

# UNITED NATIONS EXPERT MECHANISM ON THE RIGHTS OF INDIGENOUS PEOPLES: NEW ZEALAND SUBMISSION FOR REPORT ON RIGHT TO SELF-DETERMINATION

## Foreword

1. The Expert Mechanism on the Rights of Indigenous Peoples has invited submissions for its first substantive report on the right to self-determination since the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) by the General Assembly.
2. The New Zealand Government is grateful for the opportunity to submit on this study. From the perspective of those in Aotearoa New Zealand this study is timely given the Expert Mechanism's country engagement mission to New Zealand in April 2019, and the New Zealand Government's report on the impact of COVID-19 on Māori to the Special Rapporteur on the rights of indigenous peoples.<sup>1</sup> That report highlighted the involvement of Māori communities in New Zealand's response to the pandemic. It noted how the "immediate response to the pandemic has demonstrated the benefits of Māori exercising self-determination and working in partnership with the Government to achieve better outcomes for Māori and the communities they live in."<sup>2</sup>
3. From an international perspective the study is also timely as Indigenous peoples and states continue to consider how the Declaration's confirmation of rights of self-determination will be realised. Sharing perspectives and experiences and obtaining the views of the Expert Mechanism will contribute to the Declaration's goals.

## Executive Summary

4. This submission is intended to inform the Expert Mechanism's study on the right to self-determination from the perspective of a Member State. It emphasises the New Zealand Government's commitment to a Declaration plan to implement and realise the Declaration in Aotearoa New Zealand.
5. The submission begins by identifying where Indigenous peoples' right to self-determination sits within the Declaration and its relation to other articles and key principles including, in the context of Aotearoa New Zealand, the guarantee of tino rangatiratanga to Māori under Te Tiriti o Waitangi, the Treaty of Waitangi.<sup>3</sup> The submission notes that, whether under the

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<sup>1</sup> Report to the United Nations Special Rapporteur on the rights of indigenous peoples (22 December 2020) <https://www.tpk.govt.nz/docs/UN%20Special%20Rapporteur%20Report.pdf>.

<sup>2</sup> At [7].

<sup>3</sup> Te Tiriti o Waitangi, the Treaty of Waitangi, of 1840 is the instrument that led to the establishment of the modern State of Aotearoa New Zealand through a process of colonisation by Great Britain. It followed the 1835 He Whakaputanga o te Rangatiratanga o

Declaration or Te Tiriti o Waitangi, the Treaty of Waitangi, there is an expectation of greater self-determination by Indigenous peoples. The New Zealand Government acknowledges the expectation and the reality that it should do more to make room for the growing exercise of Māori self-determination in Aotearoa New Zealand.

6. The submission addresses the need for the Government to respect and support Māori communities in their work of deciding on the manifestations of self-determination that are most suitable for them. As an operating ethos this also avoids the risk of the Government determining how self-determination can and should be exercised by Māori, while recognising the need to support Indigenous peoples' right to self-determination.
7. To offer some context for the benefit of the Expert Mechanism's study, the submission provides some recent examples of progress made and challenges faced in realising the self-determination of Māori communities. It highlights a number of initiatives that provide a basis for optimism regarding the trajectory of change, including the Government's commitment to a Declaration plan to implement the Declaration's objectives and goals.
8. The submission then discusses the aims of the Expert Mechanism's study on Indigenous peoples' right to self-determination. The New Zealand Government sees the Expert Mechanism's study as an important component of a wider shift towards recognising Indigenous peoples' priorities and valuing their attainment.

### **Right to self-determination under the Declaration**

9. The United Nations Declaration on the Rights of Indigenous Peoples was adopted by the General Assembly in September 2007 after many years of negotiation.<sup>4</sup> The New Zealand Government's support for the Declaration was announced in April 2010.
10. In New Zealand's statement of support for the Declaration, the Government recognised the "long involvement of Māori in the elaboration of the Declaration and the extent of their investment in its development."<sup>5</sup> The Minister for Māori Affairs at the time, Dr Pita Sharples, noted in announcing support that:<sup>6</sup>

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Nu Tirenī (known in English as the Declaration of Independence of the United Tribes of New Zealand). Te Tiriti is composed of articles in both the Māori language and in English, all of which must be construed to interpret and apply the Treaty's terms. In Aotearoa New Zealand's domestic law, a number of pieces of legislation direct administrative law decision-makers to consider or apply the principles of the Treaty of Waitangi rather than its terms.

<sup>4</sup> United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295, 2007).

<sup>5</sup> Minister for Māori Affairs "Announcement of New Zealand's Support for the Declaration on the Rights of Indigenous Peoples" (20 April 2010) at [6]. Accessible at <https://www.beehive.govt.nz/release/supporting-un-declaration-restores-nzs-mana> (accessed 11 February 2021).

<sup>6</sup> At [5].

The Declaration contains principles that are consistent with the duties and principles inherent in the Treaty, such as operating in the spirit of partnership and mutual respect. We affirm this objective, and affirm the Government's commitment to build and maintain constructive relationships with Māori to achieve better results for Māori, which will benefit New Zealand as a whole.

11. The New Zealand Government has a real interest in the Expert Mechanism's study on Indigenous peoples' right to self-determination as well as in other international initiatives to further implement the Declaration and to realise the rights of Indigenous peoples affirmed in the Declaration.

12. Article 3 of the Declaration sets out Indigenous peoples' right to self-determination:

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

13. Article 3 imports identical wording from article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which provide that all peoples have the right to self-determination.<sup>7</sup>

14. The former Special Rapporteur for the rights of indigenous peoples, Victoria Tauli-Corpuz, emphasised in her final report to the General Assembly that Indigenous peoples' right to self-determination "is, fundamentally, a human right".<sup>8</sup> The Special Rapporteur stated:<sup>9</sup>

The Special Rapporteur reiterates that the right to self-determination of indigenous peoples is, fundamentally, a human right. Its realization is indispensable for indigenous peoples to enjoy all the collective and individual human rights pertaining to them. The right has an external and an internal dimension, expressed through the exercise of control over their lives and through the participation in all decision-making that may affect them, in accordance with their own cultural patterns and structures of authority.

15. Another former Special Rapporteur, Prof James Anaya, similarly considered self-determination to be "a foundational right, without which indigenous peoples' human rights, both collective and individual, cannot be fully enjoyed".<sup>10</sup>

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<sup>7</sup> International Covenant on Civil and Political Rights, art 1.

<sup>8</sup> Victoria Tauli-Corpuz "Report of the of the Special Rapporteur on the rights of indigenous peoples" (A/74/149, 17 July 2019) at [15].

<sup>9</sup> Victoria Tauli-Corpuz "Report of the of the Special Rapporteur on the rights of indigenous peoples" (A/74/149, 17 July 2019) at [15], citing S. James Anaya *Indigenous Peoples in International Law* (2nd ed, New York, Oxford University Press, 2004).

<sup>10</sup> James Anaya "Report of the Special Rapporteur on the rights of indigenous peoples" (A/HRC/12/34, 2009) at [41].

16. Article 3 cannot be read in isolation from other provisions in the Declaration that are clearly intended to support its attainment. New Zealand international law expert, Dr Claire Charters, has written that “[t]he clearest expression of the meaning of an Indigenous peoples’ right to self-determination is found in articles 4, 5, 18, 19, 20 and 33 of the Declaration ...”.<sup>11</sup>

17. Article 4 is particularly significant as it explicitly refers to the exercise of the right to self-determination alongside the important contributory and related concepts of autonomy and self-government:

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

18. Of further significance are the Declaration’s articles addressing free, prior and informed consent rights.<sup>12</sup> As EMRIP has reported in its 2018 study on the Declaration’s affirmation of free, prior and informed consent: “Free, prior and informed consent is a manifestation of indigenous peoples’ right to self-determine their political, social, economic and cultural priorities.”<sup>13</sup> Self-determination can be operationalised in many instances through processes that respect free, prior and informed consent settings and that reflect the particular circumstances of Indigenous peoples and states. This is to suggest that through the operational application of situations where free, prior and informed consent is in play, there may be opportunities for states, third parties and Indigenous peoples to achieve some rebalancing of power and influence and a resulting strengthening of partnerships that respect the self-determination rights of Indigenous peoples. Weaknesses in upholding free, prior and informed consent rights can therefore be a potentially limiting factor in realising self-determination rights affirmed in the Declaration.

19. The Declaration is clear that the right to self-determination does not compromise the territorial integrity of member states.<sup>14</sup> That the New Zealand Government is responsible for speaking on behalf of New Zealand’s national interests internationally has also been recognised by the Waitangi Tribunal.<sup>15</sup> Yet this is not to detract from the importance of

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<sup>11</sup> Brief of evidence of Dr Claire Winfield Ngamihi Charters (Wai 2417, #A10, 20 January 2014) at [105].

<sup>12</sup> See arts. 10, 11, 19, 29 and 32 of the Declaration.

<sup>13</sup> The Expert Mechanism on the Rights of Indigenous Peoples “Free, prior and informed consent: report” (A/HRC/39/62, 2018) and covering statement available at <https://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/StudyFPIC.aspx>.

<sup>14</sup> Article 46(1).

<sup>15</sup> See Waitangi Tribunal *Ko Aotearoa Tēnei: A Report Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, vol 2, 2011) at 681-689; and Waitangi Tribunal *Te Mana Whatu Ahuru: Report on Te Rohe Potae Claims* (Wai 898, pre-publication version,

ensuring that Indigenous peoples' voices, the very people whose self-determination is affirmed by the Declaration, are heard in the international community through participation in international policy fora and decision-making bodies.

20. The right to self-determination has been described as a cross-cutting or intersecting right, because it touches on many areas of a state's relations with Indigenous peoples, including control over lands, territories and natural resources as well as distinct economic, social and cultural institutions.<sup>16</sup> This is particularly relevant when it comes to forming strong processes to implement the Declaration. It serves as a reminder that self-determination is not only a legal or academic concept but is also "crucial to the survival of indigenous peoples' languages, cultures, health and food sovereignty".<sup>17</sup> The Special Rapporteur has similarly noted:<sup>18</sup>

The Special Rapporteur considers the enjoyment by indigenous peoples of their rights to their lands, territories and natural resources as the most crucial condition to allow for the exercise of their autonomy or self-government. In fact, for many indigenous peoples, the main objective of autonomy or self-government is to be able to maintain their relationship to their lands, territories and resources, which defines their cultures and identities as distinct peoples.

21. As a "foundational" right, Indigenous peoples' right to self-determination does not dictate specific institutional arrangements or mechanisms but a practical reinterpreting of the control that Indigenous communities have when making decisions about themselves. Self-determination is not of one kind.<sup>19</sup> Indigenous cultures and identities are collective and the attainment of the right to self-determination affirmed by the Declaration will embrace the collective dimensions of this right.
22. When seen alongside New Zealand's own constitutional settings, in which Te Tiriti o Waitangi, the Treaty of Waitangi, is foundational, the Declaration's affirmation of the right to self-determination aligns closely with the guarantee of "tino rangatiratanga" in article 2

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2018) at 178. The Waitangi Tribunal operates under the Treaty of Waitangi Act 1975. It is deemed a commission of inquiry and examines claims brought by Māori people relating to legislation, policies, actions or omissions of the New Zealand Crown that are alleged to breach the principles of the Treaty of Waitangi.

<sup>16</sup> Expert Mechanism on the Rights of Indigenous Peoples "Country Engagement Mission to New Zealand – Advisory Note" (14 July 2019) at [14]. See also Victoria Tauli-Corpuz "Report of the of the Special Rapporteur on the rights of indigenous peoples" (A/74/149, 17 July 2019) at [22]-[28].

<sup>17</sup> Report of the international expert group meeting on theme of "Sustainable Development in the Territories of Indigenous Peoples (E/C.19/2018/7, 21 February 2018) at [28].

<sup>18</sup> Victoria Tauli-Corpuz "Report of the of the Special Rapporteur on the rights of indigenous peoples" (A/74/149, 17 July 2019) at [22].

<sup>19</sup> Report of the international expert group meeting on theme of "Sustainable Development in the Territories of Indigenous Peoples" (E/C.19/2018/7, 21 February 2018) at [27].

of Te Tiriti o Waitangi, the Treaty of Waitangi.<sup>20</sup> The guarantee of “tino rangatiratanga” in article 2 of Te Tiriti o Waitangi, the Treaty of Waitangi was made in exchange for the kāwanatanga (the right of government) conferred in article 1. New Zealand international law expert, Dr Claire Charters, has noted that:<sup>21</sup>

Rangatiratanga has often been translated as self-determination and often connotes Māori authority. Both rangatiratanga under the Treaty and self-determination in international law, including with respect to the Declaration, are interpreted to entitle the holder/s to political and governing power or authority to determine outcomes free from outside interference ... .

23. The Waitangi Tribunal has made the same observation. In its 2015 Report on the Māori Community Development Act Claim, it said:<sup>22</sup>

We agree with Dr Charters that these articles reflect a consistent scheme in UNDRIP that recognises that indigenous peoples should not have outcomes imposed upon them by Governments. The principle of rangatiratanga operates in practice with the same effect.

24. Likewise, former Special Rapporteur for the rights of Indigenous peoples, Prof S. James Anaya, has described tino rangatiratanga as “somewhat analogous” to the right to self-determination.<sup>23</sup>

25. It is expected that Aotearoa New Zealand domestic law and constitutional settings will continue to evolve in relation to the Declaration and Te Tiriti o Waitangi, the Treaty of Waitangi. A national plan to focus attention on implementing the Declaration’s rights and objectives will lift consciousness of how matters interact with the Declaration’s articles. For some years the Declaration has been raised in Aotearoa New Zealand’s domestic courts and before the Waitangi Tribunal.<sup>24</sup> Dr Charters has observed that the Declaration is

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<sup>20</sup> Te Tiriti o Waitangi, the Treaty of Waitangi, of 1840 is the instrument that led to the establishment of the modern State of Aotearoa New Zealand through a process of colonisation by Great Britain. It followed the 1835 He Whakaputanga o te Rangatiratanga o Nu Tireni (known in English as the Declaration of Independence of the United Tribes of New Zealand). Te Tiriti is composed of articles in both the Māori language and in English, all of which must be construed to interpret and apply the Treaty’s terms. In Aotearoa New Zealand’s domestic law, a number of pieces of legislation direct administrative law decision-makers to consider or apply the principles of Te Tiriti o Waitangi, the Treaty of Waitangi rather than its terms.

<sup>21</sup> Brief of evidence of Dr Claire Winfield Ngamihi Charters (Wai 2417, #A10, 20 January 2014) at [85].

<sup>22</sup> Waitangi Tribunal’s *Whaia Te Mana Motuhake: Report on the Māori Community Development Act Claim* (Wai 2417, 2015) at 41.

<sup>23</sup> James Anaya “Report of the Special Rapporteur on the rights of indigenous peoples on the situation of Maori people in New Zealand” (A/HRC/18/35/Add.4, 31 May 2011) at [8].

<sup>24</sup> See, for example, the Waitangi Tribunal’s *Whaia Te Mana Motuhake: Report on the Māori Community Development Act Claim* (Wai 2417, 2015) at ch 2.5; and *New Zealand Maori*

“generally more explicit and specific” in expressing Indigenous peoples’ rights than the Treaty principles at an abstract level,<sup>25</sup> providing opportunities for claims by Māori that rely on either the Treaty, the Declaration, or both.

### **Expectation of greater exercise of self-determination by Indigenous peoples**

26. The Expert Mechanism has described self-determination as an “ongoing process” in which institutions of decision-making are devised that:<sup>26</sup>

... enable indigenous peoples to make decisions related to their internal and local affairs, and to participate collectively in external decision-making processes in accordance with relevant human rights standards.

27. As already noted, Indigenous peoples’ right to self-determination does not dictate specific institutional arrangements or mechanisms but a practical reinterpreting of the control that Indigenous peoples have when making decisions about themselves. This is part of a process of making room for the exercise of self-determination and, in the context of Aotearoa New Zealand, the exercise of the tino rangatiratanga guaranteed in Te Tiriti o Waitangi, the Treaty of Waitangi.

28. In 2019, the former Special Rapporteur on the rights of indigenous peoples emphasised the need for inter-cultural understandings of the right to self-determination.<sup>27</sup> She considered that insufficient attention had been given to the interpretations of Indigenous peoples themselves.<sup>28</sup>

29. The New Zealand Government accepts there is a need to support Māori communities in their efforts to decide the manifestations of self-determination that are most suitable for them. The Government can make room for the growing exercise of self-determination, and is progressively doing so in a number of areas, some of which are discussed later in this submission. This is an incremental exercise rather than a single step, involving aspects of recognition and capacity-building by all.

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*Council v Attorney-General* [2013] NZSC 6 at [92]; and *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17.

<sup>25</sup> Brief of evidence of Dr Claire Winfield Ngamihi Charters (Wai 2417, #A10, 20 January 2014) at [83]. The courts and the Waitangi Tribunal commonly refer to “the principles of the Treaty” rather than either of its texts (Te Reo Māori or English language) when interpreting and applying Te Tiriti o Waitangi, the Treaty of Waitangi.

<sup>26</sup> Expert Mechanism on the Rights of Indigenous Peoples “Progress Report on the study on indigenous peoples and the right to participate in decision-making” (A/HRC/15/35, 23 August 2010) at [31].

<sup>27</sup> Victoria Tauli-Corpuz “Report of the of the Special Rapporteur on the rights of indigenous peoples” (A/74/149, 17 July 2019).

<sup>28</sup> At [18]-[19].

30. Indigenous understandings of self-determination (and of tino rangatiratanga in the domestic context of Aotearoa New Zealand) are nuanced and continue to develop. That is a reason why an ongoing constitutional dialogue remains a feature of Aotearoa New Zealand's civic life. Essential to this is the manner in which the parties to Te Tiriti o Waitangi, the Treaty of Waitangi co-operate to achieve a true working partnership under this particular treaty and the domestic constitutional circumstances it gives rise to. Aotearoa New Zealand's constitutional arrangements, including the partnership relationships that flow from the principles and articles of Te Tiriti o Waitangi, the Treaty of Waitangi, permit such evolutionary processes. The trajectory of change is towards greater recognition of Māori self-determination. The New Zealand Government acknowledges the efforts of successive generations of Māori leaders in building this constitutional momentum and that a number of rangatira (leaders) have made calls for more immediate and transformational changes.<sup>29</sup>
31. Domestically, legal innovations are expected to continue to give greater expression to rangatiratanga, in particular through the lens of the principles and articles of Te Tiriti o Waitangi, the Treaty of Waitangi. The development by Aotearoa New Zealand of a plan to implement the Declaration is intended to provide further and new spaces for Māori communities to articulate what self-determination means for them and support those initiatives.
32. As an operating ethos this also avoids the risk of the Government determining how self-determination can and should be exercised by Māori. The former Special Rapporteur has stated:<sup>30</sup>
- In most cases, options for the enjoyment of those rights have been unilaterally defined by States. The proposals of indigenous peoples have had to be adapted to existing legal, policy and administrative frameworks. The imposition of State frameworks in the implementation of arrangements for autonomy or self-government has often resulted in what could be termed “fragmented autonomies”.
33. Such “fragmented autonomies” can be contrasted with attempts by Indigenous peoples to develop coherent governance frameworks according to their own values as manifestations of this aspect of their self-determination.

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<sup>29</sup> He Whaakaaro Here Whakaumu Mō Aotearoa: The Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation (2016).

<sup>30</sup> Victoria Tauli-Corpuz “Report of the of the Special Rapporteur on the rights of indigenous peoples” (A/74/149, 17 July 2019) at [20].

34. In the New Zealand context, the Māori response to COVID-19 in 2020 and 2021 has demonstrated “the benefits of exercising self-determination and working in partnership with the Government to achieve better outcomes for Māori and the communities they live in.”<sup>31</sup> Māori organisations acted and developed locally tailored solutions to assist the most vulnerable within their communities alongside many tribal organisations who also provided funding.<sup>32</sup> The Government was able to support those acts of self-determination.
35. While the COVID-19 pandemic has been an unexpected challenge, it has renewed the expression of self-determination by indigenous peoples in Aotearoa New Zealand in tangible and immediate ways. While all too often the fulfilment of Indigenous peoples’ rights has been “portrayed as a cost”,<sup>33</sup> examples such as the Indigenous responses to COVID-19 in Aotearoa New Zealand offer opportunities to present a strong counter-narrative of the benefits that flow from having stronger attainment of self-determination rights.
36. The Expert Mechanism has stated that any national plan for implementing the Declaration should be grounded on the right to self-determination.<sup>34</sup> In 2019, the New Zealand Government established a Declaration Working Group as an independent body to provide advice and recommendations on the form and content of a Declaration plan and an engagement process strategy to realise the Declaration. While progress on the development of a Declaration plan has slowed down as a result of COVID-19, Aotearoa New Zealand is committed to being among the first states to create a plan to implement the Declaration.
37. The Declaration Working Group issued its report, *He Puapua*, in November 2019. In the Māori language “he puapua” means “a break”. The title is intended by the authors to allude to “the breaking of the usual political and societal norms and approaches.”<sup>35</sup> The Report

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<sup>31</sup> Report to the United Nations Special Rapporteur on the rights of indigenous peoples (22 December 2020) <https://www.tpk.govt.nz/docs/UN%20Special%20Rapporteur%20Report.pdf> at [7].

<sup>32</sup> Report to the United Nations Special Rapporteur on the rights of indigenous peoples (22 December 2020) <https://www.tpk.govt.nz/docs/UN%20Special%20Rapporteur%20Report.pdf> at [6] and [18]-[37].

<sup>33</sup> Victoria Tauli-Corpuz “Report of the of the Special Rapporteur on the rights of indigenous peoples” (A/74/149, 17 July 2019) at [21].

<sup>34</sup> Expert Mechanism on the Rights of Indigenous Peoples “Country Engagement Mission to New Zealand – Advisory Note” (14 July 2019) at [14].

<sup>35</sup> He Puapua: Report on the Working Group on a Plan to Realise the UN Declaration on the Rights of Indigenous Peoples in Aotearoa/New Zealand (1 November 2019) [Partial release version accessible at <https://www.tpk.govt.nz/en/whakamahia/un-declaration-on-the-rights-of-indigenous-peoples>] at i.

strongly emphasises the importance of rangatiratanga to the credibility of any Declaration plan.

38. The Report notes that it forms only the “first step towards the creation of a Declaration plan”.<sup>36</sup> In April 2020, the Minister acknowledged the Declaration Working Group for its report and reiterated the Government’s commitment to the work programme. At this point the New Zealand Government is considering the report’s recommendations.
39. The New Zealand Government also acknowledges the relevance and contributions to the attainment of self-determination by Indigenous peoples of both the Constitutional Advisory Group’s 2013 report as well as the Māori-led Matike Mai Aotearoa report of 2016.<sup>37</sup> The latter report recommended that a Māori Constitutional Convention be called in 2021. This was recently held, albeit in an online environment in light of the COVID-19 pandemic response, in order to advance understandings among Indigenous peoples in Aotearoa New Zealand of future areas of focus in attaining self-determination. Contributions such as these explore how renewing constitutional settings can address present structural barriers that impede the realisation of self-determination by Indigenous peoples. In the 2016 Matike Mai Aotearoa report and preceding consultative processes, Māori communities and experts have again articulated calls for constitutional transformation in Aotearoa New Zealand to better achieve tino rangatiratanga and self-determination.

### **Recent New Zealand progress and challenges**

40. The Expert Mechanism in its 2019 Advisory Note to New Zealand emphasised the cross-cutting or intersecting nature of the right to self-determination.<sup>38</sup> Similarly, recent initiatives led by Māori have emphasised the need for cohesive, coordinated planning to implement the Declaration.<sup>39</sup> In this section, the New Zealand Government provides some examples of positive developments towards Māori achieving greater self-determination, while recognising that the work underway is but a part of what will be

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<sup>36</sup> At [8].

<sup>37</sup> He Whaakaaro Here Whakaumu Mō Aotearoa: The Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation (2016).

<sup>38</sup> Expert Mechanism on the Rights of Indigenous Peoples “Country Engagement Mission to New Zealand – Advisory Note” (14 July 2019) at [14].

<sup>39</sup> See, for example, the recommendations in He Whaakaaro Here Whakaumu Mō Aotearoa: The Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation (2016). See also the reports of the Aotearoa Independent Monitoring Mechanism which is a body, independent of the State, to monitor and report on New Zealand’s work to realise the Declaration’s rights and objectives: see Aotearoa Independent Monitoring Mechanism “Report of the Independent Monitoring Mechanism regarding the implementation of the UN Declaration on the Rights of Indigenous Peoples in Aotearoa New Zealand – Intervention to the Committee on Economic, Social and Cultural Rights” (February 2018); and annual reports since 2015 to the Expert Mechanism on the Rights of Indigenous Peoples.

needed over time to realise effective self-determination in diverse manifestations as chosen by Māori.

41. The former Special Rapporteur has also stated:<sup>40</sup>

A comprehensive approach is needed that includes the indigenous conceptions of territory, control, power and relations. The nation-building processes that must be undertaken can progress only through mutual understanding and agreement between States and indigenous peoples.

42. Aotearoa New Zealand is not starting from square zero in meeting the challenges that such nation-building processes raise. In addition to Declaration planning, there are various domestic examples of what the former Special Rapporteur on the rights of indigenous peoples has called “hopeful practices” in relation to the right to self-determination (or tino rangatiratanga in the context of Māori and Te Tiriti o Waitangi, the Treaty of Waitangi) in Aotearoa New Zealand.<sup>41</sup>

43. In 2018, the Government moved to establish the Office for Māori Crown Relations: Te Arawhiti as a separate agency, following a months-long engagement process with Māori and the public over what a new government portfolio concerned with Māori-Crown relations should prioritise. A core focus of the agency is to rethink the future relationship between Māori and the Crown beyond the historical Treaty settlement process.<sup>42</sup> Strengthening existing partnerships is a vital step.<sup>43</sup>

44. Some of the practices and initiatives either already underway or to be established that can support the attainment of self-determination consistent with the Declaration, including through implementation of a Declaration plan, include:

- a. further agreement making and then giving legal effect to negotiated Treaty of Waitangi settlements establishing co-management of traditional tribal natural resources such as rivers and forests. There are also other forms of statutory redress, including participatory rights relating to Indigenous places within traditional

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<sup>40</sup> Victoria Tauli-Corpuz “Report of the of the Special Rapporteur on the rights of indigenous peoples” (A/74/149, 17 July 2019) at [20].

<sup>41</sup> Victoria Tauli-Corpuz “Report of the of the Special Rapporteur on the rights of indigenous peoples” (a/74/149, 17 July 2019) at [76].

<sup>42</sup> Cabinet paper “Establishment of the Office for Māori-Crown Relations – Te Arawhiti” (6 November 2018, proactive release 6 May 2020) at [13]-[16]. Retrieved at [https://www.tearawhiti.govt.nz/assets/Publications/Proactive-release-Establishment-of-the-Office-for-Maori-Crown-Relations-Cabinet-paper\\_7-May-2020.pdf](https://www.tearawhiti.govt.nz/assets/Publications/Proactive-release-Establishment-of-the-Office-for-Maori-Crown-Relations-Cabinet-paper_7-May-2020.pdf)

<sup>43</sup> Cabinet paper “Proposed final scope of the Crown/ Māori Relations portfolio and a Crown/ Māori engagement framework and Guidelines” (September 2018). That there could be constitutional dimensions to this work is apparent from the paper (at [21](a)). Retrieved at <https://www.tearawhiti.govt.nz/te-kahui-hikina-maori-crown-relations/>

lands and territories. This can include work undertaken to recognise Indigenous worldviews in law. Future reviews of these arrangements will be able to evaluate their effectiveness;<sup>44</sup>

- b. dedicated Māori seats in the national House of Representatives, and provisions of the Local Electoral Act 2001 that enable the establishment of Māori seats in local government bodies.<sup>45</sup> These representation measures exist alongside the self-government and control by tribes of their own political institutions and traditional governing measures;
- c. reform of the legislation and institutions governing Māori land (Te Ture Whenua Māori Act 1993), with an aim to make it easier for Māori families to connect, use and develop their land consistent with economic and social rights. The most recent reforms came into force on 6 February 2021;<sup>46</sup>
- d. the convening of a whole-of-government work programme to respond to the Waitangi Tribunal's landmark report on Māori culture and identity in New Zealand law and policy, *Ko Aotearoa Tēnei*;<sup>47</sup>
- e. the establishment of independent advisory groups in a range of fields of importance to Māori, including on rights to water and in respect of family and criminal justice issues;<sup>48</sup>

<sup>44</sup> For example, the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 and the Ngati Tuwharetoa, Raukawa and Te Arawa River Iwi Waikato River Act 2010; Te Urewera Act 2014; and Te Awa Tupua (Whanganui River Claims Settlement) Act 2017.

<sup>45</sup> Local Electoral Act 2001, s 19Z and see, in particular, the Local Electoral (Māori Wards and Māori Constituencies) Amendment Act 2021

<sup>46</sup> Te Ture Whenua Māori (Succession, Dispute Resolution, and Related Matters) Amendment Act 2020. Among other measures this provides for a simpler succession process and establishes a free mediation service for disputing landowners grounded in applicable customary law (tikanga Māori).

<sup>47</sup> Te Pae Tawhiti: Wai 262 work programme. More detail, including relevant Cabinet materials, is accessible at <https://www.tpk.govt.nz/en/a-matou-kaupapa/wai-262-te-pae-tawhiti>. Earlier work in response to the Wai 262 report of the Waitangi Tribunal includes the reform of Māori language legislation to provide for a partnership approach between Māori and the Crown for the revitalisation of the Māori language, including the establishment of an independent statutory entity to represent iwi (tribal) and Māori interests in the language at a community level and to support, inform and influence the government initiatives to protect, promote and revitalise the language.

<sup>48</sup> See Kāhui Wai Māori "Te Mana o te Wai: the health of our wai, the health of our nation" (September 2019). Accessible at <https://www.mfe.govt.nz/publications/fresh-water/te-mana-o-te-wai-health-of-our-wai-health-of-our-nation-k%C4%81hui-wai-m%C4%81ori>; Te Korowai Ture-ā-Whānau: the final report of the Independent Panel examining the 2014 family justice reforms (May 2019). Accessible at <https://www.justice.govt.nz/assets/Documents/Publications/family-justice-reforms-final-report-independent-panel.pdf>. Multiple reports of Te Uepū Hāpai i te Ora – the Safe and Effective Justice Advisory Group are accessible at <https://safeandeffectivejustice.govt.nz/about-this-work/reports/>. 2021 has seen the establishment of a Ministerial advisory group to address

- f. the current implementation plan for *He Korowai Oranga*, New Zealand’s Māori Health Strategy, setting the Government’s direction for Māori health advancement over the next five years as well as decisions anticipated to be taken in 2021 to move to establish a Māori health authority as part of reforming the organisation and provision of publicly funded health services in Aotearoa New Zealand;<sup>49</sup> and
- g. ongoing dialogue with a range of institutions that promote Māori participation in civic life, including the New Zealand Māori Council (established under the Māori Community Development Act 1962) and the Iwi Chairs Forum, a national forum of tribal leaders.
45. These developments cannot be viewed in isolation from other initiatives independent of the Executive Government including those led by the Judiciary, such as Indigenous restorative justice processes for young people (including Rangatahi courts) and the reorientation of the first instance court system, Te Kōti ā Rohe the District Court, to more appropriately reflect contemporary society’s expectations of it,<sup>50</sup> as well as developments in the private sector, such as development initiatives to greatly expand private economic activity under Māori control in what has come to be called the Māori economy.
46. The New Zealand Government considers that these, and other advances, provide a basis for the optimism underlying the development of its plan to implement the Declaration. Nonetheless it is conscious of the challenges for states to uphold Indigenous peoples’ right to self-determination. Foremost among these challenges is for states to decide how best to make increasing space for self-determination. In many cases, Aotearoa New Zealand included, there may be structural barriers inhibiting development of the expression of self-determination rights. Being prepared to explore structural and formal settings is part of making space for acts of self-determination to occur. In some situations, making such

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treatment of children in the care of the State in response to reports and inquiries focused on the disproportionate way in which Indigenous children are made subject to State interventions and opportunities that exist to better promote equitable outcomes by re-empowering Indigenous peoples’ tribal bodies to care for such children when the need for care beyond the whānau (extended family) arises. See Hon Kelvin Davis “New expert group appointed to advise Government on Oranga Tamariki” (Press release, 27 January 2021). Retrieved at <https://www.beehive.govt.nz/release/new-expert-group-appointed-advise-government-oranga-tamariki>

<sup>49</sup> Whakamaua: Māori Health Action Plan 2020-2025. Accessible at

<https://www.health.govt.nz/publication/whakamaua-maori-health-action-plan-2020-2025>

<sup>50</sup> See Rangatahi Courts & Pasifika Courts <https://youthcourt.govt.nz/about-youth-court/rangatahi-courts-and-pasifika-courts/>; and “Transformative Te Ao Mārama model announced for District Courts” <https://www.districtcourts.govt.nz/media-information/media-releases/11-november-2020-transformative-te-ao-marama-model-announced-for-district-court/>

space can occur by withdrawing from a position of dominance in areas in which states have asserted authority, including in sensitive and politically contested domains.

### **Expert Mechanism's study on self-determination**

47. As noted at the beginning of this submission, the New Zealand Government has a real interest in the Expert Mechanism's study on the right to self-determination as well as in other international initiatives to further implement the Declaration and to better realise the rights of Indigenous peoples.
48. As the Special Rapporteur's report on the effect of COVID-19 on Indigenous peoples makes plain, there is evident need across the board to place Indigenous peoples' rights at the centre of recovery programmes.<sup>51</sup>
49. New Zealand's Minister for Foreign Affairs, Hon Nanaia Mahuta has noted it had previously been difficult to bring Indigenous relationships to the fore in foreign policy matters.<sup>52</sup> The Minister considered that the time had come "to ensure a more inclusive approach to indigenous issues being a feature of foreign policy." While committing to a plan for implementing the Declaration can be seen as a domestic matter, it can also contribute to foreign policy objectives. Aotearoa New Zealand's experience of implementation of the Declaration may be of wider relevance to states and Indigenous peoples, and likewise the New Zealand Government expects to learn from other Indigenous peoples and member states where experiences demonstrate realisation of self-determination for Indigenous peoples.
50. The New Zealand Government sees the Expert Mechanism's study as an important component of a larger shift towards recognising Indigenous priorities and valuing their attainment.

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<sup>51</sup> José Francisco Calí Tzay "Report of the Special Rapporteur on the rights of indigenous peoples on the impact of the coronavirus" (A/75/185) at [90].

<sup>52</sup> Hon Nanaia Mahuta "Inaugural Foreign Policy Speech to Diplomatic Corps" (4 February 2021) <https://www.beehive.govt.nz/speech/inaugural-foreign-policy-speech-diplomatic-corps>