

**United Nations Human Rights Council Universal Periodic Review of New Zealand
2018-2019**

**Report of the Independent Monitoring Mechanism regarding the
Implementation of the UN Declaration on the Rights of Indigenous Peoples in
Aotearoa New Zealand, July 2018**

I Introduction

1. This is a report for the Human Rights Council's review of New Zealand under its universal periodic review in 2018/2019 from the Aotearoa Independent Monitoring Mechanism (Monitoring Mechanism).
2. 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 (the Forum)¹ to act as independent experts. The Monitoring Mechanism is supported 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.

II Engagement with Government

3. Since its establishment the Monitoring Mechanism has sought to engage with the New Zealand Government (the government). Recent developments have led to the creation of a formal relationship with Te Puni Kōkiri - the Ministry of Māori Development (TPK) and government funding to support the Monitoring Mechanism in its work.

III Recommendations

4. The Monitoring Mechanism has the following key priorities for the Human Rights Council's review of Aotearoa/New Zealand:
 - A. constitutional transformation to better respect Māori rights
 - B. self-determination
 - C. free, prior and informed consent
 - D. Māori interests in natural resources
 - E. water rights
 - F. equity in Treaty of Waitangi settlements between the state and Indigenous peoples

¹ 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.

- G. the development of a national plan of action to facilitate better implementation of the Declaration
5. The Monitoring Mechanism has held five thematic workshops with Iwi groups to discuss their experiences, issues and recommendations in relation to the above (and other) issues.

A Constitutional Transformation

Recommendation 1:

In accordance with recent UN recommendations, that the government work with the Monitoring Mechanism and iwi to progress constitutional transformation discussions and implement the recommendations of the 2016 Matike Mai Aotearoa report.

6. New Zealand is an exception globally in not having human rights included in a formal and written constitution. As a result, the New Zealand legislature/Parliament is supreme and has full legal authority to breach human rights without court oversight. As a result, New Zealand's *legal* protection of Indigenous peoples' rights is one of the weakest in the world (albeit Māori have comparatively greater levels of political leverage).
7. Constitutional transformation is also required because the rights affirmed in Te Tiriti/the Treaty of Waitangi, the founding constitutional document, are not reflected in New Zealand's current Westminster (UK)-designed constitutional system. Establishing a rights-based constitutional foundation is critical to making meaningful improvements in the realisation of Māori rights – including addressing the severe, ongoing social, economic and cultural disparities that Māori continue to experience (as detailed in all available statistical data (including from Government)).
8. The 2016 Matike Mai Aotearoa report² proposed models for an inclusive constitution, based on Te Tiriti and which have a focus on improved relationships that reflect self-determination, partnership and equality. The report recommended further dialogue over the next five years – amongst Māori and with other groups and the government – to develop, agree and implement an inclusive, Tiriti-based constitution.

² *He Whakaaro Here Whakaumu mō Aotearoa: Report of the Independent Constitutional Transformation Working Group* (2016). Accessible at: <http://www.converge.org.nz/pma/MatikeMaiAotearoaReport.pdf>

9. In the past year, two UN Committees have recommended that the government take action to progress constitutional discussions.³ Most recently, the UN Committee on Economic, Social and Cultural Rights (CESCR) has urged the government to:⁴

Take immediate steps, in partnership with Māori representative institutions, to implement the recommendations of the Constitutional Advisory Panel regarding the role of the Treaty of Waitangi within its constitutional arrangements together with the proposals put forward in the (2016) Matike Mai Aotearoa report.

10. Workshops with Iwi groups noted an overarching failure by successive governments to adhere to existing constitutional documents, He Whakaputanga and Te Tiriti, and to implement Māori rights. Participants also highlighted failures to include Māori in constitutional and related decision-making. As a result, government systems don't work for Māori; and actively cause harm.

11. Examples included:

- a. Prisons and the justice system – examples and research show that non-Māori get lesser sentences for the same offences and the disproportionate and increased risk for Māori of imprisonment.
- b. The state care system – continues to remove Māori children from their whānau (extended family) and provides them with a poorer standard of care.
- c. Housing – more Māori are living on the streets, in tents and cars because they are homeless.

12. Workshops also offered up solutions. Where Māori values and ways of doing things have been able to continue, despite a lack of support or recognition, Māori are flourishing because elders are able to provide solutions and guidance. Examples of this included: kapahaka, the arts, kaupapa Māori education, whaikōrero, pū kōrero, and whare wānanga.

B. Self-determination

Recommendation 2:

That government establish, support and sustain effective mechanisms to engage with the Māori Tiriti partner to recognise and protect Māori self-determination in its laws, policies and practices.

³ UN Committee for the Elimination of Racial Discrimination, (2017), *Concluding Observations: New Zealand*, CERD/C/NZL/CO/21-22, at para 13(a).

⁴ UN Committee on Economic, Social and Cultural Rights, (2018), *Concluding Observations on the fourth periodic report of New Zealand (Advanced Unedited Version)*, E/C.12/NZL/CO/4, at para 9(a).

13. For Māori, meaningful participation in decision-making is not a reality. Consultation and engagement does not reflect the obligations of Te Tiriti or the Declaration standards of free, prior and informed consent. Most consultation and engagement is tokenistic, decisions are pre-determined or ultimately made by a government agency rather than those it engages with or who are affected.
14. A major source of frustration was constantly having to work within Pākehā/ Western frameworks. The exercise of mana motuhake (autonomy), living according to tikanga and mātauranga Māori (Māori knowledge) and the strength and resilience of Māori and Māori culture were seen as key along with Māori frameworks and practices.
15. The creation of a Crown-Māori Relations Ministerial portfolio and department by the new government has been a positive step, recognising the significance of the Tiriti partnership and the need to strengthen this relationship. The Monitoring Mechanism hopes that this indicates a genuine commitment to listen and engage as equal partners under Te Tiriti.

C Free, Prior and Informed Consent – Trade Agreements

Recommendation 3:
<p>a. That the government does not ratify the CP-TPPA, in light of Māori concerns regarding the substance and process of the agreement, and its compliance with Te Tiriti and the Declaration, and</p> <p>b. Ensures its trade policy is compliant with Te Tiriti and with its obligations of free, prior and informed consent.</p>

16. The Monitoring Mechanism has raised concerns about the Trans-Pacific Trade Agreement (TPPA) in the past. Concerns related to both the substance of the agreement (and the extent to which it would impact the government's ability to meet its Tiriti obligations), and the lack of consultation with Māori during negotiations.
17. In March the government signed a revised version of the agreement, called the Comprehensive Progressive Trans Pacific Partnership Agreement (CP-TPP). The text for CP-TPP is the same as the original TPPA, with a small number of provisions suspended until the United States rejoins.

18. In February 2018, the Forum reiterated its opposition to the signing of the CP-TPP, as the suspended provisions do not address Māori concerns.⁵ The government continues to make international agreements that impact upon Te Tiriti without consulting Māori or seeking their free, prior and informed consent. Other issues of concern include:⁶
- a. That by extending the interests of foreign investors into areas such as intellectual property and environmental regulation, the CP-TPP places further obstacles to Te Tiriti being properly recognised;
 - b. The exception clause to address Te Tiriti in the CP-TPP is insufficient to protect Māori rights;
 - c. That consultation with Māori in relation to the CP-TPP has been extremely limited and certainly not of the standard required by the Declaration;
 - d. That recommendations from the Waitangi Tribunal's report on the TPPA (as well as its 2011 report on the Wai-262 claim), have still not been addressed – including the recommendation that the Crown work with Māori to develop a protocol to govern Investor-State Dispute Settlements (ISDS) where Te Tiriti implications are raised.

D. Natural Resources

Recommendation 4:

That the government establish bi-partisan forums where significant Tiriti issues with respect to resources and the environment are addressed independently of party-politics.⁷

19. Workshops with Iwi centred on seabed mining off the Taranaki coast. In August 2017, the Environmental Protection Authority (EPA) granted Trans-Tasman Resources 35-year consents to annually mine up to 50 million tonnes of iron sand in the South Taranaki Bight. The iwi, Ngā Rāuru and Ngāti Ruanui are two of seven groups who appealed the decision to the High Court.
20. Workshop participants highlighted a lack of meaningful participation in decision-making, and consultation practices where opportunities for Māori input are limited. There was a strong view that these processes didn't reflect or enable rangatiratanga (self-determination) or meet the standards of free, prior and informed consent. There was also frustration at the lack of commitment to genuine partnership and disappointment at the lost opportunities for real co-governance, innovation and change.

⁵ <https://itsourfuture.org.nz/wp-content/uploads/2018/04/Treaty-of-Waitangi-2.pdf>

⁶ For example, see: C. Jones, *Submission to Foreign Affairs, Defence and Trade Select Committee on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership*.

⁷ Examples already exist for example, legislation that recognised the Whanganui River and Te Urewera National Park as legal entities, with rights. This legislation also provided for co-management bodies, mandated to act in the interests of those natural resources.

E. Water

Recommendation 5:

- a. That government provide for Māori rights in water, in accordance with articles 25-29 of the Declaration, and
- b. Takes urgent steps to enable meaningful Māori participation in water allocation decision-making.

21. Māori rights in water have been the subject of ongoing discussions with government and remain unresolved. The Waitangi Tribunal is continuing the second stage of its *Fresh Water and Geothermal Resources Inquiry*, looking at whether the current law and freshwater management reforms are consistent with the principles of Te Tiriti.⁸

22. Other concerns in relation to water include: water quality and management;⁹ protection of waterways; access to drinking water;¹⁰ and the granting of permits by local government to large commercial water users. This has led numerous experts to declare that New Zealand is in a state of water crisis¹¹ with major environmental, health¹² and economic implications¹³ echoing trends around the globe.¹⁴

23. Both central and local government have come under scrutiny in relation to the right of free, prior and informed consent and, Māori consultation¹⁵ and participation¹⁶

⁸ <https://www.waitangitribunal.govt.nz/inquiries/urgent-inquiries/national-fresh-water-and-geothermal-resources-inquiry/> The New Zealand defence forces are also complicit in polluting waterways <https://www.radionz.co.nz/news/national/348951/toxic-water-it-s-the-uncertainty-that-s-the-killer>.

⁹ See <http://www.aljazeera.com/programmes/peopleandpower/2017/08/polluted-paradise-170831042123144.html>.

¹⁰ For example, see <https://www.stuff.co.nz/auckland/local-news/western-leader/99550944/water-shortages-could-be-a-sign-of-things-to-come> and “Report links fourth death to Havelock North water crisis”, http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11955292.

¹¹ See Dr Mike Joy, lecturer at Massey University, “Our Fresh Water Crisis”, at <https://millionmetres.org.nz/why-streams/>

¹² See “Editorial: Water woes are a clear health crisis”, at <https://www.stuff.co.nz/national/politics/opinion/99628685/editorial-water-woes-are-a-clear-health-crisis>; also with 60 of Auckland city's 84 beaches being unswimmable – see “Auckland swimmers unaware of contamination on beaches” at <https://www.radionz.co.nz/news/national/350225/auckland-swimmers-unaware-of-contamination-on-beaches>.

¹³ See <https://www.stuff.co.nz/southland-times/opinion/101287773/we-have-resilience-lessons-to-learn>.

¹⁴ See “The lessons New Zealand could learn from the Cape Town water crisis”, <http://www.newshub.co.nz/home/new-zealand/2018/01/the-lessons-new-zealand-could-learn-from-the-cape-town-water-crisis.html>

¹⁵ See email to Northland Regional Council raising concerns about the lack of Māori consultation about a water resource consent application, at <https://www.facebook.com/groups/1105337399603221/permalink/1107177082752586/>, and <https://www.facebook.com/groups/1105337399603221/permalink/1107303406073287/>

standards, despite recent legislation to enhance Māori engagement and protect the 'life force' of water itself.¹⁷

F. Equity in Treaty of Waitangi settlements between the state and Indigenous peoples

Recommendation 6: that the government reach agreement with Māori on a fairer process for the settlement of Treaty claims that complies with international human rights standards.

24. 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 hapū¹⁸ 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 providing evidence of a lack of representativeness and accountability, unfair processes and marginalisation of smaller groups.¹⁹ This has resulted in poor outcomes leading to many claimants' rights and interests not being adequately represented within the Treaty settlement process.
25. In April 2018, the Waitangi Tribunal released the Whakatōhea Mandate Inquiry Report. In this report, the Tribunal determined that the Crown had indeed breached Treaty principles in its settlement negotiations with Whakatōhea, in particular, finding that the Crown's recognition of mandate "was not fair, reasonable, and made in good faith".
26. The Tribunal raised similar criticisms of Crown process in the Ngāpuhi Mandate Inquiry Report in 2015. The Tribunal has made recommendations to the Crown, across a number of reports, about how to address flaws in the mandating process. For example, it has recommended that the Crown take a more active role in monitoring the

¹⁶ See email to Northland Regional Council raising concerns about the lack of Māori consultation regarding Councils obligation to appoint hearing commissioners with expertise in tikanga Māori (Māori values, customs and traditions), at https://www.facebook.com/groups/1105337399603221/permalink/1145715332232094/?comment_id=1145717512231876&comment_tracking=%7B%22tn%22%3A%22R4%22%7D.

¹⁷ See information on the Mana Whakahono-ā-rohe arrangements introduced in April 2017, at <http://www.scoop.co.nz/stories/PA1704/S00082/making-history-with-mana-whakahono-a-rohe-agreements.htm>

¹⁸ 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.

¹⁹ For example, Waitangi Tribunal *The Whakatōhea Mandate Inquiry Report* (Wai 2662, 2018), Waitangi Tribunal *The Ngāpuhi 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).

mandating strategy and that it must be impartial in its dealings with different Māori groups and preserve and not damage relationships between them.

27. 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.
28. 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.”²⁰ In its 2016 concluding observations, the Committee also recommended strengthened consultation processes and capacity building to support effective Māori participation.²¹
29. 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.”²²
30. 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.²³

G. National Plan of Action

Recommendation 7:

- a. The the government work with the Monitoring Mechanism to develop and implement a National Plan of Action for the implementation of the Declaration, and**

²⁰ Committee on Human Rights *Concluding observations of the Human Rights Committee: New Zealand* 98th session CCPR/C/NZL/CO/5 (2010) para 21.

²¹ 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.

²² 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.

²³ 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.

b. Continue its cooperation and support to the Monitoring Mechanism to enable its independent monitoring of the Declaration's implementation.

31. There is still no coordinated, overarching plan or strategy for the Declaration's implementation in New Zealand meaning progress is ad hoc. In particular, there are major gaps in relation to the key rights of self-determination and participation.
32. As well as a National Plan identifying actions and indicators to implement and monitor the Declaration, there is a need for: comprehensive planning across government; reviewing legislation for consistency with the Declaration; clear responsibility for the Declaration within government, and targeted resources for its implementation.