

WHAT CAN WE LEARN FROM NEW ZEALAND

for Constitutional Recognition of Indigenous
Peoples in Australia?

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INTRODUCTION

There is currently bipartisan political support for Indigenous constitutional recognition. The Expert Panel released its recommendations in 2012. However bipartisan support has not been achieved for these recommendations and discussions are underway as to the appropriate set of reforms for constitutional recognition of Indigenous peoples in Australia.

In his 2013 *Act of Recognition* second reading speech advocating for the constitutional recognition of Indigenous peoples in Australia, Prime Minister Tony Abbott, as Leader of the Opposition, remarked that “we only have to look across the Tasman to see how it all could have been done so much better. Thanks to the Treaty of Waitangi in New Zealand two peoples became one nation.”

But what was it that New Zealand had done so much better? Might looking at New Zealand help us broaden the way we think about Indigenous constitutional recognition in Australia?

In June 2014, Cape York Institute for Policy and Leadership (CYI) were supported by the government to undertake an investigative trip to New Zealand, to further our research and thinking towards constitutional recognition of Indigenous peoples in Australia. We undertook the trip to broaden our ideas about the ways in which Indigenous peoples might be recognised within a Nation-State, both politically and legally. New Zealand provided a nearby, comparable example of a stable and prosperous Commonwealth country in which Indigenous peoples were successfully recognised in a variety of ways.

The purpose of the trip was therefore to try and find answers to the following questions:

- What can we learn from the New Zealand situation?
 - What aspects of Maori political, legal and symbolic recognition have been successful? What benefits have flowed from these forms of recognition?
 - What aspects of Maori political, legal and symbolic recognition have been unsuccessful? What have been the difficulties and complications?
 - What forms of Indigenous recognition might Australia learn from?

In preparation for this research trip, we liaised with experts, academics, politicians and lawyers who specialize in Maori affairs, with a particular focus on Maori leaders. There was strong interest and enthusiasm about our trip from counterparts in New Zealand. We planned to travel to Wellington, Auckland and Hamilton.

Australian research participants

The CYI research trip participants included:

- Fiona Jose, CYI CEO
- Shireen Morris, CYI policy adviser, constitutional reform research fellow
- Nolan Hunter, Empowered Communities leader; CEO Kimberley Land Council
- Sean Gordon, Empowered Communities leader; CEO Darkinjung Local Aboriginal Land Council, NSW
- Damien Freeman, Director of the Governor-General’s Prize, Constitution Education Fund Australia.

Meeting schedule

We met with the following leaders and experts:

- Hon Chris Finlayson, Attorney General, Minister for Maori affairs, Associate Minister for Treaty of Waitangi Negotiations & Minister for Arts, Culture & Heritage
- Sir Edward Durie, co-chairman of the Maori Council, the first Māori appointed as a Justice of the High Court of New Zealand and a leading legal expert on the Treaty of Waitangi
- Te Ururoa Flavell, Maori Party co-leader, member of Parliament
- The Maori King, Kiingi Tuheitia
- Judge Craig Coxhead, Maori Land Court judge
- Judge Sarah Reeves, Maori Land Court judge
- Professor Sir Tamiti Reedy, Waitangi Tribunal member
- Miriama Evans, Waitangi Tribunal member
- Donna Hall, experienced Maori affairs lawyer
- Dame Claudia Orange, Treaty of Waitangi historian and expert, Te Papa Museum
- Dr Bryan Gilling, Treaty of Waitangi expert, Maori land and Waitangi Tribunal settlements lawyer, historian and academic, Morrison Kent Lawyers
- Dr Carwyn Jones, Maori affairs and Treaty of Waitangi academic (Victoria University of Wellington)
- Peter Johnston, Rainey Collins Lawyers, Maori affairs expert
- Associate Professor Rawinia Higgins, Maori language policy expert (Victoria University of Wellington)
- Dr Robert Joseph, Maori affairs expert (University of Waikato, Hamilton)
- Professor Margaret Wilson, former Attorney-General (University of Waikato, Hamilton).

We also met with experts and leaders at the following relevant institutions:

- Maori Heritage Council
- Maori Language Commission
- Waitangi Tribunal
- Office of Treaty Settlements
- Maori Land Court
- Ministry of Justice.

We experienced an enlightening five days of discussions and learning. One highlight was the group being invited by the Attorney-General, the Hon Chris Finlayson, to attend a Waitangi Tribunal settlement 'in principle' signing ceremony. This was a prestigious cultural occasion, full of Maori song and language, that we were honoured to attend.

Our research trip to New Zealand provided us with many informative discussions. We gained valuable insights into New Zealand history, the differences in the New Zealand political situation and climate and the differences in attitudes towards Maori and Maori affairs to the situation here in Australia, as well as valuable insights into the institutional arrangements which recognise Maori people in New Zealand and the benefits and difficulties flowing from these arrangements.

New Zealand provided a useful comparison to the Australian situation. New Zealand and Australia share several key similarities as nations, as well as some interesting differences. New Zealand, like Australia, was a land inhabited by Indigenous peoples and colonised by the British. Like Indigenous Australians, Maori were dispossessed from their land and

suffered under discriminatory colonial and settlement policies and laws. Like Indigenous people in Australia, the Maori were often prohibited from practicing their cultures and languages. Colonisation and settlement was at times violent. There were Indigenous deaths from imported diseases. The Maori population dwindled significantly, and eventually Maori became a minority within the New Zealand population.

Like Indigenous Australians, therefore, the Maori face the challenge of being a minority 'mouse' trying to be heard against the 'elephant' majority. And like Indigenous Australians, the Maori minority are the only minority group that were dispossessed and displaced by the British settlement of the nation. Efforts at Maori recognition in New Zealand therefore deal with the fundamental challenge of allowing Maori people a fair voice within the New Zealand democratic system, given their unique historical status as a displaced and dispossessed Indigenous minority.

There are also key differences between New Zealand and Australia that affect the way these distinct Indigenous populations have managed to find a voice within the nation. Maori are far more significant in numbers than the Indigenous Australian minority. While Indigenous Australians are approximately 3% of the Australian population, Maori are 15% or more. While New Zealand is a geographically small country, enabling easy interaction and collaboration between Maori tribes, Australia is geographically much more vast. Indigenous Australian communities can be extremely remote and isolated both from other tribes and from urban areas. Similarly, there is more cultural homogeneity amongst Maori groups than amongst Indigenous Australian groups. In Australia, there have been hundreds of different Indigenous languages that are very different from each other – making communication between groups and promotion of ancestral languages more difficult. While Maori tribes may speak different dialects, the Maori language is much more unified than Indigenous Australian languages. All these factors mean that the Maori situation is different in important ways from the Indigenous Australian situation.

A key historical difference is the absence of a Treaty in the colonisation of Australia. While in New Zealand the Maori entered into the Treaty of Waitangi with the Crown, in Australia there was no such unifying agreement between Indigenous peoples and the Crown. While Batman attempted to enter into a Treaty with the Indigenous peoples near Port Phillip in 1835, this Treaty was never considered valid by colonial authorities. This contrast in the histories of the two nations is significant. The Treaty of Waitangi gave Maori people important standing and rights in New Zealand. It enabled the Maori to try to hold the Crown accountable to its promises over time. The Treaty was crucial to the development of institutional structures to recognise and give Maori a voice in New Zealand's political system.

So while there are important similarities between Australia and New Zealand, the Indigenous non-recognition predicament in Australia is more extreme than the Maori position in New Zealand. Indigenous Australians are more marginalised. They are a more disadvantaged and more extreme minority. Indigenous Australians have not benefitted over time from institutional structures which recognise them, nor a Treaty which protects their rights.

This does not mean that it is too late to implement helpful solutions to increase Indigenous empowerment, participation and recognition in Australia. It just means that our solutions need to take the uniqueness of the Australian situation into account.

Our key learnings from the trip are as follows.

THE WAITANGI TRIBUNAL AND SETTLEMENT PROCESSES

The historical situation in New Zealand is fundamentally different from the situation in Australia because there is no Australian equivalent in 1788 to New Zealand's Treaty of Waitangi, which was signed in 1840. Nonetheless, there may be things we can learn from the institutional arrangements for Maori recognition that have flowed from the Treaty of Waitangi.

The Treaty of Waitangi

The Treaty of Waitangi can be described as:

- Legally mostly ineffective: because it is not entrenched in the Constitution (New Zealand has no formal Constitution), and it is only enforceable where expressly incorporated into legislation.
- Socio-politically quite effective: while initially the Treaty did not carry much political or moral force, over time as politics and mindsets have themselves changed, the Treaty has helped shift national and political mindsets towards a greater respect towards Maori rights, such that New Zealand is seen as a bicultural nation and Maori are seen politically as something more akin to equal Treaty partners.

The Treaty of Waitangi was made in 1840 and was signed by around 500 Maori chiefs. The English version reads as follows:

Her Majesty Victoria Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favor the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorized to treat with the Aborigines of New Zealand for the recognition of Her Majesty's sovereign authority over the whole or any part of those islands - Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorize me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to Her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

Article the first

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation of Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole sovereigns thereof.

Article the second

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs, yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

Article the third

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

[signed] W. Hobson Lieutenant Governor

Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and We the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof in witness of which we have attached our signatures or marks at the places and the dates respectively specified.

Done at Waitangi this Sixth day of February in the year of Our Lord one thousand eight hundred and forty.

The Chiefs of the Confederation

The Treaty's preamble acknowledges the British monarchy, the native prior occupants and those immigrating to New Zealand. It is said to establish a "bicultural foundation for New Zealand".¹ The preamble establishes the Treaty's purpose as protecting Indigenous rights and property, recognising British sovereign authority, and establishing law and order and conditions for justice for both the native population and the Crown's 'subjects'.

- Article One declares that the native chiefs cede their sovereignty and authority absolutely and without reservation to the British Crown (although this is disputed, as the Maori text of the Treaty employs a concept that falls short of the English concept of 'sovereignty').
- Article Two confirms and guarantees the Indigenous tribes 'full exclusive and undisturbed' possession of their properties as long as they wish to retain those properties; but says that the tribes yield to the Crown the exclusive and pre-emptive right of alienation at agreed prices.²
- Article Three says that 'in consideration therefore' – so in return, presumably, for ceding sovereignty and granting the Crown the exclusive and pre-emptive right to buy native land – the Crown grants the native people 'royal protection' and imparts 'all the rights and privileges of British subjects'. Thus, Article Three gives the native

¹ New Zealand Human Rights Commission, 'Human Rights in New Zealand' (2010), 39.

² Article Two has also been interpreted to give Maori the right to live as Maori, or the right to self-determination, see New Zealand Human Rights Commission, 'Human Rights in New Zealand' (2010), 39.

people equal citizenship and equality before the law, but may also establish a duty of protection, whereby the Crown is supposed to act in the best interests of Indigenous people.

The Treaty is said to establish the principle of partnership in the relationship between Maori people and the State, which means that Treaty parties are supposed to negotiate with each other reasonably and in good faith.³ The Treaty has been described as “the promise of two peoples to take the best possible care of each other.”⁴

The Crown, however, has always been the dominant partner, and it is now widely conceded that the Crown often failed to honour its obligations under the Treaty. For much of New Zealand’s history the Treaty of Waitangi was ignored by governments.⁵ The Human Rights Commission states that “New Zealand’s history since the signing of the Treaty has been marked by repeated failures to honour these founding promises.”⁶

The Treaty has moral, political and cultural force

As politics and mindsets have evolved, however, the Treaty has become a significant document of moral, political and cultural force in the national imagination.

The bicultural foundation that the Treaty establishes seems to be one of the clearest ways the Treaty has helped positively shift the national mindset, elevating the status of Maori heritage such that it continues to move towards a position of equality alongside the country’s British heritage. Maori culture is seen as New Zealand’s culture. Today, Maori rituals are incorporated into citizenship ceremonies to welcome new immigrants.⁷ The Treaty of Waitangi is taught in schools.

It can’t be said, however, that the Treaty is solely responsible for this positive national attitude. Other factors play a part: there is a more unified Maori culture, greater population numbers and a single language, unlike Indigenous Australian cultures, making it an easier culture to represent and promote. But the Treaty and the Waitangi Tribunal have helped in symbolic and practical ways, especially to promote Maori language. The Treaty has, over time, become a symbol of New Zealand’s bicultural foundation.

The existence of the Treaty of Waitangi has also clearly helped increase the prominence of Maori people politically in New Zealand. It has achieved this through ‘socio-political’, rather than legal force.⁸ The Treaty developed symbolic and political weight, and this has helped the Maori political cause. The Treaty’s ‘extracted’ principles of partnership, fiduciary duty, cooperation and protection have evolved to become ingrained.⁹ Courts have interpreted the partnership principle to mean that parties need to deal with each other reasonably and with an attitude of good faith. And politically, the “perception of a duty to achieve partnership is

³ *New Zealand Māori Council v Attorney-General* [1987] NZLR 641; New Zealand Human Rights Commission, ‘Human Rights in New Zealand’ (2010), 39; see also the UN Declaration on the Rights of Indigenous Peoples which states in its preamble: “Treaties are the basis for a strengthened partnership between Indigenous people and the State”.

⁴ Bishop Manu Bennett, cited in Human Rights Commission (2003), *Human Rights and the Treaty of Waitangi: te mana i Waitangi* (Auckland: Human Rights Commission).

⁵ Carwyn Jones, “Strengthening Partnership between States and indigenous peoples: treaties, agreements and other constructive arrangements” Geneva, 16-17 July 2012, Organized by the Office of the United Nations High Commissioner for Human Rights, 2.

⁶ New Zealand Human Rights Commission, ‘Human Rights in New Zealand’ (2010), 39.

⁷ New Zealand Human Rights Commission, ‘Human Rights in New Zealand’ (2010), 39.

⁸ Noel Cox, ‘The treaty of Waitangi and the relationship between the Crown and the Maori in New Zealand’ (2003) 28 *Brooklyn Journal of International Law* 123, 132.

⁹ Philip Joseph, ‘The Maori Seats in Parliament: Te Oranga O Te Iwi Maori: A Study of Maori Economic and Social Progress’, *New Zealand Business Roundtable*, Wellington, 2008.

so pervasive that many territorial local governments now think it is stated somewhere in law.”¹⁰ Likewise, the extracted fiduciary principle “has emerged as a duty to consult Maori,”¹¹ which, though not legally actionable, has developed moral and political force. The Treaty, it is said, has now come to have widespread political influence.¹²

Noel Cox argues that treaties play an instrumental role in influencing how nations view themselves. With respect to Australia’s republic debate, Cox observes that “Aboriginal relations ... have played a lesser part in the Australian republican debate than they have in the political debate in Canada or New Zealand, largely because the Australian aboriginal population generally lacked treaties with the Crown.”¹³ This perhaps demonstrates that where treaties have been established with Indigenous peoples, Indigenous perspectives and peoples play a greater part in matters of national and foundational significance, and thus relationships with Indigenous peoples are seen as having greater importance for the nation as a whole.

The Treaty of Waitangi has even come to be known as the agreement which gives moral legitimacy to the Crown’s sovereignty in New Zealand. Cox argues that legitimacy of the British inherited legal form does not only rely on the fact that the majority of the population approve, or that the rule of law is maintained:

*This legitimacy alone, however, is not necessarily sufficient. Nor does it alone explain the general acceptance of the current regime in New Zealand. There exists a second, potentially potent, source of legitimacy in New Zealand - the Treaty of Waitangi ("Treaty"). As the moral, if not legal, authority for European settlement of New Zealand, this 1840 compact between the Crown and Maori chiefs has become increasingly important as a constitutional founding document for New Zealand. As a party to the Treaty, the Crown may have acquired a new and significant source of legitimacy as the body with which the Maori have a partnership. It is also a source of legitimacy that belongs specifically to the Crown as a symbol of government.*¹⁴

The Treaty could thus be viewed as New Zealand’s founding constitutional document.¹⁵ Indeed, New Zealand as a nation tends to view it in this way. This is evidenced by the Waitangi Day public holiday. New Zealand has no “New Zealand Day” national holiday like we have Australia Day. Their national holiday is marked by a celebration of the Waitangi Treaty – it is viewed as New Zealand’s founding day. The Treaty therefore carries great symbolic force in the national imagination, making New Zealand bicultural even in a formal sense.

New Zealand’s national anthem has been translated into Maori and is routinely performed in both languages. This first happened in 1878 at the request of the Governor.¹⁶ Under the Treaty of Waitangi, Maori language and culture have become an intrinsic part of the New Zealand identity.

¹⁰ Steven Franks, ‘Treaty of Waitangi: only good intentions?’ – paper presented to a Samuel Griffith Society conference.

¹¹ Steven Franks, ‘Treaty of Waitangi: only good intentions?’ – paper presented to a Samuel Griffith Society conference.

¹² Steven Franks, ‘Treaty of Waitangi: only good intentions?’ – paper presented to a Samuel Griffith Society conference.

¹³ Noel Cox, ‘The treaty of Waitangi and the relationship between the Crown and the Maori in New Zealand’ (2003) 28 *Brooklyn Journal of International Law* 123, 131.

¹⁴ Noel Cox, ‘The treaty of Waitangi and the relationship between the Crown and the Maori in New Zealand’ (2003) 28 *Brooklyn Journal of International Law* 123, 123-4.

¹⁵ *Ibid.*

¹⁶ <http://www.mch.govt.nz/nz-identity-heritage/national-anthems/history-god-defend-new-zealand>.

In New Zealand today there is bipartisan political support for a process that will enable the Treaty of Waitangi relationship, between Maori and the Crown, to be transformed from a historically *dysfunctional* relationship to a *functional* relationship. The Crown is now committed to reaching a final settlement with each of the Maori tribes, each intended to be a final settlement of all historical grievances, so that the Maori and the Crown can move forward together in a constructive partnership for the future.

The Crown has established two institutions to facilitate this process: the Waitangi Tribunal and the Office of Treaty Settlements.

Waitangi Tribunal

If the Waitangi Treaty established a framework of biculturalism in New Zealand, the Waitangi Tribunal sits at the epicenter of this framework.

The Waitangi Tribunal, established in 1975, is a permanent Commission of Inquiry, whose members are appointed by the Governor-General on behalf of the Queen on the advice of the Government of the day. The Tribunal operates independently of the Government. For the most part, it makes non-binding recommendations which the Crown may or may not accept. The role of the Tribunal is to investigate grievances that Maori bring to it concerning breaches of the Treaty by the Crown. The Tribunal is made up of 16 members, half of whom are Maori and the other half non-Maori. The members are all experts in Maori affairs: historians, academics, lawyers, community leaders and court judges.

When representatives of a tribe lodge their claims with the Tribunal, and the Tribunal is satisfied that the applicants are the legitimate representatives of the tribe, the Tribunal commences an inquiry into the history of the relationship between the Crown and the tribe. In this, the Tribunal is assisted by its team of professional historians, who undertake research that aims to clarify what happened and whether the actions or omissions of the Crown were consistent with the Treaty or in contravention of it. The Tribunal then publishes a report containing its version of the history, its assessment of whether the Crown's actions and omissions are consistent with its Treaty obligations, and recommendations as to actions that the Crown might now take to provide redress for its historical breaches of Treaty obligations.

Judge Coxhead, a member of the Maori Land Court and the Waitangi Tribunal identified the following benefits of the Tribunal:

- It is an important forum for the Maori to tell their story, and it provides a safe environment in which to air their grievances.
- It has an educative role for the country as a whole (particularly through the reports that it hands down).
- The process is empowering for the Maori: they are able to tell their history the way they want to—this enables them to deal with their emotions *in order to focus on the best future*.
- The Tribunal's role has changed over the years: it has a historical role, but also a role in keeping the Crown honest in managing the Treaty relationship, which has shifted from a focus on compensation to maintaining the ongoing relationship.

Office of Treaty Settlements

Once the Tribunal has handed down its report and recommendations, the tribe may then proceed to negotiate a settlement with the Crown (although in some rare circumstances, the settlement negotiations commence without having first obtained a report from the Tribunal).

The Attorney-General appoints a retired diplomat to serve as the Crown Negotiator, and this person is supported by officials in the Crown Settlement Office. The Crown Negotiator, on the Crown's behalf, then commences negotiations with the tribe's representatives. The outcome of the negotiation is a Deed of Settlement, which is then enacted by the Parliament of New Zealand (usually with bipartisan support). There are three components to the settlement:

1. Historical: agreed historical account, acknowledgements, and Crown apology
2. Cultural redress: site vesting, co-governance, protocols, place names, statutory recognition
3. Financial redress: cash, Crown assets.

All three of these are essential to the success of the settlements: without acknowledgement of history, the settlement will seem hollow over time; without cultural redress, the settlement will lack context and/or purpose (without this, there will be an inability to see what money delivers); without financial redress, the settlement will not be sustainable.

The settlement is intended to be a final and complete settlement of historical grievances. The Attorney-General has set up an office to manage the post-settlement relationship: the settlement is meant to establish a new basis for a functional partnership between the Crown and the Maori, where there has previously been a dysfunctional relationship.

For some tribes, the financial compensation is very important, as large sums of money are involved. However, this is often not the case, and the compensation is modest (on a per capita basis). Over time, many tribes have come to see the financial compensation as less significant than the cultural redress and the Crown apology. It should be noted that right from the beginning the Crown conceded that it could not afford to compensate the Maori adequately for their losses, and that to do so would send New Zealand broke. So the financial redress can only ever be symbolic in nature.

Cultural redress has taken a range of different forms, and affords an opportunity for thinking creatively about how the Maori can reaffirm their culture and its enduring significance for the tribe and the nation. One important aspect of this is dual naming of place names, which is managed by the Geographic Board.

The historical dimension has been of very great importance. The Crown and the Tribe settle on an agreed statement of the history, and a negotiated form of the apology. Elaborate ceremonies mark the beginning and the conclusion of the settlement process, and the tribe has the primary role in deciding how the ceremony is to take place. Sometimes, it is on tribal land; sometimes at Parliament House. Often, Maori is the predominant language in the ceremony.

Waikato-Tainui settlement

The first settlement to be concluded was that with the Waikato-Tainui in 1995. Her Majesty Queen Elizabeth II personally signed the *Waikato Raupatu Claims Settlement Act 1995* incorporating it into New Zealand law and personally delivered the apology in the presence of the Maori Queen, Dame Te Arikinui Te Ātairangikaahu. This was the first time that The Queen had assented to an Act in public, and the first time that she had personally given her assent to an Act of the New Zealand Parliament, of which she is a constituent element. The English version of the Crown apology reads as follows:

1. *The Crown acknowledges that its representatives and advisers acted unjustly and in breach of the Treaty of Waitangi in its dealings with the Kiingitanga and Waikato*

in sending its forces across the Mangataawhiri in July 1863 and in unfairly labelling Waikato as rebels.

2. The Crown expresses its profound regret and apologises unreservedly for the loss of lives because of the hostilities arising from its invasion, and at the devastation of property and social life which resulted.

3. The Crown acknowledges that the subsequent confiscations of land and resources under the New Zealand Settlements Act 1863 of the New Zealand Parliament were wrongful, have caused Waikato to the present time to suffer feelings in relation to their lost lands akin to those of orphans, and have had a crippling impact on the welfare, economy and development of Waikato.

4. The Crown appreciates that this sense of grief, the justice of which under the Treaty of Waitangi has remained unrecognised, has given rise to Waikato's two principles 'i riro whenua atu, me hoki whenua mai' (as land was taken, land should be returned) and 'ko to moni hei utu mo te hara' (the money is the acknowledgment by the Crown of their crime). In order to provide redress the Crown has agreed to return as much land as is possible that the Crown has in its possession to Waikato.

5. The Crown recognises that the lands confiscated in the Waikato have made a significant contribution to the wealth and development of New Zealand, whilst the Waikato tribe has been alienated from its lands and deprived of the benefit of its lands.

6. Accordingly, the Crown seeks on behalf of all New Zealanders to atone for these acknowledged injustices, so far as that is now possible, and, with the grievance of raupatu finally settled as to the matters set out in the Deed of Settlement signed on 22 May 1995 to begin the process of healing and to enter a new age of co-operation with the Kiingitanga and Waikato.

Practical benefits of settlements

According to conservative Attorney-General Chris Finlayson, Minister for Treaty Settlements, the Waitangi Tribunal settlement process has become a bipartisan national project in the doing of justice. The settlement process demonstrates the national respect for citizens' property rights, and acknowledges that breached property rights must be compensated. Thus, the commitment to the Waitangi Tribunal settlement process also demonstrates national commitment to the rule of law.

Even though the financial compensation paid can never get close to the real value of the damages and loss suffered by Maori through the process of colonisation, Finlayson argues that settlements give the Maori an economic "leg up", and help to establish a solid base for regional economic development. And if Maori prosper economically, this is good for the national New Zealand economy. One Maori lawyer said that in 2010, Maori-owned assets were estimated at \$37 billion. At 15% of the New Zealand population, if Maori people prosper, this is good for the entire nation.

But the Waitangi Tribunal settlement process also does much for national healing and social cohesion: it establishes a formal truth and reconciliation process for New Zealand. The settlement process has been critical in enabling Maori people to achieve greater empowerment, and to achieve catharsis and move on from past wrongs. The process allows for the airing and recognition of genuine grievances, allows for Maori stories to be told, for disputed histories to be settled, and creates a formal sense of closure so that parties can then move on productively into a better future. The achievement of settlement represents the start of a fresh new Maori relationship with the Crown. Parties can then move forward in

an ongoing partnership, always accountable under Treaty of Waitangi and settlement principles.

Nonetheless, the settlement process is not perfect. Rifts can occur as tribes sort out who is a legitimate claimant and who is not. It can be complicated when individuals are living away from their tribal base. There can also be disputes over the ways in which financial redress is used and invested. Some smaller *iwi* who do not win large settlements do not end up benefitting financially, as the cost of running their local organisation and managing the settlement becomes too cumbersome.

Reflections

Despite imperfections, the Waitangi Tribunal settlement process establishes a formal process for justice to be done, for the truth to be documented and for Maori and the Crown to rebuild better working relationships. It establishes a formal 'truth and reconciliation' process for New Zealand and provides for a far more holistic and comprehensive 'settlement' process, underpinned by, but not limited to, recognition of property rights. In contrast, the Australian native title and land rights regimes are more narrowly focused on the legal recognition or otherwise of Indigenous peoples' ongoing property rights, but do not deal with matters of healing, reconciliation and compensation more broadly.

It was telling to our group that New Zealand did not avoid the 'truth' part of this reconciliation process. Australia's journey towards reconciliation seems to lack the 'truth' element: we have thus far shied away from a detailed analysis of the colonial and post-colonial history of each region as part of the reconciliation process. We have tried to pursue reconciliation without formally acknowledging the genuine historical grievances of Indigenous people, though the 2008 National Apology was one such recognition of the Stolen Generation.

The lack of 'truth' from our reconciliation process may be one reason why so many Indigenous Australians find the current Australian approach to reconciliation somewhat hollow. Without an acknowledgement of the truth and of history, what does reconciliation mean? Without an acknowledgement of history, how can Indigenous people be expected to truly 'get over it' and move on?

This is an issue that requires deeper thought by Indigenous Australians and the nation's leadership. While there was no settlement Treaty between Indigenous people and the Crown in Australia for Indigenous peoples to point back to and hold the government accountable to, there were Royal Instructions issued to both Captain Cook and Captain Phillip, setting out how the Indigenous peoples were to be treated by the explorers and settlers. In practice, these Instructions were not adhered to by the settlers and the Crown did not, in many cases, ensure that these Instructions with respect to the Indigenous peoples were followed.

Further thinking needs to be done about the implications of our colonial history for contemporary process that are intended to move us towards reconciliation, including native title and land rights processes.

THE MAORI COUNCIL

Historically, the New Zealand Maori Council structure arose out of Maori political advocacy which began in the 1800s:

There is a long history behind the formation of the New Zealand Maori Council as part of the long Maori struggle for autonomy. The Maori Council's system can be traced back to the Kotahitanga movement and the Maori parliaments in the 1800s. In 1900 Sir James Carroll was able to get a statute to establish Councils' at a papakainga level. Government would not recognise the need for Maori organisation at a national or district level.

This changed in 1945 when the Councils' set up for the war effort were reorganised into District Maori Councils. Government again refused to recognise a national Maori body which might lead to "Maori nationalism".

In 1962 the break-through occurred when the New Zealand Maori Council was established as a national body.¹⁷

The New Zealand Maori Council is now a body spearheaded by nine elected Maori representatives. The body is formed from a collective of Maori Committees within each Maori District. Maori Council Districts can be declared by resolution at any time by the New Zealand Maori Council under the *Maori Community Development Act*¹⁸ and are distinct to Maori electorates for the purposes of the Maori roll for Maori reserved parliamentary seats. There are currently 16 Maori Council Districts across New Zealand. Committee areas within Districts are the declared Tribal Committee areas under section 14 of the *Maori Social and Economic Advancement Act 1945*.¹⁹

Maori people over twenty years of age are entitled but not compelled to vote for Maori Committee elections – voting in New Zealand is not compulsory. A Maori person must vote within the Committee area in which they reside, or if the person has 'marae affiliations' (cultural connections) with the area. However a person may not be a member of more than one Maori Committee at one time – so they must choose which area they want to vote in and be primarily affiliated with.²⁰

To form a new Committee a person must notify the local District Maori Council in their area of their intention to establish a new Maori Committee. Then they must confirm the Maori Committee area or boundaries with the District Maori Council and place a public notice of Maori Committee elections in the local newspaper. Then meetings are held to elect seven members to constitute each Maori Committee and to appoint two members to go forward

¹⁷ <http://www.maoricouncil.com/our-history/>

¹⁸ *Maori Council Community Development Act 1962*, s 14.

¹⁹ *Maori Community Development Act 1962*, s 8.

²⁰ *Maori Community Development Act 1962*, s 19.

to the District Maori Council. Elections for the Maori Committees, District Maori Councils and the national New Zealand Maori Council are held triennially, with the next elections in 2015.

The New Zealand Maori Council is then headed by elected representatives from each Maori District. Each District Maori Council must appoint three members to the New Zealand Maori Council. From within this national body, representatives are elected onto the Executive Team to spearhead the goals and vision under the *Maori Community Development Act 1962*. Currently there are nine members of the Executive Team, with Sir Edward Durie and Maanu Paul as co-chairmen.

The goals and vision of the New Zealand Maori Council are articulated in Section 18 of the Act:

General functions of the New Zealand Maori Council

(1) The general functions of the New Zealand Maori Council, in respect of all Maoris, shall be—

(a) to consider and discuss such matters as appear relevant to the social and economic advancement of the Maori race:

(b) to consider and, as far as possible, give effect to any measures that will conserve and promote harmonious and friendly relations between members of the Maori race and other members of the community:

(c) to promote, encourage, and assist Maoris—

(i) to conserve, improve, advance and maintain their physical, economic, industrial, educational, social, moral, and spiritual well-being;

(ii) to assume and maintain self-reliance, thrift, pride of race, and such conduct as will be conducive to their general health and economic well-being;

(iii) to accept, enjoy, and maintain the full rights, privileges, and responsibilities of New Zealand citizenship;

(iv) to apply and maintain the maximum possible efficiency and responsibility in their local self-government and undertakings; and

(v) to preserve, revive and maintain the teaching of Maori arts, crafts, language, genealogy, and history in order to perpetuate Maori culture:

(d) to collaborate with and assist State departments and other organisations and agencies in—

(i) the placement of Maoris in industry and other forms of employment;

(ii) the education, vocational guidance, and training of Maoris;

(iii) the provision of housing and the improvement of the living conditions of Maoris;

(iv) the promotion of health and sanitation amongst the Maori people;

(v) the fostering of respect for the law and law-observance amongst the Maori people;

(vi) the prevention of excessive drinking and other undesirable forms of conduct amongst the Maori people; and

(vii) the assistance of Maoris in the solution of difficulties or personal problems.

(2) The New Zealand Maori Council shall advise and consult with District Maori Councils, Maori Executive Committees, and Maori Committees on such matters as may be referred to it by any of those bodies or as may seem necessary or desirable for the social and economic advancement of the Maori race.

(3) In the exercise of its functions the Council may make such representations to the Minister or other person or authority as seem to it advantageous to the Maori race.

The purpose of the Maori Council, according to its website, is to lead Maori policy development at a national level and Maori community development at a local level. Its role has included:

- Advocating on behalf of Maori for breaches of the Treaty of Waitangi, representing Maori who wish to be dealt with collectively;
- Lodging Treaty claims to the Waitangi Tribunal;
- Advocacy through the courts (in 2013 the Maori Council lodged a Supreme Court challenge over water rights which was lost);
- Political advocacy and greeting of dignitaries on behalf of Maori;
- Liaising with the Minister on behalf of Maori people.

It would seem that the New Zealand Maori Council has freedom in terms of the ways in which it fulfills its duties as outlined by the Act. They are free to advocate and influence government, though there do not seem to be mandated procedures or avenues for how this should be done. The Act does not provide formal processes for the Maori Council to influence Parliament's law making for Maori affairs, but it would seem that Maori influence over parliamentary law making is primarily fulfilled by reserved Maori parliamentary seats.

In practice, according to Sir Edward Durie, in more recent years the authority of the Maori Council has been inadvertently undermined by the increasing prominence and power of the many *iwi* (tribes). Waitangi Tribunal settlements and the payment of compensation to *iwi* have enabled many *iwi* to achieve greater financial and political autonomy. As a result, the *iwi* have increasingly been able to negotiate directly with government and to influence government policy in Maori affairs. This new *iwi* autonomy and advocacy has begun to overtake the historical role of the Maori Council.

Despite the recent decline of the impact of the Maori Council, both Sir Edward Durie and Donna Hall felt that it was a very useful structure, though it was not currently operating at its potential capacity. Hall advised that it was important to have a central structure that could unite, rather than divide, Indigenous voices and give them a platform to influence their affairs within the nation. Hall felt that the fact that Maori representatives were elected was very important. It gave the representatives legitimacy amongst Maori. She noted that Maori people are very capable of choosing the best Maori advocates to represent them.

However, some people voiced a feeling that the Maori Council's time had passed. Others, including the Minister for Maori Affairs, Dr Pita Sharples, have criticised the *Maori Community Development Act 1962* for being out-dated, because it still contains arguably discriminatory elements empowering Maori wardens to evict Maori people from bars, and like provisions.²¹

Reflections

While its role and efficacy has changed over time, and the enabling Act may be out of date, the Maori Council institutional structure can be seen as a practical structure for Maori recognition and representation within New Zealand. This institution intends to give Maori people a voice in Maori affairs. It is also a structure that enables unity and co-operation between Maori groups, which has helped build and consolidate Maori empowerment, although Maori groups have increasingly been independently effective in achieving a political voice and the effectiveness and influence of the Maori Council has correspondingly declined in recent times.

Nonetheless, without formalised institutional structures to help unite Maori people and encourage co-operation, Maori people may have been more divided, voiceless and disempowered. Such institutional structures have demonstrably helped to provide the Maori voice in Maori affairs, and helped to facilitate co-operation, consensus, and a greater sense of unity between tribes: important elements for effective national advocacy.

Given that Maori people in New Zealand are better placed than anyone to advise on the challenges related to Maori affairs policy, it is sensible that the government has effected a structure to enable Maori people to have influence in their own affairs. This appears to be a practical way of achieving Indigenous empowerment and recognition.

MAORI LANGUAGE AND CULTURE

The Treaty of Waitangi has been most effective in establishing New Zealand as a bicultural nation in which Maori language and culture is highly valued.

Interestingly, it seems that New Zealand has achieved its greatest advances in Maori language and culture promotion under conservative governments. Conservative New Zealand governments have understood the economic value of the Maori culture in the world market. The New Zealand international brand has thus strategically come to be associated with Maori culture, with great success.

²¹ Adam Bennett, 'Fears for future of Maori Council' New Zealand Herald, 27 September 2013.

Maori Language Commission

The settlement process meant that in 1985, the Tribunal found that Maori language was a treasure or *taonga* that the Crown was supposed to protect under Article 2 of the Treaty:

...the Waitangi Tribunal received a claim alleging that the state had breached its obligations because it had failed to protect the Māori language, te reo Māori. The Waitangi Tribunal held hearings over four weeks in 1985 and issued the Te Reo Māori Report the following year. Though this claim was distinct from claims relating to lands or fisheries in the sense that the subject matter was something intangible, the Tribunal had little difficulty in determining that the language was indeed something that was highly valued to Māori and fell within the protection of the Treaty guarantees. The Tribunal made a number of important recommendations in this report, a number of which were implemented by the New Zealand government. The Tribunal recommended that te reo Māori be recognized as an official language, enabling anyone who wished to do so to speak Māori in Courts of law. These recommendations were given effect by the Māori Language Act 1987. The Tribunal also recommended that a supervisory body be established to foster and support the Māori language. This recommendation led to the creation of the Te Taura Whiri i Te Reo Māori – the Māori Language Commission. Not all of the Tribunal's recommendations in this report were fully implemented, and a more recent Tribunal report suggests that there is still much work to be done in this area. Nevertheless, the Te Reo Report, illustrates the way in which the Waitangi Tribunal can be effective in recommending practical measures that the New Zealand government can take in order to fulfil its obligations under the Treaty of Waitangi.²²

Maori was then recognised in legislation as an official language of New Zealand in 1987.

With the help of the Maori Language Commission, the Maori tribes have been successful in uniting and coming together in advancement of the project of saving Maori language. They have adopted a contemporary approach, facilitated by the Maori Language Commission, to using Maori language in various forums: through art, songs, politics and more.

This form of collaboration actually began in the Second World War, when the tribes collaborated to compose war songs, and has continued since. Over time, the tribes have collaborated to tell a united, national Maori story. Maori tribes have been able to negotiate tribal cultural and dialect differences in order to promote a national Maori language. A healthy tension has been maintained between the national Maori language and tribal dialects. Similarly, the *haka* was originally a cultural ritual performed by one particular tribe, which has now taken on national significance, particularly in the national sports arena, and is celebrated as a national symbol.

Maori Heritage Council and Geographic Board

The engendered respect for Maori language and culture has meant that Maori radio and television stations have also been established via legislated Acts.²³ Similarly with regard to recognition of natural and historic heritage and sacred sites:

The Historic Places Act 1993 provides for the recognition of “the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi

²² Carwyn Jones, “Strengthening Partnership between States and indigenous peoples: treaties, agreements and other constructive arrangements” Geneva, 16-17 July 2012, Organized by the Office of the United Nations High Commissioner for Human Rights, 3.

²³ New Zealand Human Rights Commission, ‘Human Rights in New Zealand’ (2010), 48.

tapu (sacred sites), and other taonga". The act establishes the Māori Heritage Council, which comprises a minimum of three appointed or elected Māori members of the Historic Places Trust Board, one other board member, and four people appointed by the Minister of Culture and Heritage. The functions of the council include: protecting and registering wāhi tapu and wāhi tapu areas; assisting the Historic Places Trust to develop and reflect a bicultural view in the exercise of its powers and functions; and providing assistance to whānau, hapū and iwi in the preservation and management of their heritage resources.²⁴

In New Zealand, the Geographic Board is responsible for giving official names to geographical places and landforms. There is now provision for the Board to give anything two official names: one in Maori and the other in English. This has been important as part of the cultural redress achieved by Crown settlements. Where the tribal names have not been recognised as the official name of a place or landform, the Board can address this by officially giving it a double name as part of the settlement process (there is a protocol setting out how this occurs in relation to the Waitangi Commission and the Crown settlement negotiations).

Reflections

New Zealand is much more advanced than Australia in the promotion of its Indigenous culture and language. While there is far more cultural and linguistic diversity in Australia between Indigenous language groups than exists between Maori tribes, Maori language and culture has been successfully promoted in New Zealand by the institutional arrangements that have been put in place to reflect and promote New Zealand as a bicultural nation.

Australia's practical solutions will necessarily be different to New Zealand's. But there is no reason why Australia should not aspire to have Indigenous Australian languages recognised in some formal, national way, with practical initiatives flowing from this recognition to revitalise and grow Indigenous languages.

Similarly, Australia can learn from New Zealand's restoration of Indigenous geographical names as a very practical way of achieving Indigenous recognition. In New Zealand, this is partly about recognising the way that individual communities have traditionally understood their land. It means that as New Zealanders drive around the country, they see signs double labelling important locations and sites, and they are forced to acknowledge that two cultural and linguistic traditions have engaged with the land. As people discover the Maori name, over time they come to understand the significance of the name, and how this reveals the attachment of the traditional people to their land. This process assists in reconciliation and benefits the nation as a whole.

In Australia, even non-Indigenous Australians tend to attach considerable significance to the Australian landscape as an important part of Australian national identity. Farmers feel deep attachment to their rural areas, and city-dwellers have an aesthetic appreciation for the outback as something intrinsically Australian, even if they do not live there. If Australians can come to better understand the Indigenous attachment to the land, and the Indigenous history and heritage imbedded in the land, we will all have a richer and deeper understanding of our nation. This would provide benefit to the nation as a whole, as we would each have a richer appreciation of the Australian landscape.

There is much we can learn from the ways in which New Zealand's institutional structures promote Maori language and culture.

²⁴ New Zealand Human Rights Commission, 'Human Rights in New Zealand' (2010), 47.

MAORI RESERVED SEATS IN PARLIAMENT

New Zealand has had dedicated parliamentary seats for Maori since the 1860s. One view is that initially they were put in place as a tool for political control and minimization of Maori power, as Maori at the time were in the majority.²⁵ Lloyd explains this view:

*Dedicated seats for Maori were introduced by the Maori Representation Act of 1867. The creation of Maori seats occurred at the same time as a broadening of suffrage among Maori. At a time when Maori greatly outnumbered non-Maori, dedicated seats allowed the political power of Maori to be constrained, limiting their vote to the Maori electoral roll and the four Maori seats alone.*²⁶

Others argue that the reserved seats developed in an ad hoc and unprincipled way to try to address the problem that the Maori were disenfranchised from the vote at that time, because of the property rules that were a condition of voting rights. The British law meant that only males over 21 with an individual property title were allowed to vote, and this applied to colonies like New Zealand.²⁷ The Maori practiced communal ownership,²⁸ and though they could undertake the process to gain individual title, this was slow and many did not do this – they were rightly mistrustful of aggressive Crown tactics to individualise Maori title as a way of eroding Maori governance and authority.²⁹ Therefore many Maori men were not democratically represented.³⁰

The allocation of reserved seats was initially a temporary measure, purportedly to ensure that the Maori were represented while governments undertook the process of giving Maori males individual property titles.³¹ However the number of seats given was not proportionate to the number of Maori men in the population. Thus, the seats were probably ‘discriminatory tokenism’,³² a mere gesture rather than a bona fide attempt at proportional representation.³³ Some argue that the move involved “no high intentions or moral

²⁵ See Catherine Iorns Magallanes, ‘Indigenous political representation: identified parliamentary seats as a form of Indigenous self-determination’, in B.A. Hocking (ed.), *Unfinished Constitutional Business?* (Aboriginal Studies Press, 2005), 106–17.

²⁶ Brian Lloyd, ‘Dedicated Indigenous representation in the Australian parliament’ (2009) Research Paper no. 23, *Politics and Public Administrations Section*, http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0809/09rp23#_Toc223150953.

²⁷ Philip Joseph, ‘The Maori Seats in Parliament: Te Oranga O Te Iwi Maori: A Study of Maori Economic and Social Progress’, *New Zealand Business Roundtable*, Wellington, 2008, 6; see also Jeremy Sparrow, ‘The truth about the Maori seats’.

²⁸ Sarah McClelland ‘Maori Electoral Representation: Challenge to Orthodoxy’ [1997] 17(3) *NZULR* 272, 275; Parliamentary Library Research Paper, ‘The origins of the Maori seats’ (2009) NZ Parliamentary Library, 3.

²⁹ Parliamentary Library Research Paper, ‘The origins of the Maori seats’ (2009) NZ Parliamentary Library, 6.

³⁰ Andrew Geddis ‘A Dual Track Democracy? The Symbolic Role of the Maori Seats in New Zealand’s Electoral System’ (2006) 5(4) *Election Law Journal* 347, 352; Parliamentary Library Research Paper, ‘The origins of the Maori seats’ (2009) NZ Parliamentary Library, 3.

³¹ Parliamentary Library Research Paper, ‘The origins of the Maori seats’ (2009) NZ Parliamentary Library, 3.

³² Philip Joseph, ‘The Maori Seats in Parliament: Te Oranga O Te Iwi Maori: A Study of Maori Economic and Social Progress’, *New Zealand Business Roundtable*, Wellington, 2008, 14.

³³ Alan Ward, *A Show of Justice: Racial “Amalgamation” in Nineteenth Century New Zealand* (Auckland University Press, Auckland, 1973), 209.

principles,”³⁴ but was a “way of rewarding Māori loyalists and placating Māori rebels.”³⁵ Others say that like with the Treaty, there was some element of responding to international pressure to do things in the right and moral way, especially since the Crown was generating tax revenue from the Maori people.³⁶ Whatever the many reasons, because the property reforms were complex and slow, Maori enfranchisement was also slow, and the existence of the reserved seats was further extended.³⁷

Universal suffrage in New Zealand was achieved in 1893, but was split into two race-based voting rolls. From 1893 to 1975, ‘full-blood’ Maoris had to be on the Maori voting roll, ‘half-bloods’ (or ‘half-castes’) could choose which roll to be on, and any person with less than half Maori lineage had to be on the European roll.³⁸

In 1975 (the same year the *Waitangi Act* was introduced) Maori were given the choice as to which roll they wanted to be on, and the European roll was renamed the ‘General roll’.³⁹ However the reserved Maori seats remained, Joseph argues, out of ‘indifference and neglect’,⁴⁰ but also perhaps as an affirmative way to address historical wrongs through promoting a stronger Maori political voice. Lloyd writes:

This ambiguous status quo persisted until the 1986 Royal Commission on the Electoral System, after which there was a transition to Multiple Member Proportional voting (MMP) in national elections. The first vote under MMP occurred in 1996, and since then it has played a significant part in increasing Maori parliamentary representation. In addition, New Zealand has introduced measures such as education and affirmative selection by political parties. As a result of these changes, the present system of parliamentary representation in New Zealand consists of a combination of measures, which comprise:

- *dedicated seats for Maori, with the number of seats, calculated as a proportion of the Maori population—currently eight seats*
- *Multiple Member Proportional voting (MMP) for a proportion of seats in parliament. For the 2005 election there were 52 ‘party list’ (proportional) seats and 69 ‘electorate’ (first-past-the-post) seats and*
- *voters nominating to be on either Maori or ‘General’ electoral rolls.*

Under MMP, Parliament in New Zealand is made up of a combination of ‘electorate seats’ (which include dedicated Maori seats) and an approximately equal number of ‘list’ (proportional representation) seats. In list seats, political parties establish a ranking of

³⁴ Tina Dahlberg, ‘Māori Representation in Parliament and Tino Rangatiratanga’, He Pukenga Korero, Vol. 2(1), 1996, 63.

³⁵ Parliamentary Library Research Paper, ‘The origins of the Maori seats’ (2009) NZ Parliamentary Library, 8.

³⁶ Claudia Orange, *The Treaty of Waitangi*, Allen & Unwin Port Nicholson Press, Wellington, 1987, 184; Parliamentary Library Research Paper, ‘The origins of the Maori seats’ (2009) NZ Parliamentary Library, 8.

³⁷ Andrew Geddis “A Dual Track Democracy? The Symbolic Role of the Maori Seats in New Zealand’s Electoral System” (2006) 5(4) *Election Law Journal* 347, 352.

³⁸ Andrew Geddis “A Dual Track Democracy? The Symbolic Role of the Maori Seats in New Zealand’s Electoral System” (2006) 5(4) *Election Law Journal* 347, 353.

³⁹ Jeremy Sparrow, ‘The truth about the Maori seats’, 5.

⁴⁰ Philip Joseph, ‘The Maori Seats in Parliament: Te Oranga O Te Iwi Maori: A Study of Maori Economic and Social Progress’, *New Zealand Business Roundtable*, Wellington, 2008, 5; see also Jeremy Sparrow, ‘The truth about the Maori seats’.

candidates, and acquire a number of seats as a ratio of the proportion of the total vote attracted by the party.

This system has some significant effects in raising the electability of Maori candidates, because 'identified Maori electors can vote not just for a Maori representative in their Maori electorate but ... also ... for a party that has other Maori candidates on its list'. Nevertheless, all electors cast two votes (an electorate vote and a party vote), and electors' votes have the same weight, whether they are enrolled on the Maori or general electoral roll.⁴¹

These modern measures have significantly increased Maori representation in Parliament, and "New Zealand achieved parity between the proportion of Maori in its population and the proportion of Maori representatives in parliament following the 2002 national elections."⁴² Similarly, there are now also more Maori who sit in general seats.⁴³

The Maori reserved seats have come to be associated with Treaty of Waitangi principles, though they are not expressly related. In 1975 the Maori reserved seats remained and became more fairly proportional, and the expressly racist segregation in voting rights was removed. In this same year the *Waitangi Act* was introduced into legislation. Maori people have thus argued that the reserved seats are part of acknowledging their special Indigenous rights⁴⁴ and demonstrate the position of Maori as a 'Treaty partner' with the Crown:

Maori seats have acquired, for Maori, a particular significance in relation to the Treaty of Waitangi. They have come to be seen as a means of recognition, and continued faith with the terms of, the Treaty. That is, they are seen as a formal expression and guarantee of the continuing viability of the Treaty and the relationship it describes between Maori and pakeha. Dedicated seats symbolize 'a recognition of the position of the Maori people as a "Treaty partner" in the enterprise of national government', and have thus become a 'treaty icon'.⁴⁵

A Maori person is no longer legally defined and allowed to vote according to whether he or she is full blood or half blood. A Maori person is now defined by the *Electoral Act 1993* as a 'person of the Maori race of New Zealand' and the descendants of such a person.⁴⁶ The Maori definition is based on self-identification, and no external proof is required.⁴⁷

Criticism of reserved seats

There have been criticisms of the reserved seats. The 1993 Royal Commission on the Electoral System recommended the reserved seats be abolished, though these

⁴¹ Brian Lloyd, 'Dedicated Indigenous representation in the Australian parliament' (2009) Research Paper no. 23, *Politics and Public Administrations Section*, http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0809/09rp23#_Toc223150953.

⁴² *Ibid.*

⁴³ BV Harris, 'The Treaty of Waitangi and the constitutional future of New Zealand' (2005) *New Zealand Law Review* 189, 199.

⁴⁴ Andrew Geddis "A Dual Track Democracy? The Symbolic Role of the Maori Seats in New Zealand's Electoral System" (2006) 5(4) *Election Law Journal* 347, 358.

⁴⁵ Brian Lloyd, 'Dedicated Indigenous representation in the Australian parliament' (2009) Research Paper no. 23, *Politics and Public Administrations Section*, http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0809/09rp23#_Toc223150953.

⁴⁶ Section 3(1).

⁴⁷ Jeremy Sparrow, 'The truth about the Maori seats', 8.

recommendations were ignored because of political pressure. The Commission's reasons were as follows:

- Maori are a numerically significant minority in New Zealand and would achieve proportional representation through normal political participation.
- Maori MPs being only accountable to Maori gives the impression that non-Maori MPs are only accountable to non-Maori, which is incorrect.
- All MPs should be accountable to Maori, not just specifically Maori MPs.
- A social cohesion argument for a unified electoral roll.
- It is a violation of the basic rule of law and democratic principle of equality before the law.⁴⁸

Since 2002 the number of Maori MPs in Parliament has exceeded the proportional number of Maori in the population. Some have argued that this undermines fair proportional representation of all New Zealanders, and may therefore be a case of "discriminatory privilege", even if unintended,⁴⁹ or reverse discrimination on the basis of ethnicity.⁵⁰

The Treaty argument too has been refuted, because while Maori people are said to view the reserved seats as a reflection of their constitutional position under the Treaty, the Treaty does not expressly establish reserved seats.⁵¹ As Joseph argues:

The concepts of partnership and the Crown's duty of active protection define the Treaty relationship but neither concept mandates separate Maori representation. Partnership is a substantively neutral concept. It posits reciprocal rights and responsibilities as between Maori and Pakeha, founded on notions of "reasonableness, mutual cooperation and trust". The concept does not impose normative obligations as would require the Crown to grant rights of separate Maori representation.⁵²

Indeed, Article Three of the Treaty confers upon the Maori the same rights and privileges as British subjects – equality before the law. Maori have the right to participate equally in the electoral system, but not with greater preferences than other citizens.⁵³ Arguably, therefore, reserved seats now go against the right to equality before the law and equal citizenship set out in the Treaty. In a liberal democracy, treating individuals equally without differentiations purely based on race should be of utmost importance. In this vein, Joseph argues that "liberal democracies espouse the elemental principle of 'one person, one vote, one value'

⁴⁸ Philip Joseph, 'The Maori Seats in Parliament: Te Oranga O Te Iwi Maori: A Study of Maori Economic and Social Progress', *New Zealand Business Roundtable*, Wellington, 2008, 16.

⁴⁹ Philip Joseph, 'The Maori Seats in Parliament: Te Oranga O Te Iwi Maori: A Study of Maori Economic and Social Progress', *New Zealand Business Roundtable*, Wellington, 2008, 14-15.

⁵⁰ Jeremy Sparrow, 'The truth about the Maori seats', 13; Philip Joseph, 'The Maori Seats in Parliament: Te Oranga O Te Iwi Maori: A Study of Maori Economic and Social Progress', *New Zealand Business Roundtable*, Wellington, 2008, 11-12.

⁵¹ Philip Joseph, 'The Maori Seats in Parliament: Te Oranga O Te Iwi Maori: A Study of Maori Economic and Social Progress', *New Zealand Business Roundtable*, Wellington, 2008, 17; *Report of the Royal Commission on the Electoral System: Towards a Better Democracy*, 86.

⁵² Philip Joseph, 'The Maori Seats in Parliament: Te Oranga O Te Iwi Maori: A Study of Maori Economic and Social Progress', *New Zealand Business Roundtable*, Wellington, 2008, 17.

⁵³ Philip Joseph, 'The Maori Seats in Parliament: Te Oranga O Te Iwi Maori: A Study of Maori Economic and Social Progress', *New Zealand Business Roundtable*, Wellington, 2008, 18.

and rail against electoral privilege based on racial or ethnic distinction,”⁵⁴ and that the reserved seats “institutionalise Maori separatism”.⁵⁵

Reflections

In some sense, Joseph seems to under emphasise the ways in which the Maori position is constitutionally different from other minorities, and how the unique history of Maori people in New Zealand might justify reserved seats. Because the Maori are equal Treaty partners and because the Maori are a unique minority – the only minority group that was displaced and dispossessed in order to make way for British settlement – it may be that an institutional form of recognition like reserved seats, to ensure that Maori have a proper say in New Zealand’s democratic processes, is appropriate.

However, this arrangement also needs to be considered in light of the principles of a liberal democracy, especially equality before the law, equal citizenship and ‘one voice one vote’ principles. A liberal democracy should arguably reward individual merit, and address individual and community need – the democratic system should by and large be colour and ethnicity blind, with individual equality being the guiding principle. But it is also true that the principle of equality before the law is not cut and dry; it allows for positive measures to ensure equality of opportunities and fair and equal participation in the circumstances. ‘Special measures’ at international law, the positive expression of the racial non-discrimination principle, allows for affirmative measures to promote equal opportunities and address past discrimination, to ensure that all groups have equal enjoyment of their human rights, particularly given past denial of rights. Positive measures like reserved seats could therefore be justified as a measure to equalise a historically imbalanced power relationship, and to ensure that Maori people get a fair say towards remedying the disadvantage caused by their dispossession.

That said – if Maori really are equal Treaty partners, then why are ‘special measures’ like reserved seats needed? Perhaps because the Treaty was so extensively breached. The Treaty was not legally entrenched nor part of New Zealand law and Parliaments were able to ignore their obligations under the Treaty. Given that New Zealand has no entrenched Constitution, no entrenched bill of rights, and the Treaty is not legally binding, perhaps reserved Maori seats can be justified as a way of protecting Maori rights and interests within the parliamentary democratic process. If New Zealand had a Constitution, it would be up to the judiciary to interpret the rights of Maori people under the Constitution and to strike down Parliament’s laws that breached such rights. With reserved Maori seats, Maori MPs are better placed to effectively influence Parliament’s laws to begin with, rather than leaving it up to judges to decide and strike down offending laws after someone has brought a challenge to the court. In this way, it may be that reserved Maori seats is a more democratic and pre-emptive solution to the problem of breached Maori rights than any legal entrenchment of the Treaty or any constitutionalised bill of rights. It must be noted however that reserved Maori seats have been in place since the 1860s, and this did not prevent discrimination against Maori and breaches of Maori rights under the Treaty. However over time, and with proportional representation, the Maori voice in Parliament has become stronger.

More discussion is required on the pros and cons of reserved Indigenous parliamentary seats. For Australia, history shows that unrestrained majoritarianism, with our parliamentary

⁵⁴ Philip Joseph, ‘The Maori Seats in Parliament: Te Oranga O Te Iwi Maori: A Study of Maori Economic and Social Progress’, *New Zealand Business Roundtable*, Wellington, 2008, 17.

⁵⁵ Philip Joseph, ‘The Maori Seats in Parliament: Te Oranga O Te Iwi Maori: A Study of Maori Economic and Social Progress’, *New Zealand Business Roundtable*, Wellington, 2008, 21.

sovereignty similarly unencumbered by any bill of rights, has been largely ineffective in protecting the rights of Australia's most disadvantaged minority – Indigenous Australians. Being only 3% of the population, Indigenous people hardly get a fair say in Parliament, even on matters directly concerning them. Arguably this is why the racial discrimination of the past has occurred, because Parliaments have never been good at listening to Indigenous people. This is the 'elephant and the mouse' problem that has characterised Indigenous affairs in Australia.

Our Constitution, with its discriminatory race clauses, certainly presents an undemocratic problem when it comes to 'race'. In Australia, every person and institution, including local governments and the states, is bound not to racially discriminate under the *Racial Discrimination Act 1975* (Cth). The only body that is allowed to racially discriminate against Australian citizens, and indeed has an explicit power to do so under the Race Power, s 51(xxvi), is the Commonwealth. The fact that the Commonwealth is empowered by the Constitution to pass arbitrary race-based laws, whether positive or adverse, presents a clear breach of the democratic principle of equality before the law with respect to race. Indigenous Australians, more than any other group, have suffered under the racially discriminatory attitudes embedded in and promoted by the Constitution. To remedy this, the Expert Panel proposed that a racial non-discrimination clause be adopted in the Constitution. However, this proposal was criticised, particularly by conservatives, on the grounds that it would undermine parliamentary sovereignty and give too much power to unelected judges in interpreting and applying the clause. Given that conservative and bipartisan support is crucial for referendum success, these objections must be properly contended with.

For Indigenous Australians, constitutional recognition has always been about achieving stable constitutional protection of Indigenous rights and interests, shielded from short term political fluctuations. But if conservatives assert that a racial non-discrimination clause in the Constitution is not the answer to the challenge of protecting Indigenous rights and interests within a majoritarian democracy, then what is a better solution? How can we maintain parliamentary sovereignty, while ensuring that Indigenous rights and interests are fairly protected? What is a more democratic solution to the 'elephant and the mouse' problem?

It may be that, like New Zealand, we should turn our minds to more democratic, institutional and procedural solutions to the Indigenous racial discrimination problem in Australia.

CONCLUSION

Our trip to New Zealand pushed us to think more creatively and laterally about how Indigenous peoples might be recognised nationally, and how their interests might be justly protected through practical, legislative and institutional solutions as well as in the Constitution itself. Further thought now must be given to what types of constitutional, institutional and legislative reforms might be appropriate for Australia. While the Indigenous situation in Australia is historically, geographically and politically different to the situation of the Maori in New Zealand, there is much we can learn and many institutional ideas that we may be able to adapt to suit our circumstances.

It is clear that while Australia is progressing on our own path towards reconciliation, the institutional structures in place to facilitate 'truth and reconciliation' and to promote practical biculturalism in New Zealand mean that New Zealand is well ahead of us.

We should see this as a positive challenge. There is no reason that Australia cannot achieve as much and more than has been achieved in New Zealand. We must now work together, Indigenous people and non-Indigenous, progressive and conservative alike, to come up with the package of reforms to effect meaningful Indigenous recognition in Australia.

The right package of reforms will be both practical and symbolic. It will likely be a combination of constitutional, institutional and legislative reforms. And, it will be capable of being supported by the vast majority of Australians, across political persuasions.

Level 3, 139 Grafton Street Cairns, QLD 4870
P: 07 40 460 600 F: 07 40460 601
E: info@cyi.org.au W: www.cyi.org.au

The Cape York Institute is an independent policy and leadership organisation championing reform in Indigenous economic and social policy and supporting the development of current and future Cape York leaders.



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