the social institutions which should enable the new challenges of the 21st century to be met, are increasingly ineffective. The pervasive power of international markets is undermining the traditional role of states. Scientific institutions, pursuing specialized interests, are less likely to confront the global issues and their interactions which challenge humanity. International economic institutions have failed to turn the rising tide of inequality. Business has often pursued its profit goals at the expense of social and environmental concerns. Religious institutions have not

¹² K. Bosselmann ‘In Search of Global Law: The Significance of the Earth Charter’ (2004) vol 8, issue 1 Worldviews: Environment, Culture, Religion 62. K. Bosselmann and P. Taylor The Significance of the Earth Charter in International Law in P.B. Corcoran (ed) *The Earth Charter in Action* (KIT Publishers, 2005) 171.

¹³ Earth Charter, ‘The Way Forward’. See <http://www.earthcharterinaction.org/content/> (last accessed 4 June 2009).

¹⁴ Taylor, P. (2011) ‘Notes on responsibility and law’. Personal document.

adequately fulfilled their role to provide responses to the new challenges faced by our societies. (Preamble to the Charter for Universal Responsibility).

Environmental Custodianship and Safeguards

10. New Zealand could enshrine commitment to environmental protection and to its citizens' standard of living through:
 - a. the granting of constitutional status to a healthy natural environment (including all natural resources and ecosystem functioning (land, water, air, and marine environment); and
 - b. the creation of a positive responsibility or obligation on the State to protect the environment.
 - c. the enshrinement of the principles of Open Government as articulated in the Aarhus Convention
11. New Zealand's constitutional framework should include provision for the protection of environmental issues. The environment is an integral part of New Zealand's national identity. Protection of the environment also resonates with tikanga Maori, which recognises that tangata whenua have a kaitiakitanga role in relation to the land.
12. New Zealand's environmental concerns are naturally preoccupied with water, given the country's extensive resources in fresh water, coastal marine areas, and its large Exclusive Economic Zone, for which it is responsible at international law.
13. We note also New Zealand interests in Antarctica, which are to be included in any constitutional conversation, mindful of New Zealand's responsibilities to protect and safeguard ocean ecosystems – in particular to defend this against the incursions of fishing industry interests.
14. On a national level, three quarters of the world's constitutions (147 out of 193 constitutions) currently include explicit reference to environmental rights and/or responsibilities, as noted in the above examples. Almost every national constitution enacted or amended since 1970 has included such rights or responsibilities. If nations whose High Courts have ruled that the right is implicit in their constitutions, nations that have signed binding regional treaties, and nations that signed the Male' Declaration on Climate Change are included in this calculation, 92% of nations legally recognize citizens' right to live in a healthy environment.
15. On an international level, the United Nations Commissioner for Human Rights has instructed governments to treat the right to a healthy environment as a fundamental human right. The principle is also present in both the Stockholm and Rio Declarations, to which New Zealand is party.
16. There is a strong body of evidence indicating that constitutional entrenchment of environmental rights and responsibilities contributes to stronger environmental

laws,¹⁵ increased enforcement, an enhanced role for citizens and improved environmental performance. Fourteen of the fifteen top-ranking countries in the OECD in terms of environmental performance have enacted such provisions.

17. There are currently proposals to amend parts of the Resource Management Act, however, the amendments risk the lowering of environmental standards and further inter-generational injustice. Environmental protection must be placed at a constitutional level. Twenty years of the RMA and managing effects on the “environment” have seen a steady decline in a range of environmental indicators. When humans are defined as holding rights over property as objects to be owned, the conditions are set for a system of exploitative use of nature’s resources.

18. In New Zealand access to information is largely covered by the Open Information Act. However the implementation of this Act has been effectively curbed by restriction of resources. Enshrining these principles of the Aarhus Convention in the Bill of Rights would place a higher obligation on the State to ensure the openness of Government. The 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters joins environment and human rights by linking access to information, public participation, and access to justice with environmental protection.

Other matters: written constitutions, amendments to the constitution, referenda

18. There are good arguments for and against a written constitution. The flexibility of an unwritten constitution allows room for our conceptions of the relationship between the state and citizens to develop. If the developments of the last few decades continue, an unwritten constitution may be better placed to accommodate ideas about responsibility and duties. An unwritten constitution also helps to emphasise that constitutional arrangements are more than just the one piece of paper.

19. However, a written constitution is commendable for the following reasons:

- a. To ensure constitutional status of Te Tiriti o Waitangi; and
- b. To provide a statement of principles that is unifying and accessible to the peoples of Aotearoa New Zealand;
- c. To protect against the risk that an unwritten constitutional arrangement is elitist because it means that only lawyers and politicians know how to access constitutional provisions.

20. ECO submits that amendments to the constitution should require a majority vote of greater than 75%. This would provide a brake on the susceptibility of policy to political changes.

¹⁵ (Equal Justice Project <http://equaljusticeproject.co.nz>)

21. Where there is a citizens referendum, it is submitted that when there are the required number of signatures, a referendum should be binding.

Conclusion

22. For this review, it is requested that Te Tiriti o Waitangi be accorded Constitutional status as the founding document of Aotearoa New Zealand; that Responsibilities and duties and Open Government, including access to Information, public participation in decision-making and access to justice in environmental matters be given consideration in an amended Bill of Rights; and that guiding principles of kaitiakitanga and ecological sustainable development be considered for Constitutional status.
23. The development of Constitutional principles for environmental safeguards at all levels of responsibility, including personal, regional council and state levels is commended. Such principles include sustainable development in line with UN goals for social and environmental wellbeing. Social wellbeing includes a healthy environment as well as reducing inequality, eliminating poverty and ensuring basic needs are met for all citizens and residents.

Prepared by members of ECO Executive