



**This Realm
of New Zealand**

**The Sovereign
The Governor-General
The Crown**

**Alison Quentin-Baxter
and Janet McLean**

This royal throne of kings, this scepter'd isle, . . .

This precious stone set in the silver sea, . . .

This blessed plot, this earth, this realm, . . .

– *William Shakespeare, King Richard II*

New Zealand is a democratic constitutional monarchy, one of Queen Elizabeth II's sixteen realms. This book provides a comprehensive account of how the Queen, the Governor-General and the Crown interact with our democratically-elected leaders under New Zealand's unwritten constitution.

The authors explain how these islands in the South Pacific were first brought within Queen Victoria's dominions, the arrangements then made for their future government, and how those arrangements developed over time with the pressure for democracy and responsible government to become New Zealand's current constitution. They discuss the responsibilities of, and interactions between, the key office-holders: the Sovereign herself; her representative, the Governor-General; the impersonal and perpetual Crown, and the Prime Minister, other Ministers and Members of Parliament. All of them affect in some way the government which runs the country day to day. In an afterword, the authors examine some of the key issues to be considered should New Zealand become a republic.

The parliamentary democracy that we take for granted can conceal New Zealand's ultimate constitutional underpinnings in the monarchy. But, as the authors make clear, the monarchy's continuing role in New Zealand's constitution is significant. And understanding the roles of the Queen, the Governor-General and the Crown will be critical as we look forward to debates about the possibility of a republic in New Zealand.

Dame Alison Quentin-Baxter is a distinguished public and international lawyer. She began her career as a member, and later the head, of the Legal Division of what was then the Department of External Affairs, and was a New Zealand representative at a number of conferences on the making or application of international law. Later she was a lecturer in law at Victoria University of Wellington where she taught constitutional history and law. From 1987–94 she was the director of the New Zealand Law Commission. Dame Alison has acted as a constitutional advisor in New Zealand and other jurisdictions including Niue, Fiji, the Republic of the Marshall Islands, and Saint Helena. She is the author of a report leading to the Sovereign's issue of the 1983 Letters Patent Constituting the Office of Governor-General of New Zealand, *Review of the Letters Patent 1917 Constituting the Office of Governor-General of New Zealand* (Cabinet Office, 1980), editor of *Recognising the Rights of Indigenous Peoples* (Institute of Policy Studies, 1998) and she has contributed a number of chapters and articles in books and journals. Dame Alison was appointed a Dame Companion of the New Zealand Order of Merit for services to the law, and is a Companion of the Queen's Service Order.

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CHAPTER 1

The Purpose of this Book

*This royal throne of kings, this scepter'd isle, . . .
This precious stone set in the silver sea, . . .
This blessed plot, this earth, this realm, . . .*¹

That is how Shakespeare described the realm of England in the reign of King Richard II.² A “realm” is a kingdom. From the 15th century to halfway through the 20th, his successors remained the Kings or Queens of a single realm, although it had spread around the globe. Eventually the idea of a single indivisible realm became untenable. When Queen Elizabeth II came to the throne in 1952, she was recognised as having become the Sovereign of seven separate realms. One of them was New Zealand.³ Their equal and independent status gives the Sovereign a direct and personal connection with each of what are now her 16 realms. The United Kingdom remains a realm, but its government no longer has any constitutional role in any of the others.

In this book we tell the New Zealand story: how these islands in the South Pacific were brought within Queen Victoria’s dominions, the arrangements then made for their future government, and how those arrangements developed to become New Zealand’s constitution today. We discuss the responsibilities of, and interactions between, the key office-holders: the Sovereign herself; her representative, the Governor-General and the impersonal and perpetual Crown, the Prime Minister, the other Ministers and all the Members of Parliament. There are others, too, with on-stage roles.

The time is overdue for telling, or retelling, the story of how New Zealand’s present-day constitution was shaped. There is an urgent need to broaden

¹ William Shakespeare *King Richard II* at II.i.40, 46, 50.

² 1367–1400.

³ Chapter 6 The Letters Patent, the Governor-General and the Realm of New Zealand.

the understanding of the people who live under it, and to make them better informed about the implications of any proposals for constitutional change. An increasing proportion of New Zealand citizens were born elsewhere: a common British heritage or knowledge of the Treaty of Waitangi cannot be taken for granted. Popular culture tends to confer on members of the royal family a kind of celebrity status. The monarchy's place in the workings of the political and constitutional system is largely invisible. Many young people, including those studying law at New Zealand universities, are more familiar with the United States Constitution than their own. The aim of this book is to make the workings of the New Zealand constitutional monarchy more accessible, and to correct some common misunderstandings about how it works.

In this book we explore the ways in which the Sovereign became interwoven in the history and fabric of the New Zealand constitution: how Queen Victoria came to reign over its three main islands, and also others, further offshore, and later Sovereigns eventually became recognised as the King or Queen in right of New Zealand; how monarchy became constitutional monarchy in response to the demands for democracy; and how New Zealand gradually acquired full self-government, free of the United Kingdom Government's control. We also trace developments in the institution of the monarchy itself — including the recent changes to the laws of succession to the throne.⁴ In doing so, we examine the personal roles of the Queen in right of New Zealand and of her representative, the Governor-General, at the present day. We also identify important functions of the impersonal Crown.

A main feature of the New Zealand constitution is that the powers of government are often vested in the Sovereign, or the Governor-General, instead of in those who make the decisions about when and how to use them. It therefore conceals the democratic revolution it achieved — the recognition that the Sovereign or her representative must act on the advice of Ministers who are elected Members of Parliament. That revolution left the location of executive powers with the Sovereign but put their exercise into the hands of the people's elected representatives who, collectively, have the confidence of Parliament. Some of the ancient forms and language have lingered on, including in relation to land tenure,⁵ but they have had to be adapted to modern New Zealand circumstances and expectations.

The Sovereign issues a legal instrument known as the Letters Patent constituting the office of Governor-General of New Zealand. In that instrument, she delegates to the Governor-General, and, through the Governor-General,

4 Chapter 4 The Sovereign in Right of New Zealand: The Institutional Role.

5 Discussed in Chapter 3 Constitutional Monarchy: Key Concepts.

to Ministers and officials, her executive authority and powers of government. Because that instrument is the basis of New Zealand's executive government, we describe it at some length.¹ As in the making of the Letters Patent themselves, almost all of the powers now exercised personally by the Sovereign or the Governor-General are required to be exercised on the advice of responsible Ministers. In discussing the extent of the Governor-General's duty to act on that advice, we identify the relevant "unwritten" rules of practice, known as constitutional conventions. The conventions enable the powers still legally vested in the Sovereign or the Governor-General to function acceptably in a modern democracy.

The main exception to the duty to act on ministerial advice concerns the powers exercised in the process of forming or changing a government otherwise than after a general election at the end of Parliament's three-year term. In that area the Governor-General has important powers, but it is not easy to determine how far, within the governing principles, he or she still has a limited element of personal discretion. We have tried not merely to describe the relevant practices in New Zealand and elsewhere, but also to identify gaps in the constitutional conventions as currently formulated, and sometimes to suggest reforms. In doing so we seek to dispel the widely held impression that, as in colonial times, the Governor-General still acts as a constitutional backstop or "guardian of the constitution", and accordingly may exercise the powers to appoint or dismiss a Prime Minister, grant or refuse a dissolution, or act or refuse to act without, or against, the advice of a Prime Minister whose government retains the constitutional right to govern.² Instead we recommend ways in which the recognised duty to keep the Governor-General informed could be made more meaningful and emphasise the fact that not only the Governor-General but also the Prime Minister and all the other constitutional actors share the responsibility of making the constitution work as it should.³

On the same note, we discuss the role of the Sovereign or her representative in assenting to Bills in order to give them the force of law. We consider whether it would ever be proper to refuse such assent. Certainly, there is no longer a recognised discretion to refuse assent, but the fact remains that a Bill does not become law until it has received the royal assent. Again we emphasise the associated constitutional duties which fall on other actors such as the Clerk of the House and the Attorney-General.⁴ The Governor-General's position as

¹ Chapter 6 The Letters Patent, the Governor-General and the Realm of New Zealand, Chapter 7 The Office of Governor-General and Commander-in-Chief, Chapter 8 The Governor-General in the Executive Branch.

² Chapter 10 Guardian of the Constitution?.

³ Chapter 9 Finding and Changing a Prime Minister.

⁴ Chapter 11 The Governor-General in Parliament.

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