

20 December 2017



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RE: UN Permanent Forum on Indigenous Issues: Questionnaire to National Human Rights Institutions – Response from the New Zealand Human Rights Commission

Thank you very much for the opportunity to submit information for the Seventh Session of the UNPFII. Please find our response to the questionnaire below.

1. The 2017 session of the Permanent Forum featured a focus on indigenous human rights defenders. Please provide information on the work of your institution in relation to indigenous human rights defenders. What results have been achieved through such efforts and what are some lessons learned?

At present, the Commission has no work underway in this area.

2. The theme of the 2018 session will be Indigenous peoples' collective rights to lands, territories and resources. Please provide information about indigenous peoples' collective rights to lands, territories and resources in your country. Has your institution been engaged in work relating to indigenous peoples' collective rights to lands, territories and resources?

An outline of some current issues regarding indigenous peoples' rights to lands, territories and resources in Aotearoa New Zealand is attached as **Appendix 1**.

The Commission has had some engagement with parties involved in the issues outlined. The Commission raises these issues in its advocacy work, including in its reporting to UN committees. New Zealand's review by the Committee on Economic, Social and Cultural Rights will take place in March 2018, and the Committee's list of issues includes questions focussed on these matters.

The Commission also addresses land and resource issues in its activities related to the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) (see below). Earlier this year, the Commission held a public forum on indigenous rights and the environment, canvassing issues such as resource management processes, climate change, health impacts, advocacy for indigenous rights; and discussion of land as a source of rangatiratanga (self-determination). Video of some of those presentations are available [here](#), [here](#) and [here](#).

In 2018 the Commission will undertake research and public consultation on UNDRIP thematic issues, including rights to lands and resources.

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3. What are the three to five main activities carried out by your institution at the national and/or regional level to implement the UN Declaration on the Rights of Indigenous Peoples and the principles contained therein?

a) *Te Mana i Waitangi – online education module*

In line with its statutory mandate to “promote, through research, education and discussion, the human rights dimensions of the Treaty of Waitangi”¹ the Commission has a work programme entitled *Te Mana i Waitangi*. The current focus of this programme is the development of online education material on the Treaty² and human rights.

This year the Commission released the first of its online human rights education modules³, which included an introduction to the Treaty. Further detailed modules on the Treaty and indigenous rights are being developed, due for release in early 2018.

b) *Indigenous Rights Information Series*

Throughout 2016/17, the Commission held a series of activities and events in the lead up to the UNDRIP tenth anniversary. The *Indigenous Rights Information Series* included:

- public forums on topics such as: indigenous rights and the environment; culture and language; indigenous women and leadership; equality and non-discrimination;⁴
- a workshop with Māori young people to provide information on UNDRIP and support them to produce videos sharing their perspectives on key themes;⁵
- workshops on indigenous rights and participation in the international human rights system.

c) *UNDRIP 10th anniversary conference*

To mark the tenth anniversary of the UNDRIP, the Commission partnered with Massey University’s Global Centre for Indigenous Leadership to co-host a two-day conference on the relevance and impact of the Declaration.

With local and international expert speakers, presentations and workshops, the conference looked at progress and challenges of implementing the Declaration in the past ten years, and discussed practical ways of utilising UNDRIP and other human rights instruments and processes to advance indigenous rights in Aotearoa New Zealand.⁶

Presentations and papers from the conference are also being compiled to be published as a book.

¹ Human Rights Act 1993, s 5(2)(d).

² The Treaty of Waitangi / Te Tiriti o Waitangi is the treaty between Indigenous Peoples and the British Crown in 1840. The Commission uses the term “the Treaty” to include both the English language version and the Māori language version, which is often referred to as Te Tiriti.

³ The online education module is accessible at: <https://www.hrc.co.nz/your-rights/human-rights/our-work/human-rights-education/human-rights-and-you-o-tika-tangata/>

⁴ Video of some of the presentations are available at: https://www.youtube.com/watch?v=qd_50Uqus_g&list=PLUMvdMvwOamI9wnt-pxppdEOixqlksrdR.

⁵ The resulting videos are available at: <https://www.youtube.com/watch?v=4XSsKQLo8Xw&list=PLUMvdMvwOamnpidW6DOUrRuNr5JVvoj1>

⁶ Further information and video recordings of some presentations are available at: <https://www.hrc.co.nz/your-rights/indigenous-rights/our-work/conference-un-declaration-rights-indigenous-peoples-2017>.

d) UNDRIP monitoring and reporting

The Commission regularly reports on indigenous rights issues in its reporting to and engagement with UN bodies.

New Zealand has several upcoming reviews by human rights treaty bodies – including by the CESCR and CEDAW committees in the first half of 2018 – where indigenous rights issues will likely be prominent. The Commission will be engaging with Māori groups and communities as part of its preparation for these reviews, as well as for New Zealand's third Universal Periodic Review in 2019. The Commission will be undertaking research and engagement around key indigenous rights issues, to inform the Commission's ongoing work, including international reporting.

e) UNDRIP Independent Monitoring Mechanism

The Commission continues to engage with the Independent Monitoring Mechanism for UNDRIP that was established by the National Iwi Chairs Forum (collective forum of indigenous leaders) in 2015. The Commission supports the Mechanism through the provision of secretariat and technical assistance as requested.

4. What are the main constitutional, legislative and/or administrative developments taken or planned to promote and/or implement the UN Declaration on the Rights of Indigenous Peoples in your country? Has your institution been involved in these processes, and if so how?

The Commission has contributed to some of the constitutional discussions that have been held in New Zealand in recent years, and continues to advocate for progression of these discussions.

The Commission made a major submission to the 2013 constitutional conversation conducted by the government-appointed Constitutional Advisory Panel.⁷ The Panel's final report recommended further public education and discussion on the place of the Treaty in New Zealand's constitutional arrangements.⁸

The Commission's submission advocated the position that:

- The Treaty of Waitangi is the founding document of the New Zealand state
- New Zealand's constitutional arrangements – its values, rules, institutions and practices – should flow from the Treaty of Waitangi. This means giving substantive effect to the Treaty partnership between the State and Māori in every aspect of the way in which New Zealand is governed.
- The Treaty of Waitangi provides for *co-existing* systems of governance and law in Aotearoa New Zealand in order to give effect to the right to self-determination for both indigenous and non-indigenous New Zealanders
- The Commission's aspiration for the future of Aotearoa New Zealand is that human rights protections will be strengthened and the Treaty of Waitangi will be increasingly recognised as the founding document of this country in a substantive way.

⁷ The Commission's submission is available at: <https://www.hrc.co.nz/your-rights/indigenous-rights/our-work/review-new-zealands-constitutional-arrangements/>

⁸ Constitutional Advisory Panel, (2013), accessible at: <http://www.ourconstitution.org.nz/Te-Tiriti-o-Waitangi-the-Treaty-of-Waitangi>

From 2010-2015 a Māori-led Constitutional Transformation Working Group, appointed by the National Iwi Chairs Forum undertook constitutional discussions with Māori communities through more than 300 meetings and workshops.

The final report of the Working Group, *Matike Mai Aotearoa* proposed models for constitutional change based on Māori law, the Treaty and indigenous rights.⁹ The proposed models have a focus on improved relationships that reflect self-determination, partnership and equality. There is a focus on the 'relational sphere' where Māori and the government engage and make joint decisions. The report recommends further dialogue over the next five years – amongst Māori and with other groups and the government – to develop, agree and implement an inclusive constitution.

The Commission's 2017 submission to the UN Committee on Elimination of Racial Discrimination highlighted the urgent need for the government to progress these constitutional discussions.¹⁰ The issue was reflected in the Committee's concluding observations, which recommended that the government:¹¹

Issue, without delay, a timetable for debating, in partnership with Māori, the recommendations of the Constitutional Advisory Panel regarding the role of the Treaty of Waitangi within its constitutional arrangements along with the proposals of the report of *Matike Mai Aotearoa* and all stakeholders.

The Iwi Chairs Forum and the UNDRIP Independent Monitoring Mechanism continue to call for continued constitutional conversations, and have identified constitutional transformation as the key mechanism necessary for achieving greater realisation of indigenous rights in Aotearoa New Zealand.

5. Please provide information on any activities and programmes that your institution carries out or plans to that are specific to indigenous peoples.

The Commission's current (2017/18) work programme includes work to:

- Promote the human rights dimensions of the Treaty of Waitangi – through online education modules
- Promote and monitor implementation of the UNDRIP – through research, engagement and reporting
- Advocate for indigenous rights, and engage with Māori in the course of UN human rights reporting activities – the Commission will be engaging with Māori groups as part of its preparation for upcoming UN treaty body reviews and New Zealand's third Universal Periodic Review (2019); and encouraging and supporting Māori participation in those processes.

6. Has your institution been engaged in work relating to the development or implementation of national action plans, strategies or other measures to

⁹ *Matike Mai Aotearoa – Independent Constitutional Transformation Working Group (2016), He Whakaaro Here Whakaumu mō Aotearoa*. Accessible at: <http://www.converge.org.nz/pma/MatikeMaiAotearoaReport.pdf>

¹⁰ Accessible at: http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/NZL/INT_CERD_IFN_NZL_28240_E.pdf

¹¹ UN Committee for the Elimination of Racial Discrimination, (2017), *Concluding Observations: New Zealand*, CERD/C/NZL/CO/21-22, at para 13(a).

achieve the ends of the Declaration on the Rights of Indigenous Peoples? If yes, then please provide information.

In 2015 the Commission developed a National Plan of Action (NPA) based on actions identified by government in response to the recommendations of New Zealand's 2014 UPR.¹²

While the NPA includes actions relating to Māori and indigenous rights issues,¹³ the Commission plans to regularly update the NPA and make amendments to better incorporate actions relating to the UNDRIP. Research and consultation will be undertaken in the first half of 2018, to identify key indigenous rights issues. As well as the NPA, these will inform the Commission's ongoing work, including our engagement UN treaty bodies, the UNPFII and EMRIP.

As noted above, the Commission continues to work with the UNDRIP Independent Monitoring Mechanism. The Monitoring Mechanism has consistently advocated for a National Plan for the UNDRIP. Discussions have taken place with a view to working with government and with the Monitoring Mechanism to that end.

In advocating for the need for a National Plan for UNDRIP the Monitoring Mechanism has highlighted the need for: comprehensive planning across government; reviewing legislation for consistency with the UNDRIP; clear responsibility for UNDRIP within government, and targeted resources for its implementation.¹⁴

In 2017 the Monitoring Mechanism developed a draft framework for a National Action Plan, based on key priorities which reflect the core themes of the UNDRIP: self-determination, participation, equality, cultural rights, lands and resources, and technical implementation.

7. How does your institution address violence and discrimination against indigenous peoples and individuals, in particular women, children, youth, older persons and persons with disabilities?

A key focus of the Commission's work in this area has been its campaign, *Never Again / E Kore Anō* – calling for an independent inquiry into historic abuse of children in state care.¹⁵

The new government has indicated its intention to hold such an inquiry. The Commission will continue to work with the government, survivors and other stakeholders to advocate for a robust inquiry, and to support survivors to tell their stories. The Commission is also working with others to ensure that the impact on Māori children is addressed, and that Māori voices and needs are reflected in the inquiry. At this stage, the Commission is discussing whether a dedicated, Māori-driven component of an inquiry would be the best way to address this.

¹² Accessible at: <http://npa.hrc.co.nz/#/>

¹³ For example, actions are categorised by 'population group' and issue. See: <http://npa.hrc.co.nz/#/group/maori> and <http://npa.hrc.co.nz/#/issue/indigenous>.

¹⁴ *Submission from the Monitoring Mechanism regarding the implementation of the United Nations Declaration on the Rights of Indigenous Peoples in Aotearoa/New Zealand*, A/HRC/EMRIP/2015/CRP.3, at p 7. Accessible at:

<http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/Session8/A.HRC.EMRIP.2015.CRP.3.pdf>

¹⁵ See the campaign website at: <http://www.neveragain.co.nz/>

Appendix 1: Issues relating to lands, territories and resources

Rights to lands, territories and resources remain a key issue for Indigenous Peoples in Aotearoa New Zealand.

Waitangi Tribunal

The Waitangi Tribunal is a permanent commission of inquiry, established by statute in 1975 to hear claims by Māori regarding breaches of the Treaty principles by the Crown (New Zealand government).¹⁶ The Tribunal has recommendatory powers; further limited by the fact that it may not recommend the return of private land or require that the Crown acquire private land (s 6(4A)). All together, claims to the Waitangi Tribunal (completed and still active) encompass more than 90 per cent of the country's land area. The Tribunal's intention is to complete its inquiries regarding historical claims by 2020, and after that point, to focus on contemporary and thematic claims.¹⁷

Treaty settlements

Iwi (Indigenous nations) may also negotiate directly with the Crown for the settlement of breaches of the Treaty of Waitangi.¹⁸ Settlements can include; acknowledgement and apology; cultural redress; financial redress (which can include return of land or compensation). Once agreed, settlements are enacted through legislation.

Innovative forms of redress that recognise indigenous concepts and rights relating to lands and resources have emerged through the Treaty settlements process. Two significant examples relate to the Urewera lands of the Tūhoe People, and to the Whanganui River.

Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 creates a new legal framework for the Whanganui River, Te Awa Tupua.¹⁹ The Act recognises the river as a holistic, living entity (s 12) and recognises its legal personhood (s 14).

Te Awa Tupua is an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements. (s 12)

The Act includes explicit reference to Iwi values and concepts and establishes co-management arrangements. It provides for the appointment of two persons to the role of Te Pou Tupua; one each appointed by the Crown and the Iwi of the river. The purpose of the role is "to be the human face of Te Awa Tupua and act in the name of Te Awa Tupua" (s 18(s)). The Act also establishes a series of advisory, strategy and support bodies.

Te Urewera Act 2014 recognises the inherent spiritual value of Te Urewera and the relationship Tūhoe have with it – for example, section 3 of the Act notes:²⁰

¹⁶ See: <https://www.waitangitribunal.govt.nz/about-waitangi-tribunal/>

¹⁷ See: <https://www.waitangitribunal.govt.nz/inquiries/>

¹⁸ See: <https://www.govt.nz/browse/history-culture-and-heritage/treaty-of-waitangi-claims/settling-historical-treaty-of-waitangi-claims/>

¹⁹ Accessible at:

http://www.legislation.govt.nz/act/public/2017/0007/latest/DLM6830851.html?search=ts_act%40bill%40regulation%40deemedreg_te+awa+tupua_resel_25_a&p=1

²⁰ <http://www.legislation.govt.nz/act/public/2014/0051/latest/DLM6183609.html>

Te Urewera

(1) Te Urewera is ancient and enduring, a fortress of nature, alive with history; its scenery is abundant with mystery, adventure, and remote beauty.

(2) Te Urewera is a place of spiritual value, with its own mana and mauri.

(3) Te Urewera has an identity in and of itself, inspiring people to commit to its care.

Te Urewera and Tūhoe

(4) For Tūhoe, Te Urewera is Te Manawa o te Ika a Māui; it is the heart of the great fish of Maui, its name being derived from Murakareke, the son of the ancestor Tūhoe.

(5) For Tūhoe, Te Urewera is their ewe whenua, their place of origin and return, their homeland.

(6) Te Urewera expresses and gives meaning to Tūhoe culture, language, customs, and identity. There Tūhoe hold mana by ahikāroa; they are tangata whenua and kaitiaki of Te Urewera.

The Act makes clear that Te Urewera ceases to be vested in the Crown, ceases to be Crown land, and ceases to be a national park (s 12). Te Urewera is now managed not by the Department of Conservation but by the new Te Urewera Board. This Board is responsible “to act on behalf of, and in the name of, Te Urewera” (s 17(a)). Board members are appointed by the Crown and Tūhoe (s 21). The functions of the Board include giving effect to Tūhoe cultural values and concepts as well as to the Crown’s responsibilities under the Treaty of Waitangi (s 20).

While some positive – even ground breaking – outcomes such as these have been achieved through the Settlements process, some issues of concern have been raised regarding the process itself. These include in relation to:

- Government process being to negotiate and settle with ‘large natural groups’
- Processes for dealing with situations where different iwi have overlapping claims
- Processes around identifying those who are mandated to negotiate settlements.

Other lands and resources issues

While there has been considerable progress in settling claims of historical breaches of the Treaty, there continue to be issues around contemporary government actions, and the extent that they give effect to Māori rights to lands and resources or to free, prior and informed consent. Some current examples include:

a) Development of land

Indigenous group Save Our Unique Landscape (SOUL) has been campaigning against a major housing development set to take place on their traditional lands, Ihumātao. The development was approved under legislation designed to fast-track housing development and address housing shortages. Through this process a commercial developer has been obtained consent from the local council to build 480 houses on the land. In the case of Ihumātao, the land in question was confiscated by the Crown in the 1860s and granted to settlers, and has been in private ownership since.

In its 2017 Concluding Observations for New Zealand, the CERD Committee, noted conflicting information regarding the consultation with Māori that had been undertaken, and recommended that the Special Housing Area be reviewed to ensure its compliance with the Treaty and human rights standards, including the obligations of free, prior and informed consent.²¹

²¹ UN CERD (2017), *Concluding Observations: New Zealand*, CERD/C/NZL/CO/21-22, At para 18-19. Accessible at:

b) Extractive industries

In August, the Environmental Protection Authority (EPA) granted consent to a company to mine the seabed off the West Coast within New Zealand's exclusive economic zone, despite opposition by affected indigenous peoples.²²

Iwi organisations affected by the proposed mining expressed universal opposition to the proposal. Objections related to Iwi rights and interests in the region, along with strong environmental concerns. Iwi presented arguments based on the UNDRIP and Treaty of Waitangi, and in relation to the provisions of prior Treaty Settlements, as well as their cultural obligations, customary and commercial interests. The EPA decision was split 2:2 between the four members of the decision-making body, with the Chair making the casting vote to approve the application.

While acknowledging deficiencies in consultation, impacts on kaitiakitanga (responsibilities to the environment) and on the physical, cultural and spiritual impacts on the environment itself, the EPA did not consider these to be determinative within the framework of the relevant legislation (Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012). In its decision, the EPA attached conditions to the consent, including in relation to the establishment of a reference groups through which tangata whenua (indigenous peoples) could participate in monitoring the effects of the mining.

The alternative view of the two dissenting EPA members noted, among other things: the lack of engagement with tangata whenua was a serious deficiency; that the application did not adequately recognize the role of tangata whenua and undermines their relationship with their traditional territories, which would be significantly impacted by the mining.

A number of the Iwi groups involved in the process are appealing the decision. The appeal will be heard in April 2018. The Commission has been considering possible involvement in the appeal.

The National Iwi Chairs Forum (collective of indigenous leaders) at their November 2017 meeting, unanimously passed a motion expressing their opposition to seismic testing and oil exploration in New Zealand waters.²³

c) Rights to water

Māori rights in water remain the subject of ongoing discussions between the government and Māori, and of an Inquiry by the Waitangi Tribunal.

In recent years, the issue came to the fore in relation to the partial privatisation by government of a State-owned hydro-electric power company. In 2012 the NZ Māori

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD/C/NZL/C/O/21-22&Lang=En

²² Environmental Protection Authority, (August 2017), Decision on Marine Consents and Marine Discharge Consents Application: Trans-Tasman Resources Limited (EEZ000011).

Accessible at: <https://www.epa.govt.nz/public-consultations/decided/trans-tasman-resources-limited-2016/>

²³ Te Aniwa Hurihanganui, 'Iwi leaders unanimously oppose seismic testing', Radio NZ, 30 November 2017. Accessible at: <https://www.radionz.co.nz/news/te-manu-korihiri/345129/iwi-leaders-unanimously-oppose-seismic-testing>

Council filed an urgent claim with the Waitangi Tribunal seeking a recommendation that the Crown not proceed with the proposed partial sale.²⁴ After the hearing had been split into two parts, one urgent stage and one second stage full review of Māori interests in water, the Tribunal's urgent response in August 2012 concluded that Māori have interests in water in the nature of ownership.²⁵

While the Tribunal had recommended that the Crown convene a discussion with key Māori interests to determine a way forward,²⁶ ultimately the Crown delayed the sale of shares and held consultations with iwi.

This led to further court action culminating in a 2013 Supreme Court decision.²⁷ The Supreme Court addressed the question of whether the partial privatisation of the power company would impair to a material extent the Crown's ability to remedy any Treaty breach in respect of Māori interests in the River. The Court found that it would not. The Court took into account assurances given by the Crown that it would continue to exercise its Treaty obligations; acknowledgement that Māori have rights and interests in relation to particular waters; and government reviews underway at the time, aimed at addressing recognition of Māori rights.

The issue of water rights has continued to be a prominent issue in national discussions. Discussions between government and Māori have continued, including through the Freshwater Iwi Leaders Group, a subcommittee of the national Iwi Chair's Forum. A Protocol between Ministers and the Iwi Leaders Group identifies principles, scope of engagement and priority workstreams.

The Waitangi Tribunal continues its [Inquiry into Freshwater and Geothermal Resources](#). As at end 2017, the Inquiry had been adjourned in order for the Crown to receive instructions from the incoming government, and is expected to recommence in 2018.

Some further current issues concerning water include in relation to:

- Water quality and sustainable management and protection of waterways
- Access to drinking water for some communities, particularly in remote or rural areas
- Granting of permits to large commercial water users, for purposes such as irrigation, industrial use or for bottling and sale.

The new government's stated policies around these issues, include: to impose a royalty on large commercial water users, and to work with Māori to resolve issues regarding Māori rights in water.

²⁴ <https://www.waitangitribunal.govt.nz/inquiries/urgent-inquiries/national-fresh-water-and-geothermal-resources-inquiry/>

²⁵ Waitangi Tribunal, (2012), *Stage 1 Report on the National Freshwater and Geothermal Resources Claim*, Wai 2358, at p75. Accessible at: https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_59941926/Wai2358W.pdf

²⁶ *Ibid.*, at pp 143-144.

²⁷ *The New Zealand Maori Council and Others v The Attorney-General and Others* (SC 98/2012) [2013] NZSC 6.