CITIZENSHIP LAWS IN THE REALM OF NEW ZEALAND

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I. Introduction

In 2010, a report of the Foreign Affairs, Defence and Trade Committee of the New Zealand House of Representatives entitled "An Inquiry into New Zealand's relationships with South Pacific countries" was presented to the House of Representatives.[1] The report deals with a wide range of issues but a central concern that consistently resurfaces is the fact that three of the Pacific countries which belong to the Realm of New Zealand, the Cook Islands, Niue and Tokelau[2] have a special status by virtue of their residents' New Zealand citizenship. "We believe," states the report, "that it is difficult to accept that there should be communities of New Zealand citizens overseas who receive lower standards of basic services than New Zealanders living in similar-sized population centres in New Zealand."[3]

This emphasis on citizenship is hardly surprising, given that the shared citizenship within the Realm provides a link of a very special nature between these three countries and New Zealand and brings with it some specific rights and duties of both a legal and a moral nature. These duties were described in the Kirk-Henry letters of 1973, which are elaborated on later in the paper. What is surprising, however, is the situation of uncertainty and inconsistency found when a closer look is taken at the legal documents dealing with citizenship across the Realm. The citizenship referred to is the citizenship of the state of New Zealand. It is a privilege which has been extended to the three other countries as the result of the special relationships they share with the state of New Zealand. However, references to this citizenship, in both its past and present forms, and to the rights to this citizenship, can be found scattered across the Realm in an inconsistent form. In many cases, the references do not reflect the current legal reality. This is undesirable from a legal perspective and could potentially lead to problems.

This article examines the references to citizenship and the right to citizenship found in the Realm. It will point out inconsistencies in these rights and references and the possible effects of those inconsistencies. It will then put forward some suggestions for possible solutions. These will aim to

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1 Foreign Affairs, Defence and Trade Committee *An Inquiry into New Zealand's relationships with South Pacific countries* (December 2010).

2 The Realm of New Zealand is made up of five constituent parts: the state of New Zealand, the Cook Islands, Niue, Tokelau and the Ross Dependency.

3 Foreign Affairs, Defence and Trade Committee, above n 1, at 21.

reduce the inconsistencies and make for a more universal understanding of the existence of rights to New Zealand citizenship in the Realm and prevent any of the potential problems manifesting themselves.[4]

II. Nationality/ Citizenship in the Realm of New Zealand: The Basics

This article does not discuss at length the various meanings and implications of citizenship and nationality. However, it briefly examines some fundamental aspects of citizenship in the Realm of New Zealand.

While citizenship operates at the level of international law, the idea of nationality, and later citizenship, first developed at the level of municipal law. It follows that it is not essential to the legal nature of a state at international law that there should exist any definition of its citizens.[5] Furthermore, it is for the state primarily in its domestic jurisdiction to determine who is, and who is not, a national of that state and who is or is not entitled to citizenship.[6] The state of New Zealand makes no distinction between a New Zealand 'citizen' and a New Zealand 'national',[7] although prior to the Citizenship Act 1977 all New Zealand citizens were British nationals by virtue of their citizenship status.[8]

Once a person becomes the citizen of a state there are a number of rights and duties to which they become subject. Where New Zealand extends its citizenship to the people of other Realm countries, those people gain the right of free access to New Zealand and to exercise all the rights of New Zealand citizens while they are in New Zealand. In return, there are a number of duties incumbent on them. For example, they owe allegiance to New Zealand's Head of State.[9] It follows from this allegiance that all people of the Realm of New Zealand who accept New Zealand citizenship accept a duty to uphold a number of basic values, such as a belief in democracy, individual rights and government under law.[10] "If this were not so," commented Robert Quentin Quentin-Baxter, "there could not be a common citizenship."[11]

4 The Ross Dependency, which is also a part of the Realm of New Zealand, is not discussed. The state of New Zealand is discussed where relevant, but the focus of the article is on the other three South Pacific countries of the Realm.

5 Clive Parry *Nationality and Citizenship Laws of The Commonwealth and of The Republic of Ireland* (Steven & Sons Limited, London, 1957) at 3.

6 Ibid, at 8. Regarding situations where international law might interfere in this determination see: *Laws of New Zealand* Citizenship and Nationality (online ed) at [1].

7 *Laws of New Zealand*, above n 6, at [5].

8 British Nationality and New Zealand Citizenship Act 1948, s 3(1).

9 Doug Tennent *Immigration and Refugee Law* (Lexis Nexis, Wellington, 2010) at 51-52. See also Citizenship Act 1977, Schedule 1, which contains the Oath of Allegiance to the Queen in Right of New Zealand.

10 Exchange of Letters between the Prime Minister of New Zealand and the Premier of the Cook Islands concerning the nature of the special relationship between the Cook Islands and New Zealand (4 and 9 May 1973).

11 R Q Quentin-Baxter "Second Report to the Niue Island Assembly on the Constitutional Development of Niue" (1999) 30 VUWLR 577 at 581.

A. The Realm of New Zealand

The Realm of New Zealand is defined in the 1983 Letters Patent Constituting the Office of the Governor-General of New Zealand[12] as comprising five parts: the state of New Zealand, the self-governing states of the Cook Islands and Niue, Tokelau and the Ross Dependency. The Queen in right of the Realm of New Zealand is the head of state of all parts of the Realm[13] and all nationals of the Realm share a common citizenship. The government arrangements differ among all countries. These arrangements and some of their practical consequences will be explained below.

1. The Cook Islands and Niue

The Cook Islands and Niue are self-governing states in relationships of free association with New Zealand. Such a relationship of free association[14] has been tailored specifically to meet the needs of these states within the Realm of New Zealand and thus is unique.

The Cook Islands and Niue both came within the boundaries of New Zealand by virtue of an Order in Council made in 1901 under the Colonial Boundaries Act 1895.[15] Prior to these states becoming self-governing they were dependent territories of New Zealand.[16] The origins of the current relationship can be found in art 73 of the Charter of the United Nations and in two General Assembly resolutions. Article 73 outlines the responsibilities of members who administer territories which are not yet self-governing.[17] General Assembly Resolution 742 then lists the factors to be used in deciding whether a territory is non-self-governing.[18] General Assembly Resolution 1514,[19] demands a speedy and unconditional end to colonisation. Self-government in free association

12 Letters Patent Constituting the Office of Governor-General of New Zealand (28 October 1983), SR 1983/225 (as amended SR 1987/8 and SR 2006/224).

13 Tony Angelo "In and about the Realm of New Zealand" (2006-2007) 5 NZYIL 261 at 261 and 263.

14 Alison Quentin-Baxter "Niue's Relationship of Free Association with New Zealand" (1999) 30 VUWLR 589 at 589. For more information on the free association relationship see also, ibid; I G Bertram and R F Watters *New Zealand and its small island neighbours: a review of New Zealand policy towards the Cook Islands, Niue, Tokelau Islands, Kiribati and Tuvalu* (Institute of Policy Studies, Victoria University of Wellington, Wellington, 1984); Terry M Chapman *The Decolonisation of Niue* (Victoria University Press and New Zealand Institute of International Affairs, Wellington, 1976); Tony Angelo "The Niue Constitution" (2009) 15 Revue Juridique Polynésienne 157; *Laws of New Zealand* Pacific States and Territories: Cook Islands (online ed).

15 Kenneth Roberts-Wray *Commonwealth and Colonial Law* (Stevens & Sons , London, 1966) at 244. See also Geoffrey Marston and Peter DG Skegg "The Boundaries of New Zealand in Constitutional Law" (1988) 13 NZULR 1.

16 Roberts-Wray, above n 15, at 243.

17 Charter of the United Nations, art 73.

18 Factors which should be taken into account when deciding whether a Territory is or is not a Territory whose people have not yet attained a full measure of self-government, GA Res 742, UN GOAR, 8th sess, 459th plen mtg (1953).

19 Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res 1514, UN GOAR, 15th sess, 947th plen mtg (1960).

was chosen by the people of Niue and the Cook Islands as the most attractive decolonisation option, ahead of the other options contemplated by the United Nations – independence and integration. Perhaps the best way of illustrating how this form of government works is Bertram and Watters' pendulum model,[20] where integration sits at one end of the pendulum and independence at the other. Self-government in free association lies somewhere between these two poles. The arrangement allows these countries to look after their own affairs while maintaining a particularly close relationship, that of free association, with New Zealand and thus strikes a balance between the desire for self-government and the desire to maintain ties with New Zealand.[21]

The foundations of the relationship in both cases are Acts of the New Zealand Parliament which have been adopted by the respective states and which also have the force of law in New Zealand. In the case of the Cook Islands, the Act is the Cook Islands Constitution Act 1964 and, in the case of Niue, the Niue Constitution Act 1974. These Acts provide constitutions which are the supreme law of their respective nations.[22] These Constitutions may be amended by simple majority by New Zealand, but any amendments by New Zealand will have effect only in New Zealand. Thus only the Cook Islands and Niue can amend their respective Constitutions in such a way that the amendments will be in force in their respective countries. These amendments can only be made if the legislatures follow the terms for amendment set out in the Constitutions.[23] Both Acts contain a section affirming that the right to New Zealand citizenship is not affected by anything in either Constitution,[24] although developments in New Zealand's citizenship legislation mean that it is no longer clear how this protection now operates.

The State of New Zealand does not have power to make laws for these self-governing nations. However, both Constitutions originally provided a request and consent mechanism whereby if the respective law-making bodies requested and consented to the New Zealand Parliament legislating for them, and the resulting Act of the New Zealand Parliament expressly declared that this was the case, that New Zealand Act would have the power of law as though it were enacted by the legislature of the Cook Islands or Niue.[25] Subsequently, the Cook Islands passed an Act[26] which amended art 46 so that New Zealand Acts would not extend to the Cook Islands, except where an Act of the Parliament of the Cook Islands provided for this. Thus, in the Cook Islands, this request and consent provision no longer exists.

20 Bertram and Watters, above n 14, at 34.
21 Chapman, above n 14, at 59.
22 Cook Islands Constitution Act 1974, s 4; Niue Constitution Act 1964, s 4.
23 The Constitution of the Cook Islands, art 41; The Constitution of Niue, art 35.
24 Cook Islands Constitution Act 1974, s 6; Niue Constitution Act 1964, s 5.
25 The Constitution of Niue, art 36; The Constitution of the Cook Islands, art 46. An example of where this option has been exercised is the Citizenship Act 1977 itself. Section 29 extends the Act to Cook Islands as a result of the Cook Islands requesting, and consenting to, an extension of the Act.
26 Cook Islands Constitution Amendment (No 9) Act 1980-81 (CI).

2. Tokelau

The islands of Tokelau were formerly a part of the United Kingdom's Gilbert and Ellice Islands Colony. Administration of the islands was first transferred to New Zealand in 1926 and Tokelau officially became a New Zealand territory in 1949 as a result of the Tokelau Act 1948.[27] Though the manner in which the territory is governed by New Zealand has evolved since 1948, and there is now a large degree of self-government,[28] Tokelau remains a non-self-governing territory of New Zealand.[29]

The General Fono of Tokelau is empowered to make rules relating to Tokelau to the extent that they are not inconsistent with any Act of the New Zealand Parliament that is in force in Tokelau, any regulation made under s 4 of the Act or any international obligation on Tokelau.[30] In practice, although the rules are subordinate to Acts and regulations made in Wellington, the General Fono operates largely independently and makes rules on most matters.

New Zealand statute law does not apply in Tokelau unless otherwise expressly provided.[31] Where New Zealand statute law does apply in Tokelau, any existing or future amendments to that law will also apply in Tokelau.[32] Thus the supreme lawmaking power in Tokelau, as in the state of New Zealand, lies in the hands of the New Zealand legislature, while the General Fono of Tokelau also has limited power to make certain laws.

III. The Right to New Zealand Citizenship

This section examines the right of the people of the Cook Islands, Niue and Tokelau to New Zealand citizenship. It will first briefly examine the promises which bind New Zealand to extend its citizenship to them. This section then examines the rights as contained in the Constitutions of the Cook Islands and Niue.

A. Source of the Right

In the Cook Islands and Niue, the choice to become self-governing was made on the condition that the people of those countries could continue to have the right to New Zealand citizenship. Without that assurance, along with the assurance of continued assistance, it is improbable that these states would have chosen the path that they did.[33]

27 Tony Angelo and Talei Pasikale *Tokelau: A History of Government: The constitutional history and legal development of Tokelau* (Council for the Ongoing Government of Tokelau, Apia, 2008) at 23; Tokelau Act 1948, preamble and s 3.

28 This evolution includes, for example, the delegation of the Administrator's powers to the General Fono. For more information see Angelo and Pasikale, ibid.

29 Angelo and Pasikale, above n 27, at 47.

30 Tokelau Act 1948, ss 3A and 3B.

31 Tokelau Act 1948, s 6. Only 15 statutes are extended to Tokelau currently.

32 Tokelau Act 1948, s 7.

33 See C C Aikman, J W Davidson and J B Wright "Report to the Members of the Legislative Assembly of the Cook Islands on Constitutional Development" (1999) 30 VUWLR 519, at 521; R Q Quentin-Baxter "Second Report to the Niue Assembly", above n 11, at 581.

In both cases, the New Zealand Parliament affirmed this right to citizenship by inserting a provision in the Constitution Acts which stated that nothing in those Acts, or in the Constitutions they brought into force, would affect the right to New Zealand citizenship of the people of the Cook Islands and Niue.[34] In the case of the Cook Islands, this right has been further affirmed in official correspondence between the two nations. This correspondence began with the so-called Kirk-Henry letters of 1973 between then Prime Minister of New Zealand, Norman Kirk, and then Premier of the Cook Islands, Albert Henry. These letters set out the fundamental principles underpinning the relationship between the two states, such as allegiance to the Queen in right of New Zealand.[35] This commitment was reaffirmed in art 2 of the Joint Centenary Declaration signed by the Prime Ministers of the two nations in Rarotonga on 11 June 2001. Article 2 of this declaration states: "The people of the Cook Islands will retain New Zealand citizenship, respecting and upholding the fundamental values on which that citizenship is based."[36]

In the case of Niue, there has not been an express reaffirmation of the commitment made in the 1974 Constitution Act. However, New Zealand and Niue have continued to work closely together.[37] Furthermore, it is a general assumption that the sentiment of the Kirk-Henry letters applies to Niue just as it does to the Cook Islands, as this sentiment is generic to the type of relationship which both the Cook Islands and Niue have with New Zealand.

The right to New Zealand citizenship in Tokelau flows from Tokelau's status as a dependent territory of New Zealand. This right has further been stated in the Joint Statement of the Principles of Partnership between New Zealand and Tokelau in paragraph 4, which is a mutual acknowledgement of the benefits and responsibilities of New Zealand citizenship.[38] The right to citizenship was also contained in the draft treaty between New Zealand and Tokelau which was to be signed if either of the referenda on self-government in Tokelau in 2006 and 2007 had been successful.[39]

The right in respect of all three countries is also contained in the New Zealand Citizenship Act 1977.[40]

34 Cook Islands Constitution Act 1964, s 6; Niue Constitution Act 1974, s 5.

35 Exchange of Letters between the Prime Minister of New Zealand and the Premier of the Cook Islands concerning the nature of the special relationship between the Cook Islands and New Zealand, above n 10.

36 Joint Centenary Declaration of the Principles of the Relationship Between New Zealand and the Cook Islands (signed 11 June 2001) cl 2.

37 See for example, Halavaka ke he Monuina – an arrangement between the government of New Zealand and the government of Niue for a programme of strengthened cooperation 2004-2009 (30 October 2004). For an explanation of this agreement, see "NewZ Aid" (December 2004) <enews.nzaid.govt.nz/index.php?id=14>.

38 Joint Statement of the Principles of Partnership between New Zealand and Tokelau (signed and entered into force 21 November 2003).

39 Draft Treaty of Free Association between New Zealand and Tokelau, art 3. See in relation to the first referendum, Andrew Townend "Tokelau's 2006 Referendum on Self-Government" (2007) 5 NZJPIL 121.

40 Citizenship Act 1977, ss 2(1) and 29.

B. The Right to Citizenship Contained in the Constitutions of the Cook Islands and Niue

This section explores the constitutional right to New Zealand citizenship granted in the Constitutions of the Cook Islands and Niue and assesses the effectiveness and consequences of this constitutional right.

In both Niue and the Cook Islands the right to citizenship is established as a constitutional right by virtue of the Cook Islands Constitution Act 1964[41] and the Niue Constitution Act 1974,[42] which respectively state that:

> Nothing in this Act or in the Constitution shall affect the status of any person as a British subject or New Zealand citizen by virtue of the British Nationality and New Zealand Citizenship Act 1948.

The British Nationality and New Zealand Citizenship Act 1948 was, at the time these Constitutions came into force, the legislation which governed citizenship of the state of New Zealand. When New Zealand passed the 1977 Citizenship Act, it included a section which repealed the 1948 Act.[43] The 1977 Act extended to Niue and the Cook Islands because they requested and consented to it in the correct manner and this was acknowledged in the Citizenship Act 1977.[44] However, neither s 6 of the Cook Islands Constitution Act 1964, nor s 5 of the Niue Constitution Act 1974 was amended by New Zealand, the Cook Islands or Niue, to reflect this change. This raises the question: what does the constitutional reference to New Zealand citizenship now mean? This paper argues that there are several possible interpretations.

1. The Sections Referring to Citizenship Only Protected the Citizenship Status of the People of the Cook Islands and Niue as at the Day the Constitutions Came into Force

A literal interpretation of the words in the citizenship sections of the Constitutions might lead to the conclusion that all those sections are designed to protect is the citizenship status of the people of the Cook Islands and Niue as it was on the day that those Constitutions came into force. Thus the sections were not intended to have any future effect and the Constitutions contain only protection of New Zealand citizenship limited to protection of citizenship status on the day the respective Constitutions came into force. This interpretation is arguably supported by the fact that neither New Zealand nor the Cook Islands nor Niue has changed the wording of the Constitutions to reflect the change in citizenship legislation, despite the fact that reviews of the Constitutions have been undertaken in the Cook Islands and Niue since 1977. However, taking a purposive approach, this interpretation can be swiftly dismissed. As demonstrated above, it was always the intention that the

41 Cook Islands Constitution Act 1964, s 6; Niue Constitution Act 1974, s 5.
42 Niue Constitution Act 1974, s 5.
43 Citizenship Act 1977, s 30.
44 Citizenship Act 1977, ss 29(1) and 29(2).

right of the people of the Cook Islands and Niue to New Zealand citizenship be preserved into the future and this was the reason for the insertion of these citizenship sections in the respective Constitutions.

2. The Reference to the 1948 Act Should Now be Read as a Reference to the 1977 Act

This reading, suggested by Alison Quentin-Baxter, is that because citizenship is such a key part of the Constitutions of Niue and the Cook Islands and of their relationships of free association with New Zealand, as signalled by the entrenchment of the sections protecting it, the sections should now be read as referring to the Citizenship Act 1977, especially as the Citizenship Act 1977 was extended to both countries by their request and consent.[45] If this reading were taken to be correct, it would mean that there is no issue with the reference to the repealed legislation beyond the fact that the Constitutions do not reflect legal reality. One difficulty with this argument is that it would mean that a substantial change had been made to the constitutional law of the Cook Islands and Niue without the appropriate procedures for constitutional amendments having been followed.[46] Arguments for and against this suggestion are outlined below, but the necessary conclusion seems to be that this interpretation is untenable.

(a) Entrenchment Provisions are Stronger than Request and Consent Provisions

The interpretation seems equivalent to suggesting that by requesting and consenting to the Citizenship Act 1977 becoming part of their respective laws, the Cook Islands and Niue also made an amendment to heavily entrenched sections of their Constitutions. This would mean that the sections which allowed New Zealand legislation to come into force where this was requested and consented to[47] override the sections which only allow amendments to be made to certain sections of the Constitutions where two-thirds of the legislature and two-thirds of the electors vote in favour of the amendment.[48] If this were the case, the entrenchment provision could be avoided by simply requesting that the New Zealand legislature legislate where it seemed to be difficult to get enough support otherwise. This clearly was not the intention when the Constitutions were drafted.

(b) Henry v Attorney-General

Henry v Attorney-General[49] was a 1983 Cook Islands Court of Appeal case relating to a 1981 amendment to the Cook Islands Constitution which provided that wherever a reference was made to the "Premier" of the Cook

45 *Laws of New Zealand*, above n 14, at [28].
46 The Constitution of the Cook Islands, art 41; The Constitution of Niue, art 35.
47 The Constitution of the Cook Islands, art 46 (in 1977 this article still provided for New Zealand legislation to extend by request and consent although it no longer does); The Constitution of Niue, art 36.
48 The Constitution of the Cook Islands, art 41(2); The Constitution of Niue, art 35.
49 *Henry v Attorney-General* [1985] LRC (Const) 1149.

Islands, it was henceforth to be read as a reference to the "Prime Minister."[50] Most of the amendments were to be found in the articles of the Constitution, and thus only needed to satisfy art 41(1) of the Constitution in order to be valid.[51] This requirement was satisfied. However, one of the references to the "Premier" was to be found in s 5, one of the heavily entrenched sections in the Constitution which can only be amended if the requirements of art 41(2) are satisfied.[52] These requirements were not satisfied and the validity of the amendment was thus challenged. The court held that this simple change in nomenclature was not a change which needed to follow the special criteria under art 41(2). The requirements under art 41(2) become operative only if the change to the Constitution Act "is truly an amendment, modification or extension." While *Henry v Attorney-General* dealt with a case of a simple change in nomenclature, the situation being presently discussed deals with the exchanging of one New Zealand enactment for another and thus the exchanging of the rights contained under one New Zealand enactment for the rights contained in another. The court would be unlikely simply to read a new Act into the deeply entrenched sections of the Constitution. Such a fundamental change to the Cook Islands Constitution Act 1964 is best construed as "truly an amendment", in the words of the Court, and thus would require the art 41(2) requirements to be met.

(c) Acts Interpretation Act 1924

The Acts Interpretation Act 1924 was the interpretation legislation in place for both the Cook Islands and Niue in 1977 when the change in legislation was made.[53] Section 21 of that Act provided:[54]

> In every unrepealed Act in which reference is made to any repealed Act such reference shall be construed as referring to any subsequent enactment passed in substitution for such repealed Act, unless it is otherwise manifested by the context.

Although it would appear that this legislation means that the reference to the 1948 Act should now be read as a reference to the 1977 Act, the context seems to indicate otherwise. The Constitutions are supreme law and the citizenship sections are heavily entrenched. The Acts Interpretation Act 1924 was a New Zealand Act which was in force in the Cook Islands and Niue, and it was not designed to deal with supreme legislation of any form, as supreme legislation has never existed in New Zealand. In the constitutions of countries which were once British territories, there was often provision made for the constitutions to be interpreted in accordance with the Interpretation Act 1889, with limitations placed on this.[55] No such provision was made in the Constitutions of the Cook

50 Constitution Amendment (No 9) Act 1980-1981 (CI), s 18(2).
51 The Constitution of the Cook Islands, art 41(1).
52 Ibid.
53 See Interpretation Act 2009 (Niue).
54 Acts Interpretation Act 1924, s 21(1).
55 See for example, The Constitution of St Lucia, art 124(12); The Constitution of Mauritius, art 111(2).

Islands and Niue. Thus, despite the fact that the Acts Interpretation Act 1924 seems to support the interpretation suggested above, the arguments against that interpretation are much stronger. A court would be unlikely to allow an enactment by a simple majority to amend a heavily entrenched provision.

(d) New Zealand Consolidations Still Refer to the 1948 Act

The conclusion that this is not the correct interpretation is further supported by the fact that in the New Zealand consolidations of the respective Constitution Acts, the relevant sections still refer to the 1948 Act and not to the 1977 Act. This is despite the fact that the Interpretation Act 1999 (that which applies in New Zealand) states that references to a piece of repealed legislation are to be read as references to the legislation which replaces that repealed legislation[56] and the fact that it is the practice of the Parliamentary Counsel Office to incorporate amendments into the legislation it publishes.[57]

3. The Reference to the 1948 Act Would be Read Purposively in the Courts as a Reference to the 1977 Act

Although it is clear that the references to the 1948 British Nationality and New Zealand Citizenship Act should not be read as references to the current New Zealand citizenship legislation, it might be possible for the courts, following a purposive approach, to read them as referring to the current legislation. The courts would take this approach if they found that the intention of the inclusion of the sections relating to citizenship to the Constitution Acts of the Cook Islands and Niue was to protect the right to New Zealand citizenship for the people of the Cook Islands and Niue,[58] and that the result of not reading the current citizenship legislation into the Constitution Acts would be to defeat that purpose. This reading would only be possible in very particular circumstances, where any other reading might lead to a result which defeated Parliament's purpose.

4. The Official Reference to the Repealed Legislation Means that the Reference is Now Ineffectual

The fourth possible reading is that the rights of Niueans and Cook Islanders to New Zealand citizenship are now to be found only in the Citizenship Act 1977. New Zealand provides citizenship to Cook Islanders and Niueans and, as the citizenship legislation referred to in their Constitutions no longer exists in New Zealand, the sections in the Constitutions protecting citizenship have become ineffectual and provide no constitutional guarantees. Accordingly, people of the Cook Islands and Niue have no constitutional protection against Acts of their governments that may jeopardise their rights to New Zealand citizenship. This cannot be the correct interpretation – it would be

56 Interpretation Act 1999, s 22.

57 Other legal publishers, such as Brookers, have also chosen not to update the reference in their consolidations of the Constitution Acts.

58 See discussion above at III(B)(1) which suggests that this is the purpose.

an undesirable situation for the people of those countries to be in and can never have been intended. It was clearly considered important by the Cook Islands, Niue and the New Zealand governments that citizenship rights be contained in the Constitutions, as evidenced by the heavy entrenchment of the constitutional sections containing those rights.[59] Citizenship is an important part of identity and the New Zealand citizenship of the people of the Realm is an important indicator of the constitutional arrangements within the Realm. Although the effect of such a reading would seem to be purely symbolic, at least in the meantime, it still leaves a situation of uncertainty.

5. The Rights Protected in the Constitutions Are Those That Were Contained in the 1948 Act

The fifth possible reading is that the rights that are protected are the rights that the people of the Cook Islands and Niue held under the British Nationality and New Zealand Citizenship Act 1948. This seems to be the only logical reading available, as this is what the Constitutions actually say, and in the thirty-four years since the 1977 Act was passed the references in the Constitutions have not been amended, despite the fact that there have been constitutional reviews in both countries.[60]

If this reading of the Constitutions is accepted, it follows that the governments of the Cook Islands, Niue and New Zealand are obliged to protect the rights held under the 1948 Act. They are not, however, obliged to protect any additional rights under the 1977 Act. Some rights conferred by the 1977 Act differ markedly from those conferred by the 1948 Act. The section below will consider these differences. There are a few exceptions to the rules mentioned below; here they are described in broad terms. In both Acts[61] the term 'New Zealand' includes the Cook Islands, Niue and Tokelau.[62]

(a) Loss of Citizenship Rights by Birth

Under s 6 of the 1948 Act, anyone born in New Zealand was automatically a New Zealand citizen.[63] This is no longer the case under the 1977 Act[64] so effectively the right of children born in the Realm to people who are neither citizens, nor entitled to live indefinitely in the Realm, has been extinguished.[65] This applies to all children born on or after 1 January 2006.

59 Cook Islands Constitution Act 1964, s 41(2); Niue Constitution Act 1974, s 35(1).

60 For example, *Report of the Joint New Zealand/ Niue Review Group: A Report to the Prime Minister of New Zealand and to the Premier of Niue by the Niue Review Group* (Niue Review Group, Wellington and Alofi, 1986); *Reforming the Political System of the Cook Islands: Preparing for the Challenges of the 21st Century: the Report of the Commission of Political Review* (Commission of Political Review, Rarotonga, 1988).

61 Ie, the Citizenship Act 1977 and the British Nationality and New Zealand Citizenship Act 1948.

62 British Nationality and New Zealand Citizenship Act 1948, s 2(1); Citizenship Act 1977, s 2(1).

63 British Nationality and New Zealand Citizenship Act 1948, s 6.

64 Citizenship Amendment Act 2005, s 5.

65 Ibid.

A hypothetical situation where this may be problematic for the Cook Islands or Niue would be: A child is born in 2011 in the Cook Islands to parents who have been granted work permits there, but are neither New Zealand citizens nor entitled to reside indefinitely in the Cook Islands. Under the 1977 Act, the child cannot become a New Zealand citizen.[66] However, under the 1948 Act, the child would have become a New Zealand citizen by virtue of its birth in the Cook Islands. The Cook Islands Constitution does not allow for any powers granted under it to be exercised in a way which would affect the status of any person under the 1948 Act. Therefore, that child would have to be allowed to stay in the Cook Islands and be treated as though it were a citizen. To have the child deported, or to not allow the child to enter and leave the Cook Islands at will, would be unconstitutional. Similar hypothetical scenarios for the other changes described below also exist.

(b) Loss of Citizenship by Descent After More than One Generation

Under the 1948 Act, any child whose father was a New Zealand citizen at the time of the child's birth could become a New Zealand citizen.[67] This was true even if the father was only a citizen by descent, and not by birth, but in that case the birth had to be registered before the child was 16 and the prior permission of the Minister had to be obtained.[68] Under the 1977 Act, anybody born outside New Zealand on or after 1 January 1978 to a New Zealand citizen by descent cannot become a New Zealand citizen by descent, unless they would otherwise be stateless.[69] Thus the ability of a male New Zealand citizen by descent to pass his New Zealand citizenship on to a child born outside New Zealand has been lost.

(c) Acquisition of the Right to Inherit New Zealand Citizenship by Descent from the Mother and of the Right to Inherit New Zealand Citizenship by Descent where the Birth is Illegitimate

The right to obtain citizenship by descent applied only to obtaining citizenship from the father. The same did not apply if it was the child's mother who was a New Zealand citizen, either by birth or descent.[70] It also did not apply where the child was illegitimate.[71] The only way for a child with a New Zealand citizen mother and a foreign national father to gain citizenship was for the child to be born in New Zealand and thus to be eligible for citizenship under s 6. One of the main considerations when the 1977 Act was enacted was that it should remove this gender discrimination and extend this right of citizenship by descent to all children born of New Zealand citizens.[72] This

66 This assertion assumes that the child would not be stateless if it could not obtain New Zealand citizenship. If it would otherwise be stateless, different rules apply.
67 British Nationality and New Zealand Citizenship Act 1948, s 7.
68 British Nationality and New Zealand Citizenship Act 1948, s 7(1)(b).
69 Citizenship Act 1977, s 7(1).
70 British Nationality and New Zealand Citizenship Act 1948, s 7.
71 British Nationality and New Zealand Citizenship Act 1948, s 2(2).
72 Citizens and Aliens Bill 1977 (25-1) (explanatory note) at 1.

was achieved in the 1977 Act, which provides for citizenship by descent to anyone whose father or mother was a New Zealand citizen, otherwise than by descent, at the time of their birth.[73]

(d) Loss of Privileged Status of Commonwealth Citizens

Under the 1948 Act, British, Irish and Commonwealth citizens were treated differently than aliens. They could apply for citizenship by grant after having lived in New Zealand, or having worked in Crown service, for at least three years.[74] A number of other criteria, such as language and character, had to be fulfilled. Aliens, however, had to be naturalised and could only be naturalised after they had lived in New Zealand for at least five years.[75] Under the 1977 Act, the distinction between alien and Commonwealth citizen was removed.

IV. Other Potential Inconsistencies Regarding Citizenship in the Realm of New Zealand

This section discusses other inconsistencies in the citizenship legislation as it stands in the various parts of the Realm. It also addresses the inconsistencies in the ability to obtain New Zealand citizenship because of the varying requirements for obtaining permanent residency, or the right to live indefinitely, across the Realm.

A. Different Versions of the Citizenship Act 1977 on the Books

The acquisition of New Zealand citizenship is governed by the Citizenship Act 1977. The only way to gain New Zealand citizenship is to meet the requirements set out in the relevant sections of that statute. When the Act was passed in 1977, it was extended to the Cook Islands and Niue because they requested and consented to it. However, since 1977 the Citizenship Act has been amended eight times by New Zealand, at times fundamentally. None of those amendments extend to the Cook Islands or Niue because they have not adopted the New Zealand amendments and their Constitutions do not allow the amendments to extend automatically. This has resulted in a situation where the Citizenship Act 1977 in the statutes of Niue and the Cook Islands is not the same as the Citizenship Act 1977 in New Zealand.

In respect of Tokelau, this particular inconsistency does not exist. The Citizenship Act 1977 extended to Tokelau by virtue of s 29(3) of that Act.[76] The eight amendments to the Act since 1977 also apply by virtue of s 7 of the Tokelau Act 1948.

73 Citizenship Act 1977, s 7(1).
74 British Nationality and New Zealand Citizenship Act 1948, s 8(1).
75 British Nationality and New Zealand Citizenship Act 1948, s 12(1).
76 Citizenship Act 1977, s 29(3).

Some of the changes to the Act since 1977 have been relatively minor, such as the change allowing the delegation of some of the authority under the Act.[77] Other changes have been major including changes to allow information sharing with certain named agencies,[78] changing the requirements for attaining citizenship by birth[79] and providing that children adopted in the Cook Islands, Niue or Tokelau by New Zealand citizens or people entitled to reside indefinitely in the Realm, are citizens by birth.[80]

The fact that the citizenship legislation on the books in the Cook Islands and Niue is not up to date is unlikely to have any practical consequences. It is for the state of New Zealand alone to grant and regulate its citizenship. There is no need for the Cook Islands and Niue to have an amended Citizenship Act 1977 as part of their legislation. The only real issue here is one of appearances: if the statutes are on the books, they should be consistent. Currently the law does not reflect the legal reality and, considering New Zealand's legal system operates in a positivist manner, this is undesirable. There is a potential for these out of date statutes to cause confusion about what the relevant law actually is. Symbolically also, it is not desirable as it would seem to indicate a certain apathy towards the citizenship legislation. This is unlikely to be the case, but that is how it might appear.

B. Different Residency Requirements in Various Realm Countries

The other inconsistency in the citizenship law relates to those people who have the right to reside indefinitely in Realm countries other than New Zealand. By virtue of s 8(4) of the Citizenship Act 1977, the New Zealand Minister of Internal Affairs may, after consultation with the New Zealand Minister of Immigration, waive the requirement for a grant of citizenship under s 8(2)(a)[81] if the Ministers are satisfied that the person applying for citizenship is entitled to reside indefinitely in the Cook Islands, Niue or Tokelau. The Cook Islands, Niue and Tokelau each have its own rules regarding the right of persons to reside indefinitely within those countries. The requirements for each and for obtaining permanent residency in New Zealand are summarised below.

As the granting of New Zealand citizenship to a person entitled to live in one of the Realm countries indefinitely is a matter of discretion for the New Zealand Minister of Internal Affairs, there is no guarantee that a person who has the right to live indefinitely in the Realm will be able to obtain citizenship. Further, there is another problem in that the benchmark for obtaining the right to reside indefinitely in each of the Realm countries, which is effectively

77 Citizenship Amendment Act 1985.
78 Citizenship Amendment Act 2001; Citizenship Amendment Act 2002; Citizenship Amendment Act 2005.
79 Citizenship Amendment Act 2005.
80 Citizenship Amendment Act 2005, s 2, inserting a new s 2B into the Citizenship Act 1977.
81 That the applicant is entitled in terms of the Immigration Act 2009 to be in New Zealand indefinitely.

the key which unlocks the right to apply for a grant of citizenship, has different thresholds in each country. These in turn are different than the benchmark which New Zealand sets for people to become permanent residents of the state of New Zealand.

The practical consequence of this is that it may mean that certain people may be attracted to a Realm country other than New Zealand in order to gain permanent residency more easily than they can in New Zealand and thus gain the right to apply to become a New Zealand citizen more easily. Conversely, it may be more difficult in other Realm countries to cross the threshold to where a resident may apply for citizenship. Solutions to this inconsistency have not been suggested in this article as the solution which is currently employed appears to be the best way to deal with this difficult situation. One state is providing citizenship to the people of three other countries, and it is for those countries, especially where they are self-governing, to decide who may live within their borders. Currently New Zealand has established a threshold which requires people applying for citizenship by grant to have had the status of permanent resident, or equivalent, for at least five years.[82] New Zealand has also provided its Ministers with some discretion in granting citizenship. This state of affairs is satisfactory in the circumstances.

1. New Zealand

In New Zealand, the Immigration Act 2009 deals with immigration matters. The requirements for visas are published in the Immigration New Zealand Operational Manual, as is required by s 25 of that Act. The immigration rules for New Zealand are much more complex than those for the other Realm countries. In order to become a permanent resident of New Zealand, a person must first be a resident of New Zealand, have been a resident of New Zealand for at least 24 months and have demonstrated a commitment to New Zealand.[83]

There are a number of paths towards residency and the requirements to meet in order to become a resident will depend on which category a person applies under. Some examples of categories include entrepreneurship,[84] investment[85] and family.[86]

2. The Cook Islands

Article 76A(2) of the Cook Islands Constitution allows for any person to apply for a certificate of permanent residency in the Cook Islands pursuant to an Act of Parliament. The relevant Act of Parliament is the Entry, Residence and Departure Act 1971-72. Section 5 of that Act allows a person of good character who has lived in the Cook Islands for ten years and intends to

82 Citizenship Act 1977, ss 8(2)(b) and 8(4)(b).
83 Immigration New Zealand Operational Manual 2011, RV 2.5.
84 Immigration New Zealand Operational Manual 2011, BH.
85 Immigration New Zealand Operational Manual 2011, BJ.
86 Immigration New Zealand Operational Manual 2011, F1-7.

make it their home to be granted permanent residency at the discretion of the Minister in charge of immigration. If the Minister sees fit, the ten year period may be reduced to no less than five years. Section 5A of the Act allows for honorary permanent residency to be granted to people who have made an outstanding contribution to the Cook Islands.[87] The Constitution also provides, at art 76A(1), that any person born in the Cook Islands to at least one parent with permanent residency status also becomes a permanent resident.[88]

3. Niue

In Niue the Immigration Act 2011 regulates immigration matters. Section 20 of that Act allows the Cabinet to grant any person permanent residence status at its discretion,[89] but only where the person in question has resided in Niue for at least ten years, the person meets the residence criteria published by Cabinet and the Chief Immigration Officer agrees that the criteria have been met.[90] Cabinet is to publish Residence Criteria for the grant of permanent residence certificates.[91] To date, no criteria have been published, but there are further requirements under s 21 of the Act that every applicant for a permanent residency certificate must be both of good character and of good health.[92]

This change in legislation brings the requirements in Niue more into line with those in the Cook Islands. The previous legislation dealing with immigration matters[93] allowed the granting of permanent residency to someone who had been in Niue for three years,[94] rather than ten years, which was in line with New Zealand legislation prior to 2005.[95]

4. Tokelau

In Tokelau the Immigration Rules 1991 deal with the granting of permanent residency. Rule 7(v) allows for a permanent residence permit to be granted to a person who has ordinarily been resident in Tokelau for at least 5 years. These permits are granted by the Council for the Ongoing Government which may grant or refuse permits as it sees fit.[96] The Council can also revoke permits if it considers that there is good reason to do so in the interests of Tokelau.[97]

87 See for example, Entry, Residence and Departure (Award of Honorary Residence to Sir Barry Curtis) Order 2005.
88 The Constitution of the Cook Islands, art 76A.
89 Immigration Act 2011 (Niue), s 20(2).
90 Immigration Act 2011 (Niue), s 20(5).
91 Immigration Act 2011 (Niue), s 20(4).
92 Immigration Act 2011 (Niue), s 21(4).
93 Entry, Residence and Departure Act 1985 (Niue).
94 Entry, Residence and Departure Act 1985 (Niue), s 6(1).
95 Amended by the Citizenship Amendment Act 2005, s 7.
96 Immigration Rules 1991 (Tokelau), r 9.
97 Immigration Rules 1991 (Tokelau), r 12(1).

V. Potential Solutions

The previous part concluded that the inconsistencies in New Zealand citizenship law outlined in this article are unlikely to cause problems in practice. However, where it is avoidable, it seems unsatisfactory to leave these inconsistencies.

This section proposes some potential solutions for the outlined inconsistencies. The political difficulties that the proposed solutions might encounter are briefly discussed, but this section focuses on the legal issues, as political issues are largely outside the scope of this article.

At one other point in New Zealand's history, citizenship legislation has been left in an unsatisfactory state with potentially disastrous consequences. This was after Western Samoa became independent from New Zealand. Mrs Lesa was an overstayer in New Zealand of Western Samoan origin and was about to be deported. She brought a case to court, claiming that she was a New Zealand citizen by virtue of the British Nationality and Status of Aliens (in New Zealand) Act 1928, because she was born after that Act came into force and before its repeal by the British Nationality and New Zealand Citizenship Act 1948. In *Lesa v Attorney-General*[98] the Privy Council found that all Western Samoans born in Western Samoa between 1924 and 1948 were entitled to New Zealand citizenship because they were British subjects and therefore New Zealand citizens. This finding had the potential for far-reaching consequences for both New Zealand and Western Samoa. While in that situation an outcome which was acceptable to both New Zealand and Western Samoa was found,[99] it was possible that things might not have worked out so amiably had Western Samoa not reacted favourably to New Zealand depriving some of its people of their legally-held New Zealand citizenship. That story serves to remind New Zealand that if something can be done to prevent such a situation it should be done.[100]

A. Amend the Constitutions of the Cook Islands and Niue so that they Refer to the Citizenship Act 1977

One potential solution would be to amend each Constitution so that the relevant sections in them refers to the Citizenship Act 1977 and not to the British Nationality and New Zealand Citizenship Act 1948. This would mean that the legislatures of the Cook Islands and Niue would have to amend the sections in their Constitutions referring to citizenship[101] in accordance with the procedures set out for amending these heavily entrenched sections.[102]

98 [1982] 1 NZLR 165 (PC).

99 Protocol to the Treaty of Friendship between the Government of New Zealand and the Government of Western Samoa (21 August 1982).

100 For more information on *Lesa* and the subsequent Act of Parliament (Citizenship (Western Samoa) Act 1982) see *New Zealand Citizenship and Western Samoans: Information Bulletin no 4, March 1983* (Ministry of Foreign Affairs, Wellington, 1983).

101 Cook Islands Constitution Act 1964, s 6; Niue Constitution Act 1974, s 5.

102 The Constitution of the Cook Islands, art 41(2); The Constitution of Niue, art 35.

This would require a two-thirds majority both in the legislature and in a poll of electors. New Zealand would also have to amend the two Constitution Acts as they stand in New Zealand law and this could be done by simple majority, as these sections are not entrenched in New Zealand. By doing this the constitutional right of Cook Islanders and Niueans to New Zealand citizenship as it now exists would be protected.

This solution could be difficult to bring to fruition because it would involve persuading two-thirds of the legislators and of the ordinary people in both the Cook Islands and Niue to agree to the change. It could also appear that New Zealand was trying to meddle in the political affairs of autonomous states, if New Zealand were to initiate the action. Further, if New Zealand were to change its citizenship legislation in the future, the whole amendment process would need to be carried out again. As the countries exercise greater autonomy, any interference becomes even less welcome. Thus, while this solution is a good one in that it would provide clarity and constitutional assurance, it only works while the Citizenship Act 1977 in its present form remains in force.

B. Amend the Constitutions of the Cook Islands and Niue so that they Refer to New Zealand Citizenship Legislation Current at any Given Time

The sections could be amended in such a way that the wording would provide for any future change in the citizenship legislation of the state of New Zealand to be reflected in the Constitutions. This would mean that, were New Zealand to change its citizenship legislation again, the process of constitutional amendment could be avoided.

Although this would mean that New Zealand would have to provide citizenship rights to the Cook Islands and Niue indefinitely, such a change is within the rights of the Cook Islands and Niue. The right to unilaterally terminate the free association with New Zealand, of which the right to citizenship is a constituent part, lies with the Cook Islands and Niue. Thus, there is no issue with their enacting legislation which presupposes this constitutional relationship with New Zealand continuing into the future. New Zealand does not ordinarily have the right to terminate the special relationship unless relations were damaged irreparably.[103]

This solution would present the same problems as to whether it would be possible to get enough support in the Cook Islands and Niue for the change. It also has the potential to present an interpretation problem of its own were it not carefully drafted, because it refers to legislation which does not yet exist. The drafters would need to be very careful to ensure that the provision would catch any relevant future citizenship legislation.

Despite these issues, this solution would be the best option. It leaves no doubt as to which rights are protected by the Constitutions and it ensures that the rights will receive constitutional protection. The flexibility of this kind of provision would create a durable solution and thus remove the need for further amendments and the associated political consultations.

103 Quentin-Baxter, above n 14, at 590.

C. Bring all Amendments to the Citizenship Act 1977 into Force in the Cook Islands and Niue

This could be achieved by simple majority enactments in both the Cook Islands and Niue. Every time New Zealand passed an amendment to the Citizenship Act 1977, this could also be enacted by the Cook Islands and Niue. Such a change would bring with it no practical effects because ultimately it matters only what the citizenship legislation in New Zealand states. It would serve a symbolic function, however, and would bring the legislation into line with the legal reality. It would also remove any confusion on the part of those in the Cook Islands and Niue as to what the citizenship legislation actually states. Given that this solution would have no practical effect, it would be undesirable to adopt it if negative consequences would follow, for example it would be unwise for New Zealand to suggest that the Cook Islands and Niue make such a change if the Cook Islands and Niue might see New Zealand's suggestions as meddling. For this reason, while the solution would be desirable, it is probably impracticable and unnecessary. There would also be little point in pursuing it unless it were adopted in conjunction with solution A, B or D which resolve the constitutional reference issue, as that problem may have practical consequences.

D. Remove all References to New Zealand Citizenship from the Laws of the Other Realm Countries

Another solution would be to attempt to have the references to New Zealand citizenship removed from legislation in the Cook Islands, Niue and Tokelau, and to discourage future references from being added. The state of New Zealand would then be clearly the sole keeper of legislation relating to citizenship. This solution would remove any administrative issues that arise with inconsistencies in citizenship legislation. However, it would seem somewhat odd for autonomous states such as Niue and the Cook Islands to make no legal reference whatsoever to the citizenship of their people. New Zealand is a state of close to four and a half million people, far larger than any of the other Realm countries. Were the citizenship protections of the Cook Islands, Niue and Tokelau to be integrated entirely with New Zealand's, there is the potential for these countries to be forgotten or overlooked simply because of sheer numbers. Thus, this solution might also jeopardise the constitutional right of their people to have their right to citizenship protected by, and against, their government.

The main reason that this may be problematic is that currently the right of Niueans and Cook Islanders to New Zealand citizenship is protected by the Constitutions of the Cook Islands and Niue, as well as the New Zealand Acts providing for these Constitutions. As discussed above,[104] it is unclear exactly to which rights this protection extends, but it undoubtedly protects

104 In part III(B) of this article.

some citizenship rights. If references to citizenship were removed from the Constitutions, this would result in the protection of any citizenship rights being lost.

It is preferable to preserve a reference to citizenship in the Constitutions of the Cook Islands and Niue, even if the reference is wrong, in order that the intended protection remains. Further, the reference performs a treaty-like function. When the Cook Islands and Niue became self-governing in free association, such an arrangement was entirely new, and the best way of structuring agreements and arrangements was unclear. Recently, when Tokelau was moving towards self-government, these citizenship provisions were placed in a treaty instead of legislation, because it is now clear that self-governing countries can behave like independent states and therefore have treaty-making rights. To remove these treaty-like provisions from the Constitutions of the Cook Islands and Niue would almost be to withdraw unilaterally articles of a treaty of free association. They are essentials at the core of the compact of free association between New Zealand and the Cook Islands and Niue.

E. Reach a Formal Agreement Affirming the Right to Citizenship

Another option which could present, or contribute to, a potential solution would be to reach a formal agreement or treaty as to the right of people within the Realm to New Zealand citizenship. Numerous agreements recognising this right have been mentioned above[105] but it is probable that, especially if option D were to be followed, the people of the Cook Islands, Niue and perhaps later on Tokelau, will want a further, formal guarantee of their New Zealand citizenship status. Moves to remedy these inconsistencies through option D might otherwise be construed as a move towards removing the right to New Zealand citizenship from the people in the Realm. This is especially because the citizenship provisions in the Constitutions of the Cook Islands and Niue have a treaty-like status. In the case of the Cook Islands and Niue the suggested agreement could take the form of a bilateral treaty as both states have full treaty-making rights.[106] In the case of Tokelau, it might take the form of a government-to-government agreement. Article 3 of the draft Treaty of Free Association between New Zealand and Tokelau provides a good example of what such an agreement might look like.[107]

The New Zealand Parliament could also insert a section into the Citizenship Act 1977, which would ideally be entrenched in some way,[108] to guarantee the right to citizenship. Such an action might form part of New

105 Exchange of Letters between the Prime Minister of New Zealand and the Premier of the Cook Islands concerning the nature of the special relationship between the Cook Islands and New Zealand, above n 10; Joint Centenary Declaration of the Principles of the Relationship Between New Zealand and the Cook Islands, above n 36; Joint Statement of the Principles of Partnership between New Zealand and Tokelau, above n 38.

106 *The Laws of New Zealand*, above n 14, at [36].

107 Draft Treaty of Free Association between New Zealand and Tokelau, art 3.

108 For example, through the use of a mechanism similar to the Electoral Act 1993, s 268.

Zealand's obligations under a treaty or agreement. Politically this should not be problematic in New Zealand: New Zealand should never in the future feel the need to withdraw citizenship rights unless the Cook Islands and/or Niue ask for this to happen because it is within New Zealand's strategic interests to remain on good terms with friendly nations in the Pacific.[109] Further, New Zealand has promised not to withdraw citizenship rights. Finally, the arrangements of free association should only be terminated by agreement between the two partners or unilaterally by the formerly colonised partner in the relationship.[110]

While this would be a good solution in many respects, especially because it is much easier to present politically, it does not provide the same constitutional protection as options A and B. Therefore, those solutions should be considered first and only if they were found to be politically untenable would this option be a good alternative. It would be an important option to consider were option D to be favoured because option D on its own removes some key assurances and protections.

VI. Conclusion

This article has highlighted one issue that arises with the particular form of self-government in free association which was chosen in decolonising the islands in the Realm of New Zealand. The tension that has been created between relative dependence and independence has resulted in a situation of some confusion. New Zealand provides citizenship to Realm nations without having any legal ability to keep references to that citizenship consistent in those nations, or a need to do so. It is clear that, given the importance of citizenship as a symbol of legal identity of a person, something must be done to rectify the situation in which New Zealand and her Realm friends now find themselves. As Alison Quentin-Baxter has so succinctly stated, "the common citizenship is unworkable unless the law of each country provides the same answer to the question whether a particular person is a New Zealand citizen."[111]

Given the rapid constitutional development of the three Realm island countries in the past fifty years, it seems that any hesitation to suggest further developments to the Constitutions or government arrangements of these countries, or to their relationship with New Zealand, would be ill-advised. The decision to formulate a unique constitutional arrangement when decolonising Niue and the Cook Islands implicitly carried with it an acceptance that the arrangement might not always have perfect results and that the states involved might need to have some flexibility and commitment to continuing to mould and refine the relationship so that it works at an optimal level. Thus

109 Foreign Affairs, Defence and Trade Committee, above n 1, at 12 and 19.
110 Quentin-Baxter, above n 14, at 590.
111 *The Laws of New Zealand*, above n 14, at [28].

the states should not be afraid to adopt some of the solutions suggested in this article, or to come to their own arrangements, to rectify the ambiguities in the codification of citizenship rights.

New Zealand citizenship in the Realm is still very much a live issue. In March 2012, almost forty years after the Cook Islands attained self-government, the Cook Islands Finance Minister called for a re-examination of the right of his people to freely enter New Zealand as the population of the Cook Islands continues to shrink.[112] The first step in any such examination of the citizenship status of the people of the Realm would have to be a consideration of the current state of affairs regarding the New Zealand citizenship of the people of the three Realm countries, such as that undertaken in this paper.

The Foreign Affairs, Defence and Trade select committee in its 2010 report expressed great concern at the plight of New Zealand citizens in areas of the Realm other than New Zealand. This article has suggested that, while looking at issues such as education and health is certainly of importance, the committee would have done well also to have considered citizenship itself.

112 "Call to review free association with New Zealand" *The Cook Islands Herald* (online ed, Cook Islands, 13 March 2012).