



# Submission to the Māori Affairs Committee on the Te Ture Whenua Māori Bill

**14 July 2016**

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## **Submission of the Human Rights Commission on the Te Ture Whenua Māori Bill**

**To: Māori Affairs Committee**

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Kia tau te rangimārie ki runga i a tātou katoa. Ruia, ruia, ruia, ruia. Ruia ki runga, ruia ki raro. Ruia ki waho, ruia ki roto. Ruia ki uta, ruia ki tai. Hū ana ki te rangi, turu ana ki nuku. Nā kua tau, kua mau, kua ea. Tihewa Mauriora! Let peace reign over all those assembled here. Break, dash and crash the waters. Up high and down low. Across the outer reaches and deep within. To the hinterland and far out to sea. Rising to Rangi and fall upon Nuku. The lands are still. It is done. Behold 'tis the breath of life!

### **Introduction**

1. The Human Rights Commission ('the Commission') welcomes the opportunity to provide this submission to the Māori Affairs Committee on the Te Ture Whenua Māori Bill ('the Bill').
2. The Bill seeks to repeal and replace the Te Ture Whenua Māori Act 1993 ('the Act') which, broadly speaking, provides the legislative framework for the retention, use and succession of Māori land and the jurisdiction of the Māori Land Court. As such, the Act is a fundamentally important instrument for realising the Crown's obligations to Māori under the Treaty of Waitangi. The Act's preamble (English version) expresses this in the following terms:

Whereas the Treaty of Waitangi established the special relationship between the Māori people and the Crown: And whereas it is desirable that the spirit of the exchange of kāwanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed: And whereas it is desirable to recognise that land is a taonga tuku iho of special significance to Māori people and, for that reason, to promote the retention of that land in the hands of its owners, their whānau, and their hapū, and to protect wāhi tapu: and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whānau, and their

hapū: And whereas it is desirable to maintain a court and to establish mechanisms to assist the Māori people to achieve the implementation of these principles

3. Given the above context, the reforms introduced by the Bill have highly significant implications for:
  - a. Whānau, hapū and iwi;
  - b. The constitutional relationship between the Crown and Māori under the Treaty of Waitangi ('the Treaty'), and
  - c. The specific human rights of tangata whenua under the UN Declaration on the Rights of Indigenous People ('UNDRIP').
  
4. The inter-relationship between the Treaty, the major international human rights covenants and conventions and UNDRIP, underpins and informs the Commission's function under s 5(2)(d) of the Human Rights Act 1993 to:

“promote by research, education, and discussion a better understanding of the human rights dimensions of the Treaty of Waitangi and their relationship with domestic and international human rights law.”

### **A question of mandate**

5. A question of mandate sits at the centre of the Bill's development and its progression to this stage of the legislative process. Contention about the Bill's mandate eventually led to claims that the Bill breaches the Crown's obligations under the Treaty being lodged with the Waitangi Tribunal. The Tribunal has in turn produced an extensive report<sup>1</sup> on the Bill which reviews its history, considers the reforms it seeks to introduce, and issues findings as to its consistency with Treaty principles and recommendations as to how to achieve consistency.
  
6. Questions regarding the Bill's Treaty mandate also are fundamentally relevant to the Government's obligations under UNDRIP, specifically with regards to the principle of “free, prior and informed consent”.

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<sup>1</sup> Waitangi Tribunal, *He Karo Whenua Ka Rokohanga: Report on Claims about the Reform of the Tūe Ture Whenua Māori Act 1993*, Wai 2478

7. It should be noted that, in the time since it endorsed the UNDRIP in 2010, the New Zealand Government has re-affirmed its commitment to implement and support its principles.
8. In 2014, the New Zealand Government accepted the recommendation of the Human Rights Council in its Universal Periodic Review of New Zealand, to “take concrete measures to ensure the implementation and promotion of the Declaration”<sup>2</sup>. New Zealand has also expressed support for the Outcome Document of the World Conference on Indigenous Peoples (WCIP), which included commitments to cooperate with indigenous peoples to develop national strategies, action plans and other measures to implement the UNDRIP<sup>3</sup>. New Zealand has since reiterated its support for the Outcome Document and has called on other states and the UN system to implement it<sup>4</sup>.
9. In addition, the Supreme Court has invoked the UNDRIP in a number of cases involving Treaty of Waitangi and indigenous rights issues, including an acceptance that “the Declaration provides some support for the view that those [Treaty of Waitangi] principles should be construed broadly.”<sup>5</sup> Legal academic Dr Claire Charters has observed that there is “cause for optimism” that the Supreme Court will “continue to invoke [the UNDRIP] to ensure, over time, greater conformity between New Zealand law and [UNDRIP] standards.”<sup>6</sup>

*The UNDRIP principle of free, prior and informed consent*

10. The principle of “free, prior and informed consent” under UNDRIP does not merely obligate the State to implement a consultation exercise prior to passing legislation.

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<sup>2</sup> *Report of the Working Group on the Universal Periodic Review: New Zealand*, 7 April 2014, A/HRC/26/3, at para 128.89. Accessible at: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/NZSession18.aspx>.

<sup>3</sup> UN General Assembly, (2014), *Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples*, A/RES/69/2. Accessible at: [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/69/2](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/69/2)

<sup>4</sup> Statements by Ambassador Philli Taula, Charge d’affaires a.i., of New Zealand, 21 and 29 October 2014. Accessible at: <http://www.nzembassy.com/united-nations/new-zealands-un-statements/human-rights>.

<sup>5</sup> *New Zealand Maori Council v Attorney-General* [2013] NZSC 6 at [92]; see also *Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67; *Takamore v Clarke* [2012] NZSC 116 [2013] 2 NZLR 733

<sup>6</sup> Charters C, *Maori Legal Issues in the Supreme Court 2004-2014: A Critical, Comparative and International Assessment*, in CR Stockley (ed), *the NZ Supreme Court* 1<sup>st</sup> Ed Chapter 8 p 165

Instead, it requires the State to have consent as the objective before it may take the following actions<sup>7</sup>:

- a. Adopt legislation or administrative policies that affect indigenous peoples (Article 19)
- b. Undertake projects that affect indigenous peoples' rights to land, territories and resources (Article 32).

11. The Commission submits that the Bill falls squarely within the above criteria.
12. The principle of free prior and informed consent directly relates to the right of indigenous people to self-determination. The right of self-determination is set out in both major international human rights covenants and UNDRIP<sup>8</sup>. It reflects the human rights dimension of the Treaty inherent in the principle of tino rangatiratanga.
13. The primary UN UNDRIP monitoring entity, the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), has stated that the principle of free, prior and informed consent is an "integral element" of the right self-determination and that, accordingly, such consent must be obtained in matters of fundamental importance to the rights, survival, dignity and well-being of indigenous peoples<sup>9</sup>. In addition, the UN Special Rapporteur on the Rights of Indigenous Peoples has emphasised that:

...a significant direct impact on indigenous peoples' lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples' consent. In certain contexts the presumption may harden into a prohibition of the measure or project in the absence of an indigenous consent."

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<sup>7</sup> Office of the High Commissioner for Human Rights/ Asia Pacific Forum, *The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions*, 2013, Geneva/Sydney p 26

<sup>8</sup> In particular, see UNDRIP Articles 3, 23, 34, 35 – regarding the right to self-determination, including in respect of development and governance. See also Articles 5, 11.1, 13, 25, 31 – regarding the right to maintain/strengthen distinct institutions, practices in respect of land, territory and resources; and Articles 26, 27, 29, 32, 33 – regarding the right to control/ownership of land, territory and resources, including development and specialist tenure and judicial systems

<sup>9</sup> EMRIP, Advice No 2 (2011) on indigenous peoples and the right to participate in decision-making

14. The principle of free, prior and informed consent has also been upheld by UN treaty bodies, including the Committee on the Elimination of Racial Discrimination<sup>10</sup> and the Committee on Economic, Social and Cultural Rights<sup>11</sup>.

15. The UN Human Rights Committee also recently referred to the principle in its 2016 Concluding Observations on New Zealand's implementation of the International Covenant on Civil and Political Rights, and recommended that the New Zealand Government "guarantee the informed participation of indigenous communities in all relevant national and international consultation processes, including those directly affecting them."<sup>12</sup>

16. Furthermore, the preamble of UNDRIP places the right of indigenous people to exercise control of their lands, territories and resources at its forefront, stating that it is:

*Convinced* that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs.

*Recognising* that respect for indigenous knowledge, cultures and traditional practices contributes to the sustainable and equitable development and proper management of the environment.

*Acknowledging* that the [UN Charter, ICESCR, ICCPR and Vienna Declaration and Programme of Action] affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development.

#### *The Tribunal's findings on mandate*

17. The Tribunal placed considerable emphasis in its report on the importance of consensus when considering the Bill's mandate, stating that:

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<sup>10</sup> UN Committee on the Elimination of Racial Discrimination, General recommendation No 23

<sup>11</sup> UN Committee on Economic, Social and Cultural Rights, General comment No 21 (2009) on the right of everyone to take part in cultural life

<sup>12</sup> UN Human Rights Committee, Concluding observations on the 6<sup>th</sup> periodic report of New Zealand, 28 April 2016, CCPR/C/NZL/CO/6, paragraphs 45, 46(b)

“Repealing this Act is no small matter. The [1993] Act represents a historic and broadly based consensus between Māori and the Crown as to how Māori land is to be owned, used and governed and how it is to be safeguarded for future generations.”<sup>13</sup>

18. The Tribunal accordingly found that “the Crown will be in breach of Treaty principles if it does not ensure that there is fully informed, broad based support [for the Bill] to proceed”<sup>14</sup>. In doing so, the Tribunal rejected the Crown’s submissions that the Bill has sufficient support amongst Māori and that Treaty principles do not restrain its legislative imperative in this respect<sup>15</sup>.
19. The Tribunal also considered that the case for the Bill’s reforms had not been demonstrated by evidence arising from empirical research. The Tribunal accordingly recommended that, in order to avoid prejudice to Māori, such empirical research will need to be carried out, followed by a further engagement process with Māori landowners<sup>16</sup>.
20. In addition, the Tribunal identified a number of the aspects of the Bill that also risked breaching the principles of the Treaty. These included:
  - a. That a number of the Bill’s features “actively nullify or weaken” the Crown’s duty of active protection under the Treaty, particularly in respect of minority owners, as a result of the Bill’s amendment of the Māori Land Court’s jurisdiction. The Tribunal considered that “the quid pro quo [for reform] must be restoring the court’s discretionary powers with appropriate criteria acceptable to both the Crown and Māori. This must be put to Māori with some urgency.”<sup>17</sup>
  - b. That, while the Bill’s owner agreement threshold (75%) generally provide a strong protection against sale, owners under some form of incapacity, or putative owners who have not succeeded, will not be provided with any protection at all, due to the

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<sup>13</sup> Waitangi Tribunal, *He Karo Whenua Ka Rokohanga: Report on Claims about the Reform of the Tūe Tūe Whenua Māori Act 1993*, Wai 2478, downloaded from [www.waitangitribunal.govt.nz](http://www.waitangitribunal.govt.nz), p 85

<sup>14</sup> Ibid p 355

<sup>15</sup> Ibid,

<sup>16</sup> Ibid p 360

<sup>17</sup> Ibid p 357

Bill removing the Māori Land Court's role in ensuring that non-participating owners' interests are protected.<sup>18</sup>

- c. That alternative dispute resolution processes should feed directly into the adjudicative jurisdiction of the Māori Land Court and, to do otherwise, would risk breaching the active protection principle.<sup>19</sup> In addition, the removal of the Māori Land Court's jurisdiction to grant equitable remedies also constitutes a breach of the Crown's duty of active protection.<sup>20</sup>
- d. That the proposed establishment of the Māori Land Service and Māori Land Registrar requires a greater level of certainty in order to establish a sufficient mandate from Māori, given the fundamental nature of those reforms.<sup>21</sup>
- e. That the Bill does not fully remove elements of compulsion in the formation of whānau trusts upon intestate succession and that the processes for registration of a whānau trust "will likely be more difficult and costly than the present system".<sup>22</sup>

#### *Areas of UNDRIP alignment*

21. Although the Bill's mandate is clearly problematic when viewed through the lenses of UNDRIP and the Treaty, the Commission considers that certain aspects of the Bill can be seen as enhancing the degree of legislative alignment with UNDRIP principles. For example, the Bill's incorporation of tikanga Māori as a principle central to matters involving Māori land not only reflects the inclusion of tikanga Māori within the values of NZ common law<sup>23</sup>, it also reflects the following UNDRIP Articles:

- a. **Article 5** – the right to maintain and strengthen distinct political, economic, social and cultural institutions
- b. **Article 11.1** – the right to practice and revitalise cultural traditions

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<sup>18</sup> Waitangi Tribunal, p 357-358

<sup>19</sup> *ibid* p 358

<sup>20</sup> *ibid*

<sup>21</sup> *ibid* p 358-359

<sup>22</sup> *ibid* p 358

<sup>23</sup> Te Ture Whenua Maori Reform Bill, Explanatory Note



- c. **Article 25** – the right to maintain/strengthen the distinctive spiritual relationship with lands, territories, waters, coastal seas and other resources and uphold this for following generations.
- d. **Article 31** – the right to maintain, control, protect and develop cultural heritage, traditional knowledge and cultural expressions.

22. Similarly, the Bill's requirement that Māori customary land that changes to Māori freehold land remains in collective ownership not only intends to align the law more closely with tikanga Māori and the Treaty (as noted in the Bill's Explanatory Note), it also reflects the right under Articles 26.2 to own, use, develop and control lands possessed by reason of traditional ownership. Furthermore, the Bill's overall approach to ownership and tenure is generally reflective of Article 26.3 which requires States Parties to give legal recognition and protection to customary land, territories and resources and indigenous land tenure systems, customs and traditions.

## **Conclusion**

23. Given the Government's human rights commitments as regards the implementation of UNDRIP, the Bill should both reflect and advance its principles. It follows that the UNDRIP principle of free, prior and informed consent must be applied when considering the Bill's mandate.

24. In the Commission's view, the application of the UNDRIP principle of free, prior and informed consent reinforces the Tribunals' finding that the Bill presently does not have a sufficient mandate amongst Māori.

25. In conclusion, the Commission considers that the Bill's deficiencies as to its mandate is unable to be rectified by Select Committee.

**26. The Commission therefore recommends that the Māori Affairs Committee supports the Tribunal's recommendations that:**

- a. **The Crown undertake, and fund, the empirical research necessary to establish the evidence underpinning the case for reform.**

- b. The Crown properly inform Māori landowners of the findings of that research and undertake further engagement with them through a national hui and submissions process.**
  - c. If that engagement process results in broad support for the Bill, the Crown engage with Māori leadership groups and stakeholders for the purpose of making any further revisions or amendments that are required. This should include an agreed process for those leadership groups to consult their constituencies in order to confirm whether broad support exists.**
  - d. If that engagement process does not result in broad support for the Bill, the Crown should follow the same process to identify amendments to the current Act in order to respond to areas where there is significant agreement that reform should be made.**
  - e. The Crown continues to take advice from independent Māori experts and accords a leadership role to a representative advisory group in its engagement with Māori.**
- 27. The Commission further recommends that the impact of reform on the rights of tangata whenua under UNDRIP be included within the terms of reference of any further empirical research and engagement/consultation exercises that may be undertaken on the Bill or amendment of the current Act.**
- 28. Pursuant to its mandate under s 5(2)(d) of the Human Rights Act 1993, the Commission would seek to have input into these processes.**

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