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**REIMAGINING CONSTITUTIONALISM: CONSIDERING  
CONSTITUTIONAL CHANGE IN AOTEAROA, USING  
LESSONS FROM NORWEGIAN SAMÍ**

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### *Abstract*

*Indigenous peoples often have little or no political representation within the dominant societies that have grown around them and they have often been dispossessed of their sovereignty over their traditional lands and customs. Māori have limited political representation in New Zealand's Parliamentary decision-making processes. While they have seats in New Zealand's House of Representatives, they still do not have control over Māori policy and Māori affairs separate to the New Zealand Westminster-style Parliament. Norway's indigenous Samí have a separate Parliament that operates in many ways independently of the Norwegian Parliament. This paper looks at the Samí Parliament as a model for Māori in Aotearoa and how it might look in practice.*

### *Word length*

*The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 7,568 words.*

### *Subjects and Topics*

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## *I Introduction<sup>1</sup>*

Indigenous peoples around the world vary significantly in their histories and cultures, but also share common features. They are among the most disadvantaged and vulnerable groups of people in the world,<sup>2</sup> and the dominant societies that have grown up around them often fail to recognise their identities, way of life and their right to traditional lands and resources, as well as the ability to make decisions for themselves. Another similarity is that indigenous peoples often have little or no political representation to influence the dominant political regimes and policies that affect them. In Aotearoa New Zealand, many Māori have called for greater self-determination, including political representation.<sup>3</sup> At the heart of this demand is the desire to improve socio-economic disadvantage and address political disempowerment;<sup>4</sup> moving Māori back to having control over Māori policy and Māori affairs, or ‘tino rangatiratanga’.<sup>5</sup>

New Zealand and Norway are two countries with indigenous populations that have comparably high living standards compared with other indigenous peoples. Both have indigenous political representation in some form, but have two very different models. In Norway, the indigenous Samí people are seen as “examples for securing the rights of indigenous peoples”, including political representation.<sup>6</sup> The Samí Parliament is the main representative body for the Samí people and is largely independent from the Norwegian Parliament, the Storting. In New Zealand, Māori are currently guaranteed seven representative seats in the Westminster-based Parliament, which has failed to improve socio-economic inequities and achieve tino rangatiratanga for Māori.

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<sup>1</sup> I am neither Māori nor Samí but I imagine a better future for Māori in Aotearoa. It is my hope that this paper can highlight some indigenous voices and add to existing literature on indigenous political representation.

<sup>2</sup> Department of Economic and Social Affairs “Indigenous Peoples at the United Nations” United Nations <<https://www.un.org/development/desa/indigenouspeoples/about-us.html>>.

<sup>3</sup> Independent Working Group on Constitutional Transformation *He Whakaaro here Whakaumu mō Aotearoa: the Report of Matike Mai Aotearoa* (5 February 2016).

<sup>4</sup> Maori have higher rates of socio-economic disadvantage compared with the national average: Ministry of Health “Socioeconomic indicators” (2 August 2018) <<https://www.health.govt.nz/our-work/populations/maori-health/tatau-kahukura-maori-health-statistics/nga-awe-o-te-hauora-socioeconomic-determinants-health/socioeconomic-indicators>>.

<sup>5</sup> Mason Durie “Tino Rangatiratanga: Maori self determination” (1995) 1(1) *He pūkenga kōrero : a journal of Māori studies* 44 at 44.

<sup>6</sup> *The situation of the Samí people in the Sápmi region of Norway, Sweden and Finland: Report of the Special Rapporteur on the Rights of Indigenous Peoples* A/HRC/18/35/Add.2 (6 June 2011).

This paper looks at the different approaches to indigenous political representation for both Māori and Samí. It considers whether there are lessons Aotearoa can take from the Samí experience, and works through what a similar Māori representative body might look like in New Zealand. In doing so, this paper does not detail arguments for and against a separate Māori representative body. It assumes the case is already made. It is not possible to capture the great variety of indigenous' experiences or the range of issues of self-determination, and this paper raises more questions than answers, but it does imagine a better and more empowered future for Māori.

## *II Reimagining political representation*

*“Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.”<sup>7</sup>*

Māori and Samí have the ability to participate to some extent in decision-making that affects their rights, as outlined above in the United Nations Declaration on the Rights of Indigenous Peoples. However, like many indigenous peoples, this ability is limited. Today Māori and Samí have different political representation structures, built on a history of dispossession, marginalisation and assimilation.<sup>8</sup> Māori have guaranteed representation within the New Zealand Parliament. Samí have representation in a separate parliamentary body, distinct from the Norwegian Parliament. Both models try to ensure there is some level of partnership between the dominant society and the indigenous people, but both structures are set within the dominant political structure. While there is a lack of equal power sharing in both arrangements, Samí have more control in a separate political structure.

### *A Māori political representation*

Māori constitutionalism has developed over time from pre-contact with Europeans, to He Whakaputanga (the Declaration of Independence) in 1835, Te Tiriti o Waitangi (the Treaty of Waitangi) in 1840 and pan-Māori movements in the 19th and 20th centuries.<sup>9</sup>

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<sup>7</sup> *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007), art 18.

<sup>8</sup> A true account of this is not possible in this paper, so the focus is on political influence and representation, with an acknowledgment of the huge amount of suffering that has occurred and is still occurring.

<sup>9</sup> Independent Working Group, above n 3, at 40.

### 1 *Pre-colonisation*

Early Māori lived in small, highly mobile groups. Larger groups emerged over time as territorial relationships became more important, and economic demands meant whānau (family) were required to work together. From this time the ‘hapū’ was the “fundamental unit of economic and political organisation”, based on a combination of common descent and interest.<sup>10</sup> Within hapū, political leadership was provided by rangatira (chiefs), who coordinated community activities, mediated disputes, engaged with other hapū and led warfare.<sup>11</sup> The larger grouping, ‘iwi’, only acquired political functions from the 1850s. Before that iwi were a loose association of related peoples but did not act on a day-to-day basis, unlike hapū.<sup>12</sup>

There was, and still is, a distinct Māori constitutionalism and political order, founded in tikanga.<sup>13</sup> Traditionally tikanga set the parameters of Māori political and constitutional conduct. For this context tikanga is both a law and a set of values:<sup>14</sup> “like a constitution.”<sup>15</sup> It both influences political organisation and social interactions, and is the “ought to be” of Māori existence.<sup>16</sup> In traditional Māori society iwi and hapū made their own decisions with power derived from mana (honour, authority, respect) and rangatiratanga (chieftainship), coded in tikanga.<sup>17</sup>

### 2 *The desire for tino rangatiratanga*

With the arrival of Europeans, different iwi and hapū competed for greater mana by engaging with the new arrivals. Over time the idea of a Māori state developed. He Whakaputanga was drafted in 1835 and over the next three years was signed by 52 mostly northern rangatira.<sup>18</sup> The ideas expressed in He Wakaputanga were novel. It proposed that Māori come together regularly in a Whakaminenga (assembly) to make joint decisions, with a clear concept of a

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<sup>10</sup> Waitangi Tribunal *The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 30.

<sup>11</sup> At 30.

<sup>12</sup> At 30.

<sup>13</sup> Independent Working Group, above n 3, at 36.

<sup>14</sup> At 41.

<sup>15</sup> At 43.

<sup>16</sup> At 41.

<sup>17</sup> Waitangi Tribunal, above n 10, at 100.

<sup>18</sup> At 154; Independent Working Group, above n 3, at 44.

Māori state.<sup>19</sup> Its intent was to provide for iwi and hapū to connect at a national level and for Māori and the Crown to make joint decisions.<sup>20</sup> The Whakaminenga never met as a group with the British, but gatherings of rangatira did take place.<sup>21</sup>

In 1840, Te Tiriti was signed by around 540 rangatira and the British Crown. The English version, the Treaty of Waitangi, was relied upon by British colonists as reflecting the transferral of absolute sovereignty from Māori to the Crown.<sup>22</sup> However, Te Tiriti was intended to create a partnership between the Crown and Māori, passing governance of British subjects to the Crown while Māori retained tino rangatiratanga (akin to sovereignty) and did not cede sovereignty.<sup>23</sup> Rangatira consented to Te Tiriti on this basis; that they were equal to the Governor and with different spheres of influence.<sup>24</sup> Te Tiriti, as it is read in Te Reo, includes everything you need in a constitution: “the recognition of each community’s mana, the preservation of each community’s decision-making authority, and the recognition that there are things everyone has to come together to make a decision about, like finance and foreign affairs”.<sup>25</sup>

Following the signing of Te Tiriti, the British arrived in droves, dispossessing Māori communities of land and disempowering iwi and hapū of their tino rangatiratanga. Iwi and hapū reacted, seeking to assert their tino rangatiratanga, including through the New Zealand Wars (from 1845 to 1872), and pan-Māori movements like Kingitanga (King movement) and Kotahitanga (unity movements). However the Crown continued and imposed a new political framework on Māori, forcing traditional political roles to change and leading to the ongoing disempowerment of Māori and dismissal of the indigenous constitutionalism of Aotearoa.<sup>26</sup>

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<sup>19</sup> Independent Working Group, above n 3, at 44.

<sup>20</sup> At 49.

<sup>21</sup> Waitangi Tribunal, above n 10, at 209 and 214.

<sup>22</sup> Durie, above n 5, at 45; Waitangi Tribunal, above n 10, at 525 and 529.

<sup>23</sup> Waitangi Tribunal, above n 10, at 529.

<sup>24</sup> At 529.

<sup>25</sup> Independent Working Group, above n 3, at 53.

<sup>26</sup> Paul Moon “‘A proud thing to have recorded’: The origins and commencement of national indigenous political representation in New Zealand through the 1867 ‘Maori Representation Act’” (2014) 16 *Journal of New Zealand Studies* 52 at 52.

### 3 *Establishing a voice in a colonial system*

With the British establishing constitutional structures in New Zealand, and seeking Māori assimilation, direct political engagement for Māori was difficult. In 1852, the New Zealand Constitution Act granted the right to vote to all males aged 21 and over, who owned or leased substantial property. While the Act did not expressly exclude Māori, only about 100 Māori voted in the first general election in 1853. Māori owned land collectively, rather than individually, and the only way for Māori to be able to vote was to change their landholdings to individual titles, assimilating to the new political structures.

From the mid-1860s, there was greater demand for Māori political representation within the British-imposed structures. The Māori Representation Act was passed in 1867, specifically extending the right to vote to Māori males over 21, without the property requirement. It also introduced four Māori seats in the House of Representatives. Initially the provision was to last five years but was made permanent in 1876; an acknowledgement that “a distinct Māori voice would remain in the country’s body politic.”<sup>27</sup>

Today Māori have seven seats in Parliament, providing some political influence in decisions made by the 120-seat body. The number of seats is based on the number of people on the Māori electoral roll, outlined in the Electoral Act 1993.<sup>28</sup> The Act provides for Māori, or descendants of Māori, to register on the Māori electoral roll<sup>29</sup> and vote for a candidate in the Māori electorate in which they live.<sup>30</sup> Māori voices are also heard in Parliament through political parties, including the religious Rātana movement, which later became a political party, and the Mana Motuhake Party. From 2005 to 2017 the Māori Party was the dominant Māori representative party in New Zealand and will contest the 2020 election.<sup>31</sup>

Māori political representation, mainly through the Māori seats in Parliament, is a core part of the constitutional foundation of New Zealand. However, it is accommodated within the

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<sup>27</sup> At 62.

<sup>28</sup> New Zealand Parliament ‘150 years of Maori representation in Parliament’ (10 October 2017) <<https://www.parliament.nz/en/get-involved/features/150-years-of-m%C4%81ori-representation-in-parliament/>>.

<sup>29</sup> Section 3.

<sup>30</sup> Electoral Commission “What is the Māori Electoral Option” <<https://elections.nz/elections-in-nz/what-is-the-maori-electoral-option/>>.

<sup>31</sup> Ann Sullivan “Tōrangapū – Māori and political parties” (20 January 2012) Te Ara – the Encyclopedia of New Zealand <<https://teara.govt.nz/en/torangapu-maori-and-political-parties>>.



Westminster democracy built by colonisation and marred by a history of dispossession, marginalisation and assimilation. Tino rangatiratanga, as guaranteed in Te Tiriti, is not realised in Aotearoa.

### *B Samí political representation*

Samí have lived in the Nordic region for 2,000 years. Since the nineteenth century, the Samí people span four countries, Sweden, Finland, Norway and Russia.<sup>32</sup> In Norway, Samí have been subjected to suppression, marginalisation and assimilation policies.<sup>33</sup> However, due to international spotlight, the Norwegian Government has considered ways to enhance self-determination and Samí political voice, leading to an elected Samí Parliament.

#### *1 Traditional Samí society*

Traditional Samí society is egalitarian, with land owned collectively and used according to agreements between extended families. Extended families were organised into *siidas*, who were run by an elected council (*norraz*).<sup>34</sup> The *norraz* was “the main cultural, political, legal and economic body” that was “responsible for internal affairs such as the use of natural resources and their distribution, and foreign affairs such as negotiating with other *siidas* and non-Samí.”<sup>35</sup> With the partition of the Nordic countries in the nineteenth century, many Samí were dispossessed of land, had *siida* structures split and had traditional activities disrupted.<sup>36</sup>

#### *2 Assimilationist policies*

Underpinned by theories of race and evolution, and a desire to “civilise”, *Norwegianisation* was an official government policy in Norway from the 1800s.<sup>37</sup> The policy targeted Samí and aimed to abolish the Samí language by assimilating Samí into Norwegian culture.<sup>38</sup> The idea was that Samí were a “doomed race” and the policy was aimed at “saving people from a doomed culture.”<sup>39</sup> *Norwegianisation* actively targeted language and land, two core aspects of

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<sup>32</sup> Pia Solberg “Indigenous internal self-determination in Australia and Norway” (thesis, University of New South Wales, October 2016) at 28.

<sup>33</sup> At 19.

<sup>34</sup> At 31.

<sup>35</sup> At 31.

<sup>36</sup> At 54.

<sup>37</sup> AJ Semb “From 'Norwegian citizens' via 'citizens plus' to 'dual political membership'? Status, aspirations, and challenges ahead” (2012) 35(9) *Ethnic And Racial Studies* 1654 at 1655; Solberg, above n 32, at 59.

<sup>38</sup> Semb, above n 37, at 1655; Solberg, above n 32, at 59.

<sup>39</sup> Solberg, above n 32, at 59.

Samí identity and culture. The state used aggressive assimilation policies to eliminate the Samí language, including controlling children's access to the language by forcing them into boarding schools.<sup>40</sup> The government also banned land sales in northern Norway to those who had not yet assimilated (through the Land Act 1902), meaning Samí were often dispossessed from their lands.<sup>41</sup>

### 3 *Political change due to international attention*

Despite some steps taken by the government, like establishing a Samí Commission to represent Samí nationally in 1956,<sup>42</sup> real change in political representation did not occur until the 1970s and 1980s. Change was sparked by the 'Alta Affair', the "most far-reaching and deepest conflict" between Samí and the state in the twentieth century.<sup>43</sup> The Alta Affair was a conflict over the legality of a state-managed hydropower development that affected an area of land significant to Samí.<sup>44</sup> Before Alta, the idea that Samí were "indigenous people in the modern sense at international law was unfamiliar".<sup>45</sup> With a history of land loss, Alta represented the limit of encroachments for Samí.<sup>46</sup> Demonstrations and a legal challenge were launched.<sup>47</sup> This surprised the government, who had considered Samí to be "well integrated".<sup>48</sup> Police cracked down on protests, not wanting them to be a catalyst for Samí separatist movements.<sup>49</sup>

The Norwegian political system is "shaped by international law norms",<sup>50</sup> and the international perception of Norway's treatment of its indigenous people is a significant driver for the government. The Alta Affair led to increasingly negative reactions on the international

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<sup>40</sup> John B Henriksen "The continuous process of recognition and implementation of the Sami people's right to self-determination" (2008) 21(1) *Cambridge Review of International Affairs* 27 at 28; Solberg, above n 32, at 55.

<sup>41</sup> AJ Semb, above n 37, at 1655.

<sup>42</sup> Solberg, above n 32, at 113.

<sup>43</sup> At 173.

<sup>44</sup> Tom G Svensson "Right to Self-Determination: A Basic Human Right Concerning Cultural Survival. The Case of the Sami and the Scandinavian State" in Abdullahi Ahmed An-Na'im (ed) *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (University of Pennsylvania Press, Pennsylvania, 1992) 363 at 371.

<sup>45</sup> Solberg, above n 32, at 169.

<sup>46</sup> Svensson, above n 44, at 371.

<sup>47</sup> At 371.

<sup>48</sup> Solberg, above n 32, at 169.

<sup>49</sup> At 172.

<sup>50</sup> Torvald Falch, Per Selle, Kirstin Strømsnes "The Sámi: 25 Years of Indigenous Authority in Norway" (2016) 15(1) *Ethnopolitics* 125 at 127.

stage and the Norwegian government found it difficult to balance its perception as a model humanitarian actor, while ignoring indigenous demands at home.<sup>51</sup> It wanted to “avoid sully[ing] its carefully projected image as an international model citizen and its key role in UN diplomacy”.<sup>52</sup> Following Alta the government entered into political dialogue with Samí. In 1980 the Samí Rights Commission and the Samí Culture Commission were established, and provided recommendations to the Norwegian government, including the recommendation for a directly elected representative body.

The Government passed the Samí Act of 1987, which made provision for the government to protect and develop Samí language, culture, and society. In 1988, the government adopted an amendment to the Constitution of Norway, section 110A, that says the state is required to create conditions that enable Samí to preserve and develop its language, culture and way of life. This provides a legal and political protection for Samí culture, as well as implying a moral obligation for Norway to create an environment that is conducive to the Samí in the development of their community.<sup>53</sup>

In 1989, Norway established a nation-wide Samí Parliament and over the following years, Norway “consolidated its international profile as a peace negotiator” and state-led humanitarianism became a widely supported national project.<sup>54</sup>

#### *4 Political voice*

The Samí Parliament has changed the way Samí and the state relate to each other.<sup>55</sup> It created a public space for Samí that had not existed before, with the aim to improve Samí’s political position and promote Samí interests. The Samí Parliament recognises Samí’s historical presence as a separate ethnic people, counteracts the effects of a 150-year-long assimilation policy, and ensures Samí did not mobilise against the state.<sup>56</sup> It has 39 directly-elected members, representing seven electorates.<sup>57</sup> Members of Parliament are elected every four years.<sup>58</sup> The Parliament elects a President, who appoints a Samí Parliament Council. The

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<sup>51</sup> Solberg, above n 32, at 172.

<sup>52</sup> Solberg, above n 32, at 220.

<sup>53</sup> Henriksen, above n 40, at 32.

<sup>54</sup> Solberg, above n 32, at 179.

<sup>55</sup> Falch, above n 50, at 130.

<sup>56</sup> At 130.

<sup>57</sup> Solberg, above n 32, at 181.

<sup>58</sup> Falch, above n 50, at 131.

Council essentially operates like a national government.<sup>59</sup> There are 14,000 people registered on Samí electoral register, but there could be many more if all those eligible were registered.<sup>60</sup> To be eligible one must have at least one great grandparent who speaks or spoke Samí and identify as Samí. The earlier policy of *Norwegianisation* has affected the numbers of Samí wishing to register, as many do not speak the language, but numbers are increasing.<sup>61</sup>

The Parliament has an ambiguous role. It is a government executive agency with administrative duties and an independent political body at the same time. It cannot make legislation or pass a budget. It identifies its own priorities and develops its own politics, based on its mandate from the Samí People. It has a budget (US \$57million in 2016) but no control over the size of the budget. The Parliament has been delegated decision-making power in matters relating to Samí culture, the Samí languages and teaching based on the Samí curriculum.<sup>62</sup> Its functions include grant and funding responsibilities for Samí affairs (including language funds, culture grants, and management of schemes for artists, museums, and heritage sites), and the ability to raise objections to other policies in certain circumstances. Its mandate is under ongoing debate and powers have “increased steadily” since its establishment.<sup>63</sup>

The principle of partnership has been emphasised in the Board of Samí Parliament’s political programme since 2006.<sup>64</sup> An example of this is the Finnmark Act, which handed ownership of 96 percent of the Finnmark area (traditional Samí territory in northern Norway) to the Finnmark Estate.<sup>65</sup> The Board of the Finnmark Estate consists of six members, three appointed by the Finnmark County Council, and three by the Samí Parliament.<sup>66</sup> Today the Parliament is a “fully informed formal participant in public decision-making processes,”<sup>67</sup> and is also accepted as a “separate but integral part of Norwegian democracy.”<sup>68</sup>

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<sup>59</sup> Solberg, above n 32, at 181.

<sup>60</sup> AJ Semb, above n 37, at 1657.

<sup>61</sup> Anne Julie Semb “Sami self-determination in the making?” (2005) 11(4) Nations and Nationalism 531 at 534.

<sup>62</sup> AJ Semb, above n 37 **Error! Bookmark not defined.**, at 1658.

<sup>63</sup> At 1657.

<sup>64</sup> At 1660.

<sup>65</sup> Falch, above n 50, at 184.

<sup>66</sup> At 184.

<sup>67</sup> At 135.

<sup>68</sup> Solberg, above n 32, at 181.

### 5 *Relationship with the Norwegian state*

Samí self-determination is built on the idea of “split power” and shared rule.<sup>69</sup> The distinction between what is in the Samí sphere of influence, and what is in the Norwegian sphere, is tricky. Semb argues that the Samí Parliament is established on the basis that it has power over cultural areas, whereas the Norwegian government has power for other areas. Both bodies are accorded legal status, and have responsibility over educational and cultural institutions that are important for maintaining the culture of minority nations.<sup>70</sup> But there are issues with this. It also limits the Samí Parliament’s sphere of influence to issues that are deemed to be “cultural” and it is unclear how to distinguish between cultural and non-cultural affairs. It also makes decision-making more complex, and adds the risk that the system will not be transparent.<sup>71</sup>

In 2005 the Samí and Norwegian Parliaments entered into an agreement to consult on matters that might affect Samí interests directly.<sup>72</sup> Samí Parliamentarians have indicated that this agreement has strengthened cooperation, but they are concerned that there are still challenges in areas such as energy development and reindeer husbandry.<sup>73</sup> The agreement is also severely limited by not including financial initiatives or budgetary measures.<sup>74</sup>

Political representation for Samí in Norway is somewhat independent. The Samí Parliament provides Samí with public voice and a means to influence and create policy affecting Samí people. The Parliament is an example of self-determination and indigenous decision-making, beyond what we see in other countries.

### C *Limitations and considerations*

Both models of political representation we have considered have significant limitations that affect indigenous political influence. Both are set within the confines of the dominant system of governance, without recognition of the role indigenous people had in both Aotearoa and

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<sup>69</sup> Anne Julie Semb, above n 61, at 542.

<sup>70</sup> At 543.

<sup>71</sup> At 543.

<sup>72</sup> *Report of the Special Rapporteur on the rights of indigenous peoples on the human rights situation of the Sami people in the Sápmi region of Norway, Sweden and Finland* UN doc A/HRC/33/42/Add.3 (9 August 2016) at [20].

<sup>73</sup> At [20].

<sup>74</sup> At [20].

Norway prior to colonisation. This is especially so in New Zealand with Māori seats within the dominant Westminster Parliament. The political representation of Samí is also not guaranteed. There is formal government involvement in all that the Samí Parliament does.<sup>75</sup> and it is not enshrined in the Constitution.<sup>76</sup>

In spite of the limitations, the Samí Parliament provides Aotearoa with an example of what is possible for indigenous political representation. For many Māori, a national representative body, something similar to the Samí Parliament, has been an aspiration and integral to thinking on constitutional transformation.<sup>77</sup> It was an objective in He Whakaputanga and has been argued for by different Māori representative groups over decades.<sup>78</sup> Such a body would go some way to recognising Māori tino rangatiratanga in Aotearoa.<sup>79</sup>

### *III Reimagining constitutionalism in Aotearoa*

*“...ultimately the disempowerment can only be alleviated through a process of constitutional transformation.”<sup>80</sup>*

Before colonisation Māori had their own highly successful governance structures.<sup>81</sup> While these traditional structures may not provide answers to all modern challenges, they are necessary to build capable governments that express indigenous values and self-determination. By taking into account indigenous self-governing power, constitutional change is more likely to have indigenous support and recognising indigenous constitutionalism will go some way to addressing long-standing grievances and socioeconomic disadvantage.<sup>82</sup>

Te Tiriti guarantees Māori tino rangatiratanga, ensuring Māori policy is developed by Māori.<sup>83</sup> The Māori seats in Parliament are an important expression of tino rangatiratanga under Te Tiriti. But they are not enough.

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<sup>75</sup> Falch, above n 55, at 138.

<sup>76</sup> Solberg, above n 32, at 177.

<sup>77</sup> Durie, above n 5, at 49; Independent Working Group, above n 3.

<sup>78</sup> Durie, above n 5, at 49.

<sup>79</sup> At 49-50.

<sup>80</sup> Independent Working Group, above n 3, at 26.

<sup>81</sup> S Cornell ““Wolves Have A Constitution:” Continuities in Indigenous Self-Government” (2015) 6(1) The International Indigenous Policy Journal 1 at 1.

<sup>82</sup> At 13.

<sup>83</sup> Durie, above n 5, at 44.

### *A Constitutional reform*

The New Zealand government has considered constitutional reform in relation to Māori political representation. A Constitutional Advisory Panel was established in 2011 to report on constitutional arrangements, topical issues and areas for reform.<sup>84</sup> In relation to Māori representation, the Panel noted the desire among Māori for stronger mechanisms to enhance Māori political representation.<sup>85</sup> Among its recommendations, the Panel acknowledged that Māori political representation should be improved, that the Crown should reflect the interests and views of tangata whenua, and that the Crown should have regard to Māori political structures.<sup>86</sup> It noted that alternative models of representation include indigenous parliaments (like that in Norway), political parties, changes to constitutional status and the creation of a separate territory, but did not comment on the viability of them in Aotearoa.<sup>87</sup>

Matike Mai Aotearoa, the Independent Working Group on Constitutional Transformation, was established to go deeper than the government-sanctioned Panel. Its terms of reference were:<sup>88</sup>

To develop and implement a model for an inclusive Constitution for Aotearoa based on tikanga and kawa, He Whakaputanga o te Rangatiratanga o Niu Tirenī of 1835, Te Tiriti o Waitangi of 1840, and other indigenous human rights instruments which enjoy a wide degree of international recognition.

The report argues that we need a “transformational shift” of the constitutional foundation in Aotearoa and to restore the authority guaranteed in Te Tiriti.<sup>89</sup> The report identified six indicative models for a new constitutional arrangement, encompassing different spheres: the Crown in Parliament sphere, a Māori sphere and a relational sphere.<sup>90</sup>

### *B A separate representative Māori body?*

A separate national representative Māori body, based on the principles of Te Tiriti and grounded in tikanga, and making decisions in a ‘Māori sphere’, would make progress toward the realisation of tino rangatiratanga and reinstate the place of Māori in Aotearoa. Te Tiriti

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<sup>84</sup> Constitutional Advisory Panel *New Zealand’s Constitution: A Report on a Conversation He Kōtuinga Kōrero mō Te Kaupapa Ture o Aotearoa* (Ministry of Justice, November 2013).

<sup>85</sup> At 39.

<sup>86</sup> At 38.

<sup>87</sup> At 41.

<sup>88</sup> Independent Working Group, above n 3, at 7.

<sup>89</sup> At 29.

<sup>90</sup> At 104-112.

envisaged “a constitutional relationship where everyone could have a place in this land” and was never intended for Māori and Pākehā to come together as “one people”.<sup>91</sup> Without such a body currently, the Crown has tried to fill the gap on indigenous issues with other mechanisms, such as the Māori seats and a duty to consult Māori in policy making. Yet Māori remain vulnerable, disadvantaged and overrepresented in negative statistics. A new Māori body would fill this gap instead, ensuring tino rangatiratanga,<sup>92</sup> and that Māori interests are properly represented at constitutional and political levels.<sup>93</sup> As it should be with any political change affecting Māori, Māori should determine what an indigenous representative body would look like in Aotearoa. This paper poses some ideas to add to the discourse, using tikanga values, and lessons from the Samí Parliament in Norway.

The report of Matike Mai identifies values that should underpin any constitutional change, reflecting a desire for a more responsive and open constitutionalism.<sup>94</sup>

1. *Tikanga* – relating to or incorporating the core ideals and the “ought to be” of living in Aotearoa.
2. *Community* – facilitating the fair representation and good relationships between all peoples.
3. *Belonging* – fostering a sense of belonging for everyone in the community.
4. *Place* – protecting and respecting in Papatūānuku.
5. *Balance* – respecting the authority of rangatiratanga and kāwanatanga within different and relational spheres of influence.
6. *Conciliation* – an underlying jurisdictional base and a means of resolution to guarantee a conciliatory and consensual democracy.
7. *Structure* – conventions promoting democratic ideals of fair representation, openness and transparency.

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<sup>91</sup> At 112.

<sup>92</sup> Professor Whatarangi Winiata “The Future: Determined to Survive” in Maria Bargh (ed) *Māori and Parliament: diverse strategies and compromises* (eBook ed, Huia Publishers, Wellington, 2010).

<sup>93</sup> Durie, above n 5, at 50.

<sup>94</sup> Independent Working Group, above n 3, at 68-69.



## 1 *Tikanga*

As the foundation to Māori constitutionalism, tikanga must be the cornerstone of any constitutional transformation and at the heart of a new representative body. This will give Māori the opportunity to develop a body that makes sense in Te Ao Māori, rather than imitating the Westminster colonial structure. It may be similar to the colonial structure, but acknowledging the place of tikanga will give Māori the space to consider what their ideal would look like. To do this, Māori might decide to translate core tikanga values into a Declaration or Bill of tikanga values.<sup>95</sup> This could guide the Māori and relational spheres.

## 2 *Community, belonging and place*

Constitutions set out a legal or political structure, and also establish “relationship guidelines”.<sup>96</sup> The values of community, belonging and place recognise relationships between people, and between people and their whenua (land). A representative Māori body will need to ensure this.

The body will have to represent different communities, including individual and collective interests of those who identify strongly as Māori, those within iwi and hapū, and those without strong connections to an iwi group. Participants in the Matike Mai process wanted to preserve their right to participate in any Māori body as individuals, but also wanted guarantees that the collective voice of iwi and hapū were not lost.<sup>97</sup> This is a question of how representatives are chosen. In Norway, Samí elect 39 representatives to the Samí Parliament. In Aotearoa there could be a number of representatives from the seven Māori electorates that already exist. The total number of electorates and representatives could be tied to the Māori electoral roll, with increases based on how many voters register to be on that roll. Representatives could then be elected on a majority basis with voters having individual votes. There are other options that might better guarantee the collective voice is not lost. Voting could be used to reflect a more regional sight of authority, where there is some form of collective vote, combined with an individual vote. Another way could be to nominate

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<sup>95</sup> At 72.

<sup>96</sup> At 78.

<sup>97</sup> At 93.

representatives by consensus decision-making, which has precedence in Te Ao Māori<sup>98</sup> as well as featuring in co-governing relationships between the Crown and Māori.

As we saw with Sami, land and place is a core part of Māori identity and having constitutional recognition of this would reaffirm the special meaning whenua has for Māori. One way of physically doing this is through the location of the new body's hui (meetings). In Norway, the Sami Parliament meets in a building was specifically designed as a Sami representative place on traditional land, rather than the country's capital city. In Aotearoa, the body could travel and sit in different marae around the country, so that it is hosted by different iwi and hapū.

### *3 Balance, conciliation and the relationship with the Crown*

A new Māori body will need to consider the values of balance and conciliation, including how it relates to the Crown. With Te Tiriti at the core, the relationship with the Crown will need to be equal and equitable to ensure this new body is given practical constitutional effect.<sup>99</sup> If we were to honour the balanced spirit of Te Tiriti, Māori and the Crown would be responsible for their own spheres.<sup>100</sup> In 1840 this meant rangatira would retain tino rangatiratanga over their people, and the Crown would have kāwanatanga over Pākehā. With 180 years without this arrangement in practice, determining spheres of influence is more difficult in 2020.

Part of the consideration is how independent this body will be from the Crown. The Sami Parliament sits beneath the Norwegian Parliament. It is responsible for many aspects of Sami policy and administration but it is reliant on the state for funding, expansion of powers, and agreement on when it can be consulted. To guarantee tino rangatiratanga, Māori require the ability to have control of Māori policy and affairs, and it is contended that this can only occur if the body is independent, operating in a separate sphere to the Crown.

The report of Matike Mai proposes that the representative Māori body and the Crown exercise authority within difference spheres of influence, and come together in a "relational sphere" to jointly decide on issues that affect both.<sup>101</sup> The major problem is that there is a risk of power imbalance in New Zealand's current political structure; the Crown almost always has the final

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<sup>98</sup> Waitangi Tribunal, above n 10, at 30.

<sup>99</sup> Independent Working Group, above n 3, at 84.

<sup>100</sup> At 86; Waitangi Tribunal, above n 10, at xxii.

<sup>101</sup> Independent Working Group, above n 3.

say.<sup>102</sup> This is not insurmountable. Te Tiriti in essence gave us what we need for outlining this relationship: “the recognition of each community’s mana, the preservation of each community’s decision-making authority, and the recognition that there are things everyone has to come together to make a decision about, like finance and foreign affairs”.<sup>103</sup>

Māori and the Crown already operate at some level in co-governance (largely focused on strategic decisions) and co-management (focused more on day-to-day operations) relationships, which set some precedent for broader cooperation in a constitutional relational sphere. Co-management of the Waikato River recognises the importance of three Iwi, including Ngāti Tūwharetoa, in the protection of the River through legislation. The Tūwharetoa Māori Trust Board and the Waikato Regional Council have a Joint Management Agreement setting out how the two parties will work together in relation to the Waikato River. The co-management relationship is guided by principles of tikanga and Te Tiriti.<sup>104</sup> The Maungatautari Ecological Island Trust has a co-governance structure. The board is co-chaired by a mana whenua representative and a landowner representative. The co-governance regime ensures tikanga is incorporated into governance and decision making.<sup>105</sup>

The extent of decision-making powers in each sphere of influence and how to resolve differences in the relational sphere should be clear from the outset.<sup>106</sup> Effective co-governance occurs when the objective and outcomes are well-defined.<sup>107</sup> Decision-making in the relational sphere should be guided by principles of tikanga, including consensus decision-making. This would not diminish from the authority of the Crown in its own sphere, but it would “mark a return to tikanga as the first law” of Aotearoa.<sup>108</sup> Many examples of co-governance and co-management use consensus decision-making. For the management of the Waikato River, the parties to the Tūwharetoa Agreement have agreed to operate collaboratively, in a partnership of good faith engagement, while striving for consensus-

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<sup>102</sup> Auditor General *Principles for effectively co-governing natural resources: presented to House of Representatives under s 20 of the Public Audit Act 2001* (Controller and Auditor-General, B.29[16a], February 2016) at [1.11].

<sup>103</sup> Independent Working Group, above n 3, at 53.

<sup>104</sup> Joint Management Agreement, Tūwharetoa Māori Trust Board – Waikato Regional Council (2018), at [4.1].

<sup>105</sup> Auditor General, above n 102, at [1.20].

<sup>106</sup> At 28.

<sup>107</sup> At 12 and 14.

<sup>108</sup> Independent Working Group, above n 3, at 90.

decision making.<sup>109</sup> For the Te Waihora co-governance group all decisions must be “reached through the highest level of good faith engagement and made on a consensus basis.”<sup>110</sup> Reaching consensus means the parties are agreeing on shared principles and are talking through any issues before they arise. It might take longer to reach a decision, but these outcomes are more enduring.<sup>111</sup> Where consensus is not possible, there is the option of appointing a facilitator to assist.<sup>112</sup> This model could be used at a national level.

Another consideration will be ensuring conciliation with the Māori seats in Parliament. Given the importance of tikanga and Māori to Aotearoa, maintaining the seats would ensure Māori political authority is exercised within the state to influence and safeguard interests. An additional technical question would be how to use the Māori electoral roll for both the seats in the House of Representatives and the new Māori body.

#### *4 Structure and functions*

A representative Māori body needs structural conventions that promote fair representation, openness and transparency. The key questions relate to the constitutional status of the body, establishment of the body, the body’s functions and its sphere of influence.

For constitutional status, we can look at the Samí Parliament. It was established by legislation (the Samí Act 1987) but is lacking the additional protection of being guaranteed in the Norwegian Constitution. In New Zealand, a representative Māori body could also be established through legislation. To ensure its constitutional protection, Aotearoa could entrench the change. As well as legislation, a formal agreement between the Crown and iwi and hapū would add legitimacy to the body and the relationship. The agreement could include the objectives, the different spheres of operation and the opportunity for regular review.<sup>113</sup>

The representatives on the body could serve a term of three to four years, either at the same time as the general election, or at another time. For Samí, the elections are held every four

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<sup>109</sup> Joint Management Agreement, above n 104, at [4.2].

<sup>110</sup> Auditor General, above n 102, at [4.18].

<sup>111</sup> At [4.22].

<sup>112</sup> Joint Management Agreement, above n 104, at [5.1].

<sup>113</sup> Auditor General, above n 102, at 21.

years, in the middle of the Norwegian parliamentary election cycle.<sup>114</sup> It might be useful to separate the Māori body elections from general elections, to limit confusion.

The Samí Parliament has a relatively clear sphere of influence. It is given its powers and functions by the Norwegian Parliament with the dual function of serving as an elected political body, and carrying out administrative duties. The functions of a representative Māori body might go broader and include:<sup>115</sup>

- the formulation, management and implementation of Māori policy;
- active participation in development and interpretation of the law;
- auditing national policies and legislation;
- making appointments to institutions and agencies; control and management of public spending for and on behalf of Māori (i.e. for agencies such as Te Puni Kōkiri); and
- development of foreign policy for Māori and the pursuit of Māori interests abroad.

There will need to be thought as to the Māori body's own decision-making. Iwi and hapū make decisions in different ways and there will need to be clarity over what approach will be used. With evidence of rangatira traditionally using consensus decision-making, perhaps this is the right approach.

Further thought would also be needed as to the status of the body's decisions. It would seem constitutionally difficult for it to have the ability to pass legislation on equal standing to the Crown, but that could be explored. More realistically, the body could have the ability to look at legislation and government decision-making, as well as develop and implement its own policy through its own agencies. It could consider any Crown policy and legislation, with the ability to question it. It could even veto Crown policy and legislation in some circumstances, although it would be tricky to establish when this would be, and this would need to be clearly defined. The representative Māori body's decisions could be judicially reviewable, with a new set of criteria established for that. The benefit of New Zealand not having a written constitution is that all of this is theoretically possible.

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<sup>114</sup> The last Samí Parliament election was in 2019 and the last Norwegian parliamentary election was in 2017.

<sup>115</sup> Durie, above n 5, at 50.

## 5 *Policy issues*

Beyond the legal questions, there are fundamental policy considerations that go beyond the scope of this paper but are important to mention, including:

- Funding: the Sami Parliament has a budget from the Norwegian government but funding can stagnate where there are other priorities.<sup>116</sup>
- Public appetite: the appetite for constitutional change is generally quite low.
- Māori aspirations: Māori may want the body to do more or less than it is mandated to.
- Bureaucracy: having two bodies could create more complex decision-making.

### *C How would it look in practice?*

Based on the above, a representative Māori body could be established by entrenched legislation, as well as an agreement between iwi, hapū and the Crown. The agreement could outline the objectives for the relationship and provide clarity on the spheres of influence, including the relational sphere. It could be accompanied by a declaration of tikanga values that underpins the relationship. Legislation could elaborate on the functions of the Māori body, the Crown and the relational sphere, including decision-making and review procedures, and the process for resolving differences (by consensus or, failing that, with a facilitator). The Māori body could include developing Māori policy, commenting on legislation from a Māori perspective, overseeing expenditure for Māori agencies, and looking at Māori diplomacy. The body could be made up of representatives chosen as appropriate by iwi and hapū. The number of representatives could be based on the Māori electoral roll with separate elections to the general elections.

With a representative Māori body such as this, the state's response to issues in Aotearoa could have looked vastly different. The current COVID-19 pandemic will have health and economic impacts that will overwhelmingly affect Māori and increase existing inequities. The policy and legislative response has been criticised for a lack of indigenous voice.<sup>117</sup> One policy, the

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<sup>116</sup> Falch, above n 50, at 132.

<sup>117</sup> Science Media Centre "Estimating COVID-19's impact on Māori and Pasifika – Expert Briefing" (17 April 2020) <<https://www.sciencemediacentre.co.nz/2020/04/17/estimating-covid-19s-impact-on-maori-and-pasifika-expert-briefing/>>; Tahu Kukutai and others "Recession hits Māori and Pasifika harder. They must be part of planning New Zealand's COVID-19 recovery" (19 May 2020) *The Conversation* <<https://theconversation.com/recession-hits-maori-and-pasifika-harder-they-must-be-part-of-planning-new-zealands-covid-19-recovery-137763>>; Nicholas Steyn and others "Estimated inequities in COVID-19 infection

Ministry of Health's "Initial COVID-19 Māori Response Action Plan" was released in April 2020, four weeks after the lock down period started. The Plan acknowledged the increased risk for Māori of the virus<sup>118</sup> and outlined its approach to using tikanga and the principles of Te Tiriti.<sup>119</sup> It has been criticised as being an "afterthought", having a lack of detail and placing responsibility on Māori rather than mainstream health services.<sup>120</sup>

The government also passed the COVID-19 Public Health Response Act 2020 under urgency, without the following proper legislative process. The Act gives the Crown powers that could disproportionately affect Māori, including allowing police to enter dwellings (and marae) without a warrant.<sup>121</sup> The Human Rights Commission were concerned with the pace at which the legislation was passed. They made clear that in times of national emergency, like the COVID-19 response, sweeping powers are granted and mistakes can be made, especially when there is no time to take into account human rights and Te Tiriti commitments.<sup>122</sup> There is no mention of the Treaty of Waitangi or its principles anywhere in the Act.

Both of these examples could have looked vastly different with a representative Māori body alongside the New Zealand government.<sup>123</sup> A body could have made sure appropriate public health guidelines were created, provided Māori governance and leadership at every level of the response, ensured high-quality data was available, monitored how the virus was affecting

fatality rates by ethnicity for Aotearoa New Zealand" (14 April 2020) Te Pūnaha Matatini <<https://www.tepunahamatatini.ac.nz/2020/04/17/estimated-inequities-in-covid-19-infection-fatality-rates-by-ethnicity-for-aotearoa-new-zealand/>>; Elana Curtis "An open letter to the government from a Māori public health specialist" (5 April 2020) E-Tangata <<https://e-tangata.co.nz/comment-and-analysis/an-open-letter-to-the-government-from-a-maori-public-health-specialist/?fbclid=IwAR3iOjq9HPYXx1a43qkrCBNuCAeSJBjIsKTyub21HQcedUlf8S0j9honnKo>>; Te Rōpū Whakakaupapa Urutā, National Māori Pandemic Group "COVID-19 Position Statement" (press release, 13 April 2020).

<sup>118</sup> Ministry of Health, *Initial COVID-19 Māori Response Action Plan* (April 2020) at 5-6.

<sup>119</sup> At 7-8.

<sup>120</sup> Meriana Johnsen "Government's Māori Covid-19 response all words, no action - response group" (21 April 2020) RNZ <<https://www.rnz.co.nz/news/te-manu-korihi/414667/government-s-maori-covid-19-response-all-words-no-action-response-group>>.

<sup>121</sup> S 20(3)

<sup>122</sup> Human Rights Commission "Human Rights Commission Deeply concerned about COVID-19 Public Health Response Bill" (press release, 13 May 2020).

<sup>123</sup> Rhys Jones "Covid-19 and Māori health: 'The daily 1pm briefings have been an exercise in whiteness'" (13 May 2020) The Spinoff <<https://thespinoff.co.nz/atea/13-05-2020/covid-19-and-maori-health-the-daily-1pm-briefings-have-been-an-exercise-in-whiteness/>>; Te Aniwa Hurihanganui "Simon Bridges ignored proposals for Māori at Epidemic Response Committee, MP says" (6 May 2020) RNZ <<https://www.rnz.co.nz/news/te-manu-korihi/415943/simon-bridges-ignored-proposals-for-maori-at-epidemic-response-committee-mp-says>>.

Māori, and understood what healthcare and economic support is required for Māori. The body could have looked at both the Plan and the Act before they were finalised and passed. They could have acted with as much urgency as is needed in a National Emergency.

There is an example of partnership occurring in the context of COVID-19, which is illustrative of what is possible. Iwi in Taranaki, the East Coast and Far North of Aotearoa set up checkpoints at boundaries to flatten the spread of the virus, in partnership with local councils, Civil Defence and Police. Local authorities exercised *kāwanatanga*, while *rangatiratanga* was exercised through the authority of chiefs, upheld by *hapū* and *iwi*. Iwi watched movements in the community, provided information to travellers, and collated data. According to the Human Rights Commission this showed “*manaakitanga* or caring for visitors, and *kaitiakitanga*, guardianship towards their communities” and called for the model to be replicated.<sup>124</sup> It is with this spirit, rather than being an afterthought, that a representative Māori body could operate.

#### *IV Conclusion*

Political representation for Māori in New Zealand’s Westminster democracy is a lot less than the *tino rangatiratanga* Māori had pre-colonisation, sought in *He Wakaputanga*, and guaranteed in *Te Tiriti*. Reimagining a more inclusive Aotearoa, where we recognise and empower Māori constitutionalism, will allow for better decision-making, improve socio-economic disadvantage, address political disempowerment, and allow Māori to re-realise their *tino rangatiratanga*.

In seeking constitutional change, the government and Māori should take lessons from other models around the world. In Norway, the indigenous Samí have a representative Samí Parliament. While it has its limitations and constraints, it is unlike other indigenous political representation. Taking the Samí Parliament as a model for Aotearoa, we could establish a representative Māori body that has the ability to make and implement Māori policy, to comment on, influence and perhaps veto legislation, and operate in partnership with the Crown. The relationship between the body and the Crown would be underpinned by *tikanga*

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<sup>124</sup> Meng Foon and Paul Hunt “Covid-19 checkpoints show the way for the role of iwi in the recovery” (2 June 2020) *The Spinoff* <[https://thespinoff.co.nz/politics/02-06-2020/covid-19-checkpoints-show-the-way-for-the-role-of-iwi-in-the-recovery/?fbclid=IwAR0WpepGN2qaXyqERjHA0qXD\\_bTUXSgW4zPO4l65eyiLyV7R9SgLB1QSWSE](https://thespinoff.co.nz/politics/02-06-2020/covid-19-checkpoints-show-the-way-for-the-role-of-iwi-in-the-recovery/?fbclid=IwAR0WpepGN2qaXyqERjHA0qXD_bTUXSgW4zPO4l65eyiLyV7R9SgLB1QSWSE)>.



and the principles of Te Tiriti, including acting in good faith and seeking decisions by consensus. While this adds another layer to New Zealand's legislative process and policy-making, it will ensure better decision-making, with greater recognition of Māori.

We need to imagine a better and more empowered future for Māori and ultimately for Aotearoa. Constitutional transformation is vital to that.

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