

# UNITED NATIONS

## Office of the High Commissioner for Human Rights

### The Expert Mechanism on the Rights of Indigenous Peoples (EMRIP)

#### Country Engagement Mission (8 – 13 April 2019) – New Zealand

14 July 2019

#### ADVISORY NOTE

##### I. Context and purpose of the Mission

1. Under its revised mandate, the EMRIP assists Member States and indigenous peoples in achieving the ends of the UN Declaration on the Rights of Indigenous Peoples (the Declaration). It provides for technical assistance upon the request of States, indigenous peoples and other stakeholders, including the private sector, pursuant to paragraph 2 of Human Rights Council resolution 33/25. Under this mandate, the EMRIP can provide technical advice regarding, “the development of domestic legislation and policies relating to the rights of indigenous peoples. The EMRIP provides this advice in response to a request from the Aotearoa Independent Monitoring Mechanism (AIMM) on behalf of the National Iwi Chairs Forum and the New Zealand Human Rights Commission, under resolution 33/25.<sup>1</sup>

2. The terms of reference for this country engagement were prepared in consultation with the requesters and the Member State (see annex). The mission took place from 8 to 13 April, was made up of two EMRIP members, Ms. Laila Susanne Vars, Vice-Chair of EMRIP and Head of Mission and Edtami Mansayagan, member of the EMRIP, as well as the United Nations Office of the High Commissioner for Human Rights Secretariat, which provides substantive and administrative support to the work of the EMRIP.

3. During the Mission, the EMRIP carried out activities in Auckland and Wellington and met with many interlocutors: the requesters; Māori and Māori organisations through several public Māori community hui (town hall meetings); government representatives (Ministers of the Crown and government agencies); the National Human Rights Commission; academics; and representatives including judges, of the Māori Land Court and members of the Waitangi Tribunal. The EMRIP appreciated the full support and cooperation of all parties during this country engagement Mission.

4. The purpose of the EMRIP’s country engagement with New Zealand, as agreed upon by both parties in the terms of reference, was to

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<sup>1</sup> The AIMM is a working group created by Māori in 2015 and is independent of government. Members of the AIMM have been selected by their iwi (tribal nation) and endorsed by the national iwi Chairs Forum (the Forum) to act as independent experts. The IMM is supported by technical advisers. The objective of the AIMM is to promote and monitor the implementation of the Declaration in Aotearoa/New Zealand. The Iwi Chairs Forum is the national collective of iwi chairpersons who represent hapū (groupings of extended families) and iwi. It functions in accordance with tikanga (Māori law), the Declaration of Independence of New Zealand (He Whakaputanga o te Rangatiratanga o Nu Tireni), the Treaty of Waitangi (Te Tiriti o Waitangi) and the Declaration. It meets regularly to discuss and act collectively on issues ranging from constitutional “transformation”, resource protection and recovery and economic development. The Forum also addresses government policy and practice as it affects iwi and hapū and engages in regular dialogue with government on priorities, issues and projects.

- Provide advice to support the drafting of a strategy, action plan or other measure, including objectives, key focus areas and specific measures to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples in New Zealand (within New Zealand’s constitutional arrangements, including the Treaty of Waitangi (te Tiriti o Waitangi), including the right to self-determination as a cross-cutting right and other rights to be determined during the Mission.
- Provide advice on an appropriate engagement strategy associated with the strategy, action plan or other measure with a particular focus on identifying how Māori will partner in the process of planning, considering, developing and implementing the strategy, action plan or other measure.

## II. Framework

5. The EMRIP provides this advice based on information received orally and in writing from the parties and others with whom the EMRIP engaged during the Mission as well as background information on the specific context of the New Zealand legal system, and recommendations of the UN human rights treaty monitoring bodies and other human rights experts.

6. This advice is grounded in the rights protected under the Declaration, which was endorsed by the State in 2010, and other international standards pertaining to indigenous peoples, including provisions of the international human rights treaties<sup>2</sup>. In this regard, the EMRIP considers relevant recommendations of the UN human rights treaty bodies, the Special Rapporteur on the Rights of Indigenous Peoples, and the Universal Periodic Review (UPR) procedure of the Human Rights Council.

7. The EMRIP notes that the State already committed to implementing the Declaration in 2014, under the UPR procedure, and agreed to cooperate with Māori through their own representative institutions and to develop a national plan of action through its support for the Outcome Document of the World Conference on Indigenous Peoples in 2014.

8. The EMRIP agrees with the view of the Special Rapporteur on the Rights of Indigenous Peoples, that New Zealand “has made significant strides to advance the rights of Māori”, and continues to do so.<sup>3</sup> The EMRIP notes the existence of agreements and structures within the State to promote and protect Māori rights, including: the Treaty of Waitangi (Te Tiriti o Waitangi) between Māori and the State, of 1840; the Māori Land Court, established in 1865; the Māori Council, established in 1962<sup>4</sup>, the Waitangi Tribunal, established in 1975<sup>5</sup>; the Ministry of Māori Development (Te Puni Kōkiri); the Office for Māori Crown Relations: Te Arawhiti, a new Crown agency dedicated to fostering strong, ongoing and effective

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<sup>2</sup> To date the State has ratified seven of the core international human rights treaties.

<sup>3</sup> A/HRC/18/35/Add.4

<sup>4</sup> The general functions of the Māori Council are set out in the Maori Community Development Act 1962. This Act conveys the Council’s purpose and framework in which they operate. <https://maoricouncil.com/about-us/our-purpose/>

<sup>5</sup> According to the Special Rapporteur, “the Treaty settlement process in New Zealand, despite evident shortcomings, is one of the most important examples in the world of an effort to address historical and ongoing grievances of indigenous peoples, and settlements already achieved have provided significant benefits in several cases.”

relationships with Māori across Government; and a Human Rights Commission, which works inter alia on Māori rights.<sup>6</sup> This apparatus will be important in the development of a national action plan.

9. The EMRIP notes that there are increasing references to the Declaration in case law from the senior courts and the Waitangi Tribunal. For example, in a case in 2011, the Court of Appeal concluded that common law should be developed consistently with the importance of recognising the collective nature of indigenous culture (as recognised in particular by the United Nations Declaration on the Rights of Indigenous Peoples).<sup>7</sup> The Supreme Court also referred to the Declaration in the landmark case of *Wakatū v. Attorney-General* [2017] NZSC 17. The Waitangi Tribunal has indicated that the Declaration is “perhaps the most important international instrument ever for Māori people” and carries “great moral and political force”, “valuable guidance on those issues [collective and individual rights in terms of culture, identity, education, health and so forth] and reflects in many ways the spirit of the principles of the Treaty of Waitangi”<sup>8</sup>. Another Waitangi Tribunal report refers to the Declaration, as a “base standard” and considered that, to the extent that Declaration rights may be recognised consistent with the jurisdiction of the Tribunal, the Tribunal should apply them<sup>9</sup>. Most extensively, the Waitangi Tribunal has stated that the Crown “accepts that the UNDRIP articles are relevant to the interpretation of the principles of the Treaty. Because the New Zealand government has now affirmed the Declaration, the obligations described in its articles are a circumstance we can take into account in assessing the Crown’s actions”.<sup>10</sup> The Member State produces an annual report (section 8(i) report) on progress made in implementing recommendations by the Waitangi Tribunal.

10. The EMRIP notes recent positive initiatives relating to the implementation of Māori rights including: the amended Māori Language Act 2016 and the government’s strategy for revitalising the Māori language, *Maihi Karauna*; amendments to the Resource Management Act 1991, and the *Mahi Ngātai Housing Agreement*. In light of the government’s increased focus on national “wellbeing” as representing more than Gross Domestic Product (the “Living Standard Framework”) for all New Zealanders, the Ministry of Māori Development (Te Puni Kōkiri) intends to monitor progress towards better wellbeing outcomes for Māori, based on a Māori worldview (*te ao Māori*). Noting the government’s strategy for revitalising the Māori language, *Maihi Karauna*.

11. The EMRIP notes the government’s political will to engage in this process demonstrated by the Minister for Māori Development’s release of a Cabinet Decision, during the Mission, on the development of a national plan of action/strategy (the Cabinet Decision), which includes a decision to establish a working group to provide advice and recommendations on the form and content of such a plan and on how to engage Māori<sup>11</sup>.

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<sup>6</sup> The Declaration of Independence of New Zealand (He Wakaputanga o te Rangatiratanga o Nu Tirenī), signed by a number of Māori chiefs, is an important source for Māori in understanding the Treaty of Waitangi, although the legal effect of this document is disputed.

<sup>7</sup> *Takamore v. Clarke* [2011] NZCA 587

<sup>8</sup> All these quotes come from *Wai 262 Report* (2011), pg 233, and 43

<sup>9</sup> *Stage 1 Report on national Freshwater and Geothermal Resources* (2012)

<sup>10</sup> *Whaia te Mana Motuhake: Report on the Māori Community Development Act Claim* (2015)

<sup>11</sup> <https://www.tpk.govt.nz/en/whakamahia/un-declaration-on-the-rights-of-indigenous-peoples>, and <https://www.tpk.govt.nz/en/a-matou-mohiotanga/cabinet-papers/develop-plan-on-nz-progress-un>

### III. Advice

12. The EMRIP sets out its advice below under six themes: Self-Determination; Participation, Partnership and Consultation; Education, Health and Justice; Systemic Challenges; General issues; Monitoring and Review; and Follow-up. A great variety of other issues raised but not dealt with in detail here include disproportionate poverty between Māori and non-Māori, gender-based violence among Māori, child protection issues, climate change and the environment, Māori data, and intellectual property.

13. This advice is not intended to give exhaustive guidance on developing a national plan of action but to focus on a few broad areas of particular relevance raised by the parties during the Mission. In developing the plan, full and effective consultations with Māori should take place (see below) to ensure that their priorities are fully taken on board. Many of the issues below have already been discussed in different fora in the State and appear in other reports/documents including: the summary of submissions on Crown/Māori relations; the Māori-led Matike Mai report, 2015; the report of the Constitutional Advisory Panel, 2013; and the UN human rights mechanisms including the human rights treaty monitoring bodies and the Special Rapporteur on the Rights of Indigenous Peoples.

#### 1. Self-Determination

14. The right to self-determination (articles 3, 4 and 5 of the Declaration) should be recognised as a crosscutting right across all national action plans designed to implement the Declaration. Any such plan should be grounded on this right: a foundational right upon which all other rights of indigenous peoples are dependent<sup>12</sup>. Article 3, specifically recognizes that indigenous peoples have a right to self-determination (to freely determine their political status and pursue their economic, social and cultural development), the same right as guaranteed to other peoples in articles 1 of the International Covenants on Civil and Political Rights and Economic Social and Cultural Rights. It is a right “devised to ensure subjected nations and peoples could recover their autonomy, preside over their destinies, make decisions for themselves and control their resources.”<sup>13</sup> Thus, indigenous peoples “are entitled to participate equally in the constitution and development of the governing institutional order”<sup>14</sup>.

15. Under article 4, indigenous peoples have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as the ways and means of financing these functions. Under article 5, indigenous peoples have the right to maintain their own political, legal, economic, social and cultural systems and institutions<sup>15</sup> and to participate in the political, economic, social and cultural life of the country in which they live. How self-determination for indigenous peoples is translated in practice will depend inter alia on the

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<sup>12</sup> A/HRC/12/34 and A/HRC/EMRIP/2019/2

<sup>13</sup> A/HRC/39/62: Free, prior and informed consent: a human rights-based approach - Study of the Expert Mechanism on the Rights of Indigenous Peoples and General Assembly resolution 1514 (XV).

<sup>14</sup> James Anaya, *Indigenous Peoples in International Law*, 2<sup>nd</sup> Edition (New York: Oxford University Press, 2004) at 189.

<sup>15</sup> SDG Goal 16 also relates to the need for inclusive institutions: Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels

context in the State, the self-governing or autonomous structures of the indigenous people in question, and their aspirations and must be implemented through partnership and full and effective participation of indigenous peoples themselves.

16. The EMRIP notes that the Cabinet paper committed through the national plan of action to inter alia, “contribute to enhancing the self-determination of Māori as the indigenous peoples of Aotearoa/New Zealand”. Additionally, according to many people with whom the EMRIP engaged, the right to autonomy or self-government is an essential element for discussion within the context of the plan. The Cabinet paper also refers to the plan focusing on “*the government’s priority activities* [emphasis added] into actions representing *the mutual priorities of government and Māori* [emphasis added].”

17. While the Constitutional Advisory Panel appears to have paid limited attention to this issue, the Matike Mai report has suggested several examples of how this article of the Declaration could be implemented. The Committee on the Elimination of Racial Discrimination referred to the need for recognition of the right to self-determination and self-government in the State<sup>16</sup> and recommended that the government consider the contents of the Matike Mai report seriously and in the context of implementing the Treaty of Waitangi.

Thus, in developing a national plan of action, the EMRIP advises the State and/or Māori to:

- Ensure that the plan makes explicit reference to the Declaration, the relevant articles of the Declaration and uses the language of the Declaration wherever possible.
- Ensure respect for the self-determination of Māori, as expressed above, during the process of developing a national plan of action, including through their full participation (see below).
- Ensure that the priorities established in the plan are priorities for Māori as much as the government.
- Consider how to engage with Māori on implementing their right to autonomy or self-government in matters relating to their internal and local affairs within the context of the State. This could take place within the framework of continuing discussions on the Constitution (see below) and would demand broad based participation and engagement of Māori (see below). A review of how other States have engaged in a similar process could be helpful, including the States referred to a recent report by IWGIA<sup>17</sup> of March 2019 on indigenous peoples’ right to autonomy and self-government.<sup>18</sup>

## **2. Participation, partnership and consultation**

18. The right of indigenous peoples to be consulted and to participate in decision-making is highlighted in the preamble as well as many articles of the Declaration (articles 3-5, 10-12,

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<sup>16</sup> E/C.12/NZL/CO/4 and CERD/C/NZL/CO/21-22

<sup>17</sup> IWGIA is a global human rights organisation dedicated to promoting, protecting and defending indigenous peoples’ rights. <https://www.iwgia.org/en/>

<sup>18</sup> IWGIA – Report on “Indigenous Peoples Rights to Autonomy and Self Government: as a manifestation of the rights to self-determination”. <https://www.iwgia.org/en/resources/publications/305-books/3316-indigenous-peoples-rights-to-autonomy-and-self-government>

14, 15, 17-19, 22, 23, 26-28, 30-32, 36, 38, 40, 41). As reflected in these articles, the full and effective consultation, participation, and cooperation of indigenous peoples in the development of a national action plan is consistent with the right to self-determination, and to free, prior and informed consent, necessary to implement the Declaration, and to encourage true cooperation. In this regard, indigenous peoples and the State are encouraged to take into account EMRIP's advice in its recent study on, "Free, prior and informed consent: a human rights-based approach - Study of the Expert Mechanism on the Rights of Indigenous Peoples".<sup>19</sup>

19. The preamble of the Declaration refers to the implementation of the rights therein to take place in, "a spirit of partnership and mutual respect" and that, treaties and other agreements "are the basis for a strengthened partnership between indigenous peoples and States".

20. Discussions during the Mission, and documentation reviewed, often referred to improving indigenous peoples' rights through genuine partnership with the Crown, as one of the principles of the Treaty of Waitangi. Many supported the view, that in their relationship with the Crown, Māori should be involved as genuine partners or co-designers of the plan and its goals. However, they often face the challenge of working within State structures, not having their worldview (te ao Māori) and traditional processes recognised, and having unequal power and resources, all of which impedes their participation. The Minister for Māori Development, Hon Nanaia Mahuta, recognises this in her view expressed to EMRIP members that something that works for Māori can work for everyone and the Māori worldview can change things for the better for all.

21. The Cabinet decision on the development of a national action plan refers to the establishment of a working group to include governmental and non-governmental experts on indigenous and human rights, including the National Human Rights Commission and the Aotearoa Independent Monitoring Mechanism. According to the Cabinet decision, "The non-governmental working group members will be independent experts and will not represent any particular advocacy group." It will also include, "other groups from across Māoridom" but does not clarify whether this means participation by Māori themselves, as opposed to experts. Thus, in developing a national plan of action, the EMRIP advises the State and/or Māori as follows:

- Ensure the consultation, participation and partnership of Māori in the initiation, development, implementation, monitoring and evaluation phases of the national action plan process.
- Ensure that the whole process is culturally appropriate and transparent, respecting the customs and traditions of Māori.
- Ensure that the relevant articles of the Declaration are explicitly referred to in the plan and that the language of the Declaration is used wherever possible.
- Ensure that the working group referred to in the Cabinet Decision includes Māori, who have the support of their communities, and are representative of youth, older people, gender, geographic distribution and persons with disabilities. The selection

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<sup>19</sup> A/HRC/39/62

process for membership should be conducted in good faith throughout the Māori community.

- Māori should mobilise themselves to respond to and get involved in this process. The State should facilitate Māori and provide the necessary finances to allow them to mobilise themselves along the lines/groupings they consider efficient, in line with their traditional organisational structures (through whānau, hapū, and iwi) and/or by community or profession, such as lesbian, gay, bisexual, transgender, and intersex (LGBTI), prisoners, health workers, educators.
- Both the State and Māori should ensure that a broad section of Māori participate and are consulted throughout this process, including from whānau, hapū, and iwi, in different geographic locations, as well as existing mandated groups, like the National Iwi Chairs Forum, and other lead Māori organisations.
- Ensure that participation is comprehensive, inclusive and accessible taking into account the special needs of indigenous elders, women, children, youth and persons with disabilities.
- Ensure that Māori can speak Māori in meetings, and that two-way translation is provided.
- Full participation of Māori should ensure that the development of the process and its goals take into account Māori worldview (te ao Māori) and support their preferred frameworks. There should be awareness, acceptance, and accommodation of the challenges Māori may face in functioning within a State structure.
- Ensure the participation of non-Māori, as well as relevant government agencies, parliamentarians, relevant independent institutions and senior government officials across the agencies to ensure knowledge of and awareness of Māori culture (Māoritanga).
- Ensure the provision of accessible documents for indigenous persons with disabilities, and accessible locations for meetings.
- The form of participation could include public meetings (hui), online consultations, written submissions, interviews, community visits or workshops and reasonable notice provided through methods that may include: social media; notices on community noticeboards or in places frequented by Māori; cellular phones' written and vocal messages; public service announcements; and other informal networks<sup>20</sup>.
- Ensure that the power imbalance is addressed so that partnership is equitable and Māori can engage properly. In this regard, comprehensive capacity building programmes and technical assistance to Māori could be provided, including awareness and understanding of their rights under the Declaration, the UN human rights treaties and other relevant international and national instruments.

### **3. Education, health, justice**

21. Article 21 of the Declaration addresses the right to the improvement of indigenous peoples' economic and social conditions. It recognises the need for improvements inter alia in

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<sup>20</sup> Several States have established good participation processes in the context of national action plans and human rights and development including El Salvador, Colombia, Peru, Namibia and Argentina. Further information on these processes can be provided upon request from the Secretariat.

education and health. States must take action to ensure the continual improvement of these conditions. It further requires States to pay attention to the special needs of elders, women, youth, children, and persons with disabilities. Article 23 recognises indigenous peoples' right to determine their own development priorities with specific reference to developing health programmes affecting them<sup>21</sup>. It further states that they should be able to administer these programmes through their own institutions, thus connecting these rights with the right to self-determination.

22. Article 24 recognises indigenous peoples' right to their traditional medicines and to maintain their health practices and article 14, acknowledges the right of indigenous peoples to establish and control their own educational systems and institutions. Moreover, indigenous peoples enjoy equality and non-discrimination (article 2) vis à vis other individuals and groups. The Declaration demands that States consult and cooperate with indigenous peoples before adopting and implementing legislative or administrative measures that affect them.

23. During its Mission, the EMRIP met with many experts both Māori and non-Māori and government officials who attested to the disparity between Māori and non-Māori with respect to life-expectancy, disability and enjoyment of good health and education, as well as an over-representation of Māori in the criminal justice system. The recommendations of the UN human rights treaty bodies also highlight these issues and some consider racism and discrimination, including within Māori communities themselves, as often a contributory factor to such inequalities.<sup>22</sup> While EMRIP attended one award-winning Māori school (a credit to the management and teachers involved), many schools are suffering from underfunding and limited support for Kaupapa Māori education. Thus, in developing a national plan of action, the EMRIP advises the State and/or Māori to:

- Ensure that the relevant articles of the Declaration as well as the UN human rights treaties and the recommendations of the human rights treaty bodies are taken into account in considering the issue of education, health, and justice.
- Facilitate and support Māori to establish and control their own education systems and institutions, including pre-school and university level, which provide education in Māori and in a manner appropriate to their cultural methods of teaching and learning. This should also include the financing of such autonomous arrangements.
- Ensure that Māori, particularly Māori children, including those living outside their communities and in urban areas, have access, when possible, to an education in their own culture and provided in their own language.
- Ensure sufficient funding to support the training of Māori teachers, development of teaching methods, literacy materials and orthographies in the Māori language. The possibility of exchanges between indigenous and non-indigenous students and teachers should be considered.

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<sup>21</sup> See EMRIP's 2016 study on the "Right to Health and Indigenous Peoples, with a Focus on Children and Youth" (A/HRC/33/57): <http://www.undocs.org/a/hrc/33/57>

<sup>22</sup> E/C.12/NZL/CO/4, CERD/C/NZL/CO/21-22, CEDAW/C/NZL/CO/8, CCPR/C/NZL/CO/6, CRC/C/NZL/CO/3-4, CRPD/C/NZL/CO/1



- Ensure the effective participation of indigenous peoples in designing education programmes in the mainstream education system, to make sure that Māori culture is considered on an equal footing with mainstream culture.
- Integrate Māori history, culture, perspectives and languages into the national education curricula to combat discrimination against Māori and help to eliminate stereotypes. Encourage the correct pronunciation of all Māori words, names and places. This could include but should go beyond using standardised orthography published by Te Taura Whiri i te Reo Māori (the Māori Language Commission).
- Take measures to increase the number of Māori entering the public sector, including in the health sectors, criminal justice system, and education.
- Ensure training across the public sector on Māori culture and language and the Declaration and on how to deliver culturally appropriate services.
- Ensure Māori have full access to publicly run quality health-care facilities, goods and services, including to those suffering from HIV/AIDS.
- Engage with Māori on how they can practice traditional medicine and enjoy its benefits within the context of the Declaration.
- Develop and implement measures to improve the mental health of indigenous peoples, including measures to reduce high rates of indigenous suicide.
- Implement measures to reduce the number of indigenous persons in prison, including non-custodial options, such as traditional restorative and rehabilitative approaches.

#### 4. Systemic challenges

24. The preamble of the Declaration states that treaties, agreements and other constructive arrangements with States are recognised to be the basis for strengthened partnerships between indigenous peoples and States. Under article 37 of the Declaration, indigenous peoples have the right to the recognition, observance, and enforcement of treaties and States must honour and respect them. In interpreting these treaties, it is important to “emphasise and assert indigenous peoples’ own understanding of the treaties negotiated by treaty nations, as documented and evidenced by indigenous people’s oral histories, traditions and the concepts expressed in their own languages”.<sup>23</sup>

25. While there are increasing references in the case law from the senior courts and in the Waitangi Tribunal’s reports to the Declaration (see above), as acknowledged by the Cabinet Decision, the EMRIP notes several challenges with respect to the place of the Treaty of Waitangi (Te Tiriti o Waitangi) in the legal order and its interpretation. It is not entrenched in legislation or in a written Constitution, has different language versions, is interpreted by the Waitangi Tribunal and the Courts on the basis of its “principles” rather than in its entirety and not strictly in accordance with te reo Māori text, some of which are referred to in legislation<sup>24</sup>, and the Waitangi Tribunal largely produces findings of a recommendatory nature only. Many of these challenges have already been considered by UN human rights

<sup>23</sup> A/HRC/EMRIP/2010/5, para. 22

<sup>24</sup> The principles are, partnership, active protection, participation and redress, as defined in *New Zealand Māori Council v. Attorney-General (Lands Case)* [1987] 1 NZLR 641. The Resource Management Act 1991 and the State Owned Enterprise Act 1986, among other statutes, refer to the principles of the Treaty and apply varying standards such as a requirement not to act in a manner inconsistent with the principles or to take these principles into account.

treaty bodies<sup>25</sup>. In addition, the Waitangi Tribunal is reportedly under-resourced and thus slow in enquiring, reporting and making recommendations on cases.

26. Challenges were also highlighted with respect to: the absence of a written Constitution; the absence of any domestic Court's legal power to declare primary legislation unlawful, as opposed to interpret, legislation/policies; the Bill of Rights not been entrenched in superior law and the absence of economic, social and cultural rights contained therein.

27. The Reports of the Constitutional Advisory Panel, the Matike Mai report on Constitutional transformation and the recent engagement by the Minister for Māori Crown Relations: Te Arawhiti, on strengthening the relationship between Crown and Māori, address some of these challenges, to a greater or lesser extent. Thus, in developing a national plan of action, the EMRIP advises the State and/or Māori to:

- Continue to develop, and take measures to ensure, the interpretation of the Treaty of Waitangi, and other relevant legislation, consistent with the rights in the Declaration, in particular article 37, to ensure consistency. This approach could contribute to resolving disagreements over interpretations of the Treaty of Waitangi.
- Review domestic laws/policies and strategies to ensure consistency with the Declaration and the Treaty of Waitangi.
- Establish measures to ensure that new legislation conforms to the rights in the Declaration and the Treaty of Waitangi and makes explicit reference to Declaration rights.
- Consider enhancing the role of the Waitangi Tribunal to include: binding rather than recommendatory decisions; the power to assess policies against the Treaty; and the provision of additional human and financial resources.
- Pursue the constitutional reform or transformation discussions with all New Zealanders, in light of the recommendations of the Constitutional Advisory Panel Report, the Matike Mai report and the outcome of the process by the Office of Māori Crown Relations: Te Arawhiti.

## **5. General issues**

As to general advice, in developing a national plan of action, the EMRIP advises the State and/or Māori to:

- Ensure that the development phase of the plan commences with a baseline study in consultation with Māori (see above), to establish the substantive content of the plan.
- The plan should be evidence-based and developed according to an accurate understanding of the situation of Māori in the State and the measures to be taken should be time-bound and measurable.
- Consider measures to ensure that the plan is maintained across political cycles for example by its adoption through legislation, in light of the long-term nature of the plan.
- Consider organising the plan thematically, clustering around the articles of the Declaration, and prioritising issues that are important for Māori.

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<sup>25</sup> See footnote 19

- Ensure that the process of developing the plan and the goals therein are adequately resourced, both human and financial. The Cabinet Decision indicates, that “financial implications associated with the [plan]... will be met within existing baselines”. It is not clear for the EMRIP whether existing baselines would meet the cost involved.
- Consider providing a strong role to the National Human Rights Commission in the development, monitoring and evaluation of this national action plan. Bearing in mind that the provision of sufficient financial resources will be crucial.
- Appoint an Indigenous Human Rights Commissioner on a full-time basis, to contribute to the profile of the Human Rights Commission as protecting the rights of Māori and to send positive messages of the State’s interest in partnership.
- Establish robust indicators on the process of developing the plan and on its impact on the ground for the purpose of tracking its implementation and holding those to account for its implementation.
- Implement the recommendations of the UN human right treaty bodies, the UPR procedure and the Special Rapporteur on the Rights of Indigenous Peoples, in the development of a national pan of action. A mapping of the themes on which these bodies made recommendations could be undertaken, possibly by the National Human Rights Commission.

## **6. Monitoring and evaluation**

As to monitoring and evaluation of the plan, the EMRIP advises the State and/or Māori as follows:

- Define the modalities of monitoring the implementation of the national action plan, at the beginning of the implementation phase. The working group should be tasked with this.
- Establish an independent, multi-party monitoring mechanism, including Māori and civil society, to lead the monitoring of the plan. It should be independent in the sense that it does not include the public bodies directly responsible for implementing the measures in the plan, and should be adequately funded.
- The National Human Rights Commission and any newly appointed Indigenous Rights Commissioner could play a key role in the monitoring mechanism. If so, adequate funding for human and financial resources would be required.
- Building upon the online tool already developed by the National Human Rights Commission to monitor the National Action Plan for Human Rights, consider expanding this tool to include the goals of the new plan, as well as UPR and treaty body recommendations and perhaps the SDGs<sup>26</sup>.
- Lessons learnt from the Commission on its involvement in earlier similar processes should be considered in advance including: how to ensure regular and accurate updates on implementation across the different government agencies, Māori and civil society; how to establish adequate resources, human and financial: and how to maintain the tool and online platform.

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<sup>26</sup> <https://npa.hrc.co.nz/overview>

**7. Follow-up**

28. As provided for in the terms of reference, the parties agreed that this advisory note should be made public unless either party objects. Neither party objects to this note being made public.

29. Both parties intend to share their experiences under this engagement during the agenda item on country engagement at the EMRIP's annual session in July 2019.

30. Some interlocutors also indicated that they would like to accept the offer by the EMRIP of facilitating closed bilateral meetings between the parties during its annual session in 2019.

31. The EMRIP expressed the willingness to continue providing advice to the parties as they move forward in this process and subject to such a request. This could involve clarifications of the advice referred to herein, or advice on other themes not dealt with here upon which the parties would like advice.

32. Upon request and depending on the availability of resources, the EMRIP may consider a follow-up mission to the State at some point in the future.

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## **ANNEX**

### **EMRIP on the Rights of Indigenous Peoples (EMRIP)**

#### **Country engagement – New Zealand<sup>27</sup>**

#### **Terms of Reference<sup>28</sup>**

### **I) Mandate**

#### **A. Country engagement mandate:**

Pursuant to paragraph 2 of Human Rights Council resolution 33/25, the EMRIP should:

- (a) Upon request, assist Member States and/or indigenous peoples in identifying the need for and providing technical advice regarding the development of domestic legislation and policies relating to the rights of indigenous peoples, as relevant, which may include establishing contacts with other United Nations agencies, funds and programmes;
- (b) Provide Member States, upon their request, with assistance and advice for the implementation of recommendations made at the universal periodic review and by treaty bodies, special procedures or other relevant mechanisms;
- (c) Upon the request of Member States, indigenous peoples and/or the private sector, engage and assist them by facilitating dialogue, when agreeable to all parties, in order to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration).

#### **B. Terms of reference under resolution 33/25:**

In accordance with the EMRIP's methods of work (A/HRC/36/57, Annex 1), terms of reference should be agreed for every country engagement activity in the light of the mandate of the EMRIP. Modalities of engagement, timelines and the types of activity envisioned, as well as the expected final product, should be prepared by the EMRIP in consultation with the requester(s) and other relevant stakeholders. The terms of reference should also include modalities for the disclosure of information, in agreement with the requester and other stakeholders.

### **II) Requester**

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<sup>27</sup> This is the third country engagement mission to be carried out by the EMRIP under its amended mandate (33/25).

<sup>28</sup> These terms of reference were developed in cooperation with the EMRIP, the requester and the Member State.

- i. Aotearoa Independent Monitoring Mechanism<sup>29</sup> on behalf of the National Iwi Chairs Forum<sup>30</sup>; and
- ii. The New Zealand Human Rights Commission

### **III) EMRIP Delegation**

Members: Laila Vars (Vice-Chair), Head of Mission; Edtami Mansayagan; and Megan Davis.  
UN OHCHR Secretariat: Kate Fox Principi.

### **IV) Dates of country engagement mission**

The EMRIP will undertake a country engagement mission to New Zealand from Monday, 8 to Saturday 13 April, visiting Wellington and Auckland. Depending on the time necessary for travel, it would be preferable for EMRIP to hold a closed meeting, but we could do this on Sunday if necessary.

### **V) Purpose**

Consistently with the EMRIP's mandate, the EMRIP intends to focus its country engagement mission on:

- i. Providing advice to support the drafting of a strategy, action plan or other measure, including objectives, key focus areas and specific measures to achieve the ends of the Declaration in New Zealand (within New Zealand's constitutional arrangements, including te Tiriti o Waitangi), including the right to self-determination as a cross-cutting right and other rights to be determined during the Mission.
- ii. Provide advice on an appropriate engagement strategy associated with the strategy, action plan or other measure with a particular focus on identifying how Māori will partner in the process of planning, considering, developing and implementing the strategy, action plan or other measure.

### **VI) Activities**

The country engagement will consist of the following activities:

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<sup>29</sup> The AIMM is a working group created by Māori in 2015 and is independent of government. Members of the IMM have been selected by their iwi (tribal nation) and endorsed by the National Iwi Chairs Forum (the Forum) to act as independent experts. The IMM is supported by technical advisers. The objective of the IMM is to promote and monitor the implementation of the Declaration in Aotearoa/New Zealand. The Iwi Chairs Forum is the national collective of Iwi chairpersons who represent hapū (groupings of extended families) and iwi. It functions in accordance with tikanga (Māori law) and on the basis of He Whakaputanga o te Rangatiratanga o Nu Tireni (He Whakaputanga), Te Tiriti o Waitangi (Te Tiriti) and the Declaration. It meets regularly to discuss and act collectively on issues ranging from constitutional transformation, resource protection and recovery and economic development. The Forum also addresses government policy and practice as it impacts on iwi and hapū and engages in regular dialogue with government on priorities, issues and projects.

<sup>30</sup> <https://iwichairs.maori.nz/>

- Information gathering to: Identify existing mechanisms, bodies or frameworks already in place that are able to support the development of national plan(s) of action, strategy or other measures; Identify any articles of the UNDRIP that have been or are in the process of being implemented; and Identify any existing principles or policies aimed at developing a plan of action, strategy or other measures that are in line with global best practice.
- Bilateral meetings with the different stakeholders on the development of a National Plan of Action or other strategy or measure to be designed to implement the Declaration including the AIMM and the Human Rights Commission; National Representatives of the IWI Chair's Forum; any other representatives of the Maori (to be advised by the requesters and the State); Te Puni Kokiri; all Ministries or other bodies (to be advised by the requesters and the State) potentially affected by a NAP/or other strategy); any lead Ministry and/or any inter-Ministerial Commission/body already established for the purpose of elaborating such a plan. A complete list will be included in the itinerary. The purpose of these meetings is a. to gather the information referred to in no. 1 and b. to establish what the needs and expectations are with respect to a strategy/National Plan of Action.
- At the end of the mission, a multilateral meeting with all representatives of all stakeholders together to discuss the way forward, including preliminary advice from the EMRIP to be elaborated in an Advisory Note after the Mission.

## **VII) Outputs**

Following the mission, the EMRIP will submit to the requester and the government of the Member State an independent Advisory Note consisting of an analytical synopsis of issues raised and explored; any agreements that may have been achieved during or after the mission; and recommendations on how to achieve the purposes set out on V above.

This note will be shared with the requesters and the government of the Member State, both of whom may submit comments prior to finalization.

Provide advice on ways to disseminate information to the non-indigenous population on the Declaration and on the need for a national plan of action.

## **VIII) Follow-up and disclosure:**

The EMRIP will indicate on its website that it intends to carry out this mission and include general information on the mission;

The EMRIP will issue a press statement at the end of its country engagement;

The Technical Advice Note will be made public, unless any party [or the requesters or State] objects.

The EMRIP's annual session in July 2019 will include an Agenda Item on country engagement with a view to offering both parties an opportunity to share their dialogue efforts and/or best practices;

The EMRIP will also, upon request, offer an opportunity for bilateral closed meetings between the parties during its annual session;

Upon request, and depending on the EMRIP's assessment of future developments and the availability of resources, the EMRIP may undertake a follow-up mission to the Member State.

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