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Expert Mechanism on the Rights of Indigenous Peoples

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**United Nations Declaration on the Rights of Indigenous Peoples**

### **Report of the Monitoring Mechanism regarding the implementation of the UN Declaration on the Rights of Indigenous Peoples in Aotearoa/New Zealand**

## 1. Introduction

This is the second annual monitoring report by the Monitoring Mechanism for the UN Declaration on the Rights of Indigenous Peoples in Aotearoa/New Zealand (the Monitoring Mechanism).

The Monitoring Mechanism is a working group created by Māori in 2015 and is independent of government. Members of the Monitoring Mechanism have been selected by their iwi (tribal nation) and endorsed by the National Iwi Chairs Forum<sup>1</sup> (the Iwi Chairs Forum) to act as independent experts. The Monitoring Mechanism is supported in its work by technical advisers. The objective of the Monitoring Mechanism is to promote and monitor the implementation of the UN Declaration on the Rights of Indigenous Peoples (the Declaration) in Aotearoa/New Zealand. In this report, the Monitoring Mechanism looks at implementation of the Declaration, with a focus on the right to participate in decision-making.

In preparing this report, the Monitoring Mechanism sought to engage with the New Zealand government. Despite numerous attempts to arrange face to face meetings, neither government civil servants nor Ministers were prepared to engage with the Monitoring Mechanism.

## 2. Recommendations

The Monitoring Mechanism makes the following recommendations:

That the experts of EMRIP:

- A. note the second report of the Monitoring Mechanism at the 9th session of EMRIP;
- B. note that the New Zealand government has yet to develop and implement a national plan of action for the implementation of the Declaration;
- C. recommend to the Human Rights Council that the mandate of EMRIP be modified and improved so that it can more effectively promote respect for the Declaration by receiving monitoring reports from Indigenous Peoples and States, evaluating States' compliance with the Declaration and providing advice and recommendations on States' initiatives to implement the Declaration.

## 3. Case studies

The following three case studies explore the extent to which the right to participate in decision-making is given effect in Aotearoa/New Zealand:

- at local level, via representation in local government;
- through government policy in relation to Treaty settlements; and
- in relation to international agreements negotiated and entered into by the New Zealand government.

<sup>1</sup> 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 Iwi Chairs Forum also addresses government policy and practice as it impacts on iwi and hapū and engages in regular dialogue with government representatives on priorities, issues and projects.

### 3.1 Participation in decision-making in local government

While comprising around 15% of the population, Māori make up only 5% of local government councillors who are elected to local government.<sup>2</sup> The Local Electoral Act 2001 (LEA) allows local government to establish Māori wards or seats; of the 78 local government authorities only the Bay of Plenty Regional Council and the Waikato Regional Council have successfully included Māori wards.

If a local government decides to establish Māori wards, the public can demand a binding poll which can overturn that decision.<sup>3</sup> The local government authority is then obliged to uphold the results of the poll for the next six years. The most recent case where this occurred was in 2015 in New Plymouth.<sup>4</sup>

Along with the LEA, the Local Government Act 2002 (LGA)<sup>5</sup> and the Resource Management Act 19916 (RMA) specify how local government must consider and provide for the views of tāngata whenua (original Māori owners) in decision-making processes. While existing provisions allow for some Māori participation and representation in local government decision-making processes, it has been argued that these are not appropriately applied across the country.<sup>7</sup>

In 2010 a Royal Commission of Inquiry on Auckland Governance was completed. The Royal Commission recommended that dedicated Māori seats be established on the new Auckland 'Supercity' Council. However, this recommendation was not supported by the government and instead the Independent Māori Statutory Board (IMSB) was created.<sup>8</sup>

Since its establishment the IMSB has advised the Auckland Council as to how it might realise its legislative obligations to Māori living in Auckland.<sup>9</sup> The IMSB has completed two Treaty of Waitangi<sup>10</sup> audits to determine how Auckland Council is upholding (or not) legislative

2 See Sullivan, A. 'Minority Indigenous Representation', and Hayward, J. 'Local Government Representation' both in *Weeping Waters: The Treaty of Waitangi and Constitutional Change*, edited by Malcolm Mulholland and Veronica Tawhai (Wellington: Huia Publishers, 2010).

3 Local Electoral Act 2001, s. 19Z-19ZA.

4 For more information see: <http://www.stuff.co.nz/taranaki-daily-news/68578894/Resounding-no-to-a-Maori-ward-for-New-Plymouth-district>

5 See section 81, Local Government Act 2002. Available online here: <http://www.legislation.govt.nz/act/public/2002/0084/latest/DLM172325.html>

6 While sections 6, 7, and 8 of the RMA concern participatory rights of Māori in decision-making over taonga, kaitiakitanga and the Treaty of Waitangi, sections 33 and 36B determine how a local authority may transfer their powers to an iwi organisation and establish joint management agreements.

7 See Hayward, 2010.

8 See section 81, Local Government (Auckland Council) Amendment Act 2009.

9 For instance, the IMSB has assisted Mana Whenua groups in developing a position and writing evidence for hearings relevant to the Proposed Auckland Unitary Plan (PAUP); which will essentially be the Auckland Council's combined district and regional plan determining, amongst other things, how the RMA is applied across the region. See submission of evidence made by the IMSB and other Mana Whenua groups to the Auckland Unitary Plan Independent Hearings Panel available online here: <https://hearings.aupihp.govt.nz/hearings>

10 Treaty of Waitangi is the English translation of Tiriti o Waitangi. Care needs to be taken not to confuse this Māori language document with the fraudulent English language document that falsely claimed that Māori ceded sovereignty to the British Crown.

obligations to Māori living in Auckland.<sup>11</sup> The first audit in 2012 identified that the Council had failed in meeting its obligations, while the 2015 audit found small improvements had been made. Recommendations on how the Auckland Council might improve its position on meeting Treaty obligations were provided in both audits.

While the LEA, RMA, and LGA aim to provide direction as to how local government can enhance the ability of Māori to participate in local government decisions, the status quo is failing.

The lack of Māori representation has been highlighted for many years, including: by the NZ Human Rights Commission (2010)<sup>12</sup> and through the Universal Periodic Review process in 2014.<sup>13</sup> Most recently, the UN Human Rights Council expressed concern at persistently low Māori representation in all levels of government, and urged the government to address this, including through the establishment of special electoral arrangements.<sup>14</sup>

### 3.2 Treaty settlements

The government has created the Treaty settlement process whereby it negotiates settlements of historical claims relating to the Treaty of Waitangi directly with claimant groups. It is government policy to negotiate claims with 'large natural groupings' rather than the individual whānau (family) and hapū<sup>15</sup> whose rights were violated. Serious concerns have been raised by Māori about this process with a number of urgent claims being made to the Waitangi Tribunal<sup>16</sup> providing evidence of a lack of representativeness and accountability, unfair processes and marginalisation of smaller groups. This has resulted in poor outcomes leading to many claimants' rights and interests not being adequately represented within the Treaty settlement process. Unsuccessful applications to the Waitangi Tribunal are sometimes appealed through the Courts for example, the two cases of Haronga and Flavell are currently being heard in the Court of Appeal on this issue.

A flow on effect when hapū and iwi are excluded from the Treaty settlement process is that lands and resources they have an interest in are offered by the government to other claimant groups. This has been the experience of the hapū Āraukūkū and the iwi Ngāti Kahu. Āraukūkū were only able to voice their concerns when the draft settlement legislation was in its final

11 See the 2012 and 2015 Treaty of Waitangi Audits online here: <http://www.imsb.maori.nz/index.php/key-programmes/treaty-audit>

12 Human Rights Commission (2010), *Māori Representation in Local Government*, available at: <https://www.hrc.co.nz/your-rights/indigenous-rights/our-work/maori-representation-local-government/>

13 *Report of the Working Group on the Universal Periodic Review: New Zealand* (2014), A/HRC/26/3, at para 128.90.

14 Human Rights Committee (2016), Concluding Observations on the sixth periodic report of New Zealand, CCPR/C/NZL/CO/6, 28 April 2016, at para 48.

15 Office of Treaty Settlements *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown Part 1* (OTS, Ministry of Justice, Wellington, 2002) at 32.

16 For example, Waitangi Tribunal *The Ngapuhi Mandate Inquiry Report* (Wai 2490, 2015), Waitangi Tribunal *The Te Aroha Maunga Settlement Process Report* (Wai 663, 2014) and Waitangi Tribunal *The Final Report on the Impacts of the Crown's Treaty Settlement Policies on Te Arawa Waka and Other Tribes* (Wai 1385, 2007).

stages<sup>17</sup> while Ngāti Kahu chose direct action by repossessing the land on which a domestic airport is situated that was to be offered to other claimants<sup>18</sup>

The UN Human Rights Committee has previously considered these issues and made a specific recommendation that “the State party should ensure that the views expressed by different Māori groups during consultations in the context of the historical Treaty claims settlement process are duly taken into account.”<sup>19</sup> In its 2016 concluding observations, the Committee also recommended strengthened consultation processes and capacity building to support effective Māori participation.<sup>20</sup>

The UN Committee on Economic, Social and Cultural Rights has also recommended that “the State party ensure that the inalienable rights of Māori to their lands, territories, waters and marine areas and other resources as well as the respect of the free, prior and informed consent of Māori on any decisions affecting their use are firmly incorporated in the State party’s legislation and duly implemented.”<sup>21</sup>

The two previous Special Rapporteurs on the Rights of Indigenous Peoples have also issued recommendations that the government reach agreement with Māori on a fairer process for the settlement of Treaty claims that complies with international human rights standards.<sup>22</sup>

### 3.3 International agreements: Trans-Pacific Partnership Agreement

In February 2016, the government signed the Trans-Pacific Partnership Agreement (TPPA), a trade treaty with eleven other Pacific rim countries.<sup>23</sup> The government entered the agreement following seven years of negotiations.

A key concern around the TPPA has been the degree of secrecy and lack of transparency and participation in relation to a treaty which has implications for: domestic decision-making and self-determination; environmental protection; Māori rights and Te Tiriti o Waitangi; medicine and public health; economic wellbeing; investment and investor dispute resolution; intellectual property and information technology.

Other concerns relating to indigenous peoples’ rights include:

that negotiation of the TPPA has not been informed by, or undertaken in accordance with the Declaration and te Tiriti obligations;

17 See the case of Āraukūkū who argue that their historical claims to lands are being settled without them as reported by Radio New Zealand <http://www.radionz.co.nz/news/te-manu-korihi/290034/south-taranaki-hapu-fears-losing-remaining-lands>

18 Radio New Zealand <http://www.radionz.co.nz/news/regional/283623/kaitaia-airport-occupied.-flights-cancelled>

19 Committee on Human Rights *Concluding observations of the Human Rights Committee: New Zealand* 98th session CCPR/C/NZL/CO/5 (2010) para 21.

20 Human Rights Committee, (2016), *Concluding Observations on the sixth periodic report of New Zealand*, CCPR/C/NZL/CO/6, 28 April 2016, at para 45-46.

21 Committee on Economic, Social and Cultural Rights *Concluding observations of the Committee on Economic, Social and Cultural Rights: New Zealand* 48th session E/C.12/NZL/CO/3 (2012) para 11.

22 Human Rights Council *Report of the Special Rapporteur on the Rights of Indigenous Peoples: The situation of Maori people in New Zealand* 18th session A/HRC/18/35/Add.4 (2011) paras 70-72 and Human Rights Council *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people: Mission to New Zealand* 62nd session E/CN.4/2006/78/Add.3 (2006) paras 89-90 and 93-95.

23 Canada, Australia, United States, Mexico, Chile, Peru, Japan, Vietnam, Malaysia, Singapore and Brunei Darussalam.

the lack of engagement with Māori as the government's Treaty partner, and failure to implement specific Waitangi Tribunal recommendations concerning government obligations when negotiating international instruments (Wai 262);

deficiencies in the 'Treaty exception' provision in the TPPA which, although purported to preserve Māori rights under the Treaty, is limited in scope and relies on the goodwill of the government to act upon it.

A number of urgent claims were made to the Waitangi Tribunal,<sup>24</sup> both in relation to the substance of the agreement (and the extent to which it would impact the government's ability to meet its Treaty obligations), and the lack of consultation with Māori in the making of it.

The government refused to defer further action on the TPPA. It also refused to release draft texts to the Waitangi Tribunal prior to the conclusion of negotiations, or even allow confidential briefings on the Treaty clause which was at issue. Furthermore, once the TPPA was signed, the government compressed the Parliamentary examination process: the period for the Select Committee to consider public submissions was shortened to only five days (compared to the standard period of 20 working days).

The Tribunal's report was critical of the consultation process and substance of the TPPA, although it did not find a Treaty breach.<sup>25</sup> The Tribunal expressed concern at the lack of recognition of the status of Māori as Treaty partners as opposed to general stakeholders; the transparency of the government in its decision-making; and the process by which the government informs itself of Māori interests.<sup>26</sup> The Tribunal noted that the government had acted contrary to the findings of a previous Tribunal decision (Wai 262) in not providing an opportunity for Māori to identify their interests in the TPPA, and that this was compounded by the secrecy and lack of transparency. The Tribunal suggested a range of improvements to the government's engagement process for future agreements.<sup>27</sup>

Several UN human rights treaty bodies, including most recently, the Human Rights Committee, have criticised the government's lack of response, and failure to implement the Wai 262 recommendations. The Human Rights Committee also noted "the State party's insufficient engagement with indigenous communities prior to the signing in February 2016 of the Trans-Pacific Partnership Agreement, which includes provisions that may have a negative effect on the rights of indigenous peoples, in particular with regard to their free, prior and informed consent in the implementation of the Agreement, and to an effective remedy (arts. 2, 26 and 27)." <sup>28</sup> The Committee recommended that the State party:

- (b) Guarantee the informed participation of indigenous communities in all relevant national and international consultation processes, including those directly affecting them;
- (c) Implement technical capacity programmes for indigenous communities aiming at their effective participation in all relevant consultation and decision-making processes.

#### 4. Summary

The case studies cited here illustrate that:

<sup>24</sup> See "TPP Legal" at: <https://tpplegal.wordpress.com/waitangi-tribunal/>.

<sup>25</sup> Waitangi Tribunal (May, 2016), *Report on the Trans-Pacific Partnership Agreement – Pre-publication version*.

<sup>26</sup> *Ibid.*, at p 53.

<sup>27</sup> *Ibid.*, at p 54.

<sup>28</sup> Human Rights Committee, (2016), *Concluding Observations on the sixth periodic report of New Zealand*, CCPR/C/NZL/CO/6, 28 April 2016, at para 45-46

legislation intended to enhance Māori representation in local government is not effective;

Treaty claims settlement processes are in need of reform; this must be undertaken with the full and effective participation of Māori. Failure to do so will lead to further injustices and will continue to undermine the relationship between the government and Māori.

Parliamentary consultation processes vary and can be manipulated and curtailed where it suits the government; and

Specific recommendations made by the Waitangi Tribunal aimed at strengthening partnership, and enhancing Māori participation in decision-making have been ignored by government.

Consultation or participation processes generally fall short of the standards set out in the Declaration; they do not reflect or promote Māori self-determination, the right of free, prior and informed consent or enable Māori to substantially influence the outcome of decision-making.

## 5. Māori initiated constitutional transformation

Despite the fraught relationship between Māori and the New Zealand government as illustrated in the above case studies, Māori continue to seek ways to improve their relationship with the government and to find concrete ways to realise their right of self-determination.

In February 2016 the Iwi Chairs Forum released the report *Matike Mai Aotearoa*. This report was prepared by a working group of the Iwi Chairs Forum called the Independent Working Group on Constitutional Transformation.<sup>29</sup> The report followed five years of engagement with Māori communities and provides proposed models for constitutional change based on tikanga and Te Tiriti, and which have a focus on improved relationships that reflect self-determination, partnership and equality. The models include a focus on the 'relational sphere' where Māori and the government engage and make joint decisions. The report recommends further dialogue over the next five years, to enable Māori to agree a model and instigate constitutional transformation.

It is incumbent upon the New Zealand government to critically analyse how it engages with Māori and that it begin to take its decision to endorse the Declaration seriously. Failure to do so will result in new grievances and diminish the already fragile relationship between the government and Māori.

<sup>29</sup> Matike Mai Aotearoa (2016), *He Whakaaro Here Whakamū mō Aotearoa*. Available at: <http://www.converge.org.nz/pma/MatikeMaiAotearoaReport.pdf>