

New Zealand's experience and indigenous issues in Australia

Ian Bowie (June 2020)

New Zealand is often held out as an example of 'race relations' that Australia might emulate.

This has been so particularly since publication of the *Uluru Statement* (2017) in which indigenous spokespeople sought: a 'Voice' to be enshrined in Australia's Constitution; a Commission legislated to supervise a process of agreement-making with Australian governments; and the Commission to oversee 'truth-telling' about Australia's history and colonisation.

Leaving the third ambit aside as something so vague as to endanger the very processes of uncovering and educating about what remains of the many cultures that were in Australia before European settlement, I wonder how much of New Zealand's experience could inform Australia on matters relating to the first two ambits of the *Uluru Statement*.

New Zealand has taken a more inclusive approach to indigenous issues than some would like for Australia. Reasons for this include the fact that unlike indigenous people in Australia, people with Māori backgrounds form large and fairly homogeneous minorities in much of New Zealand and majorities in a few communities and regions¹. Also, New Zealand has to consider substantial minorities with Pasifika or Asian backgrounds.

Nearly twenty percent of New Zealanders claimed Māori descent in New Zealand's 2018 Census², though only half of these identified as being of Māori or mixed-Māori ethnicities. The number of New Zealanders who speak Māori was smaller but still three times the number of Australians who claimed in its 2016 Census to speak any of Australia's disparate indigenous languages.

The greater ethnic homogeneity among Māori as compared with Australia's indigenous cultures/linguistic groups, despite more than two centuries of 'intermarriage', is suggested by Census data which shows a greater tendency for Māori than Australian indigenous people to marry within their ethnic affiliations^{3,4}.

But even more important than demography for New Zealand's approach to indigenous issues has been its history of constitutional development.

Constitutional law is about more than just what constitutes an entity but if we start with the constitution of the two countries, one (Australia) was created by an Act of the United Kingdom Parliament (the *Commonwealth of Australia Constitution Act 1900*) and the other (New Zealand) by an unusual treaty (the *Treaty of Waitangi* 1840) which by their representatives was between the British Crown and independent Māori tribes acting in concert.

It is argued by some that Australia should have such a treaty or treaties. Quite apart from questions as to whether such a treaty could be effected retrospectively in Australia (where many cultural/linguistic groups now exist in little more than name only), it seems doubtful that New Zealand's *Tiriti o Waitangi* has any more relevance to Australia than any other nineteenth century treaties made in other countries between indigenous people and colonial administrations.

New Zealand's Treaty consists of no more than a Preamble and three clauses written in Māori and English and by which the Chiefs of [most of] the Tribes of New Zealand ceded sovereignty to the British Crown in return for promises of protection and guarantees of indigenous rights. Ratified by

the British Government it was acknowledged then as New Zealand's founding document yet otherwise largely ignored, leading to widespread injustices and three decades of warfare.

In fact, the Treaty did not get Parliamentary recognition until New Zealand's *Treaty of Waitangi Act 1975*, and it was really the Treaty of Waitangi Tribunal established under that Act that has made possible resolution of many of the injustices. It is the Tribunal rather than the Treaty which might offer a model for settling indigenous grievances in Australia more comprehensively than is possible by Australia's National Native Title Tribunal established under the *Native Title Act 1993*.

It is also argued in Australia that indigenous rights should be enshrined in Australia's Constitution, meaning the Constitution originally enacted in London in 1900 and *patriated* to Australia in 1986. Since proposals for amendments in 2012 by an expert panel on Constitutional recognition of Indigenous Australians there has been active debate about amending this Constitution, such as to remove race-focussed provisions and to give a voice in it for indigenous people.

Contrary to popular belief, New Zealand has a written Constitution. As In Australia, this originated in United Kingdom legislation, the *New Zealand Constitution Act 1852*. This Act was in force until 1986 when New Zealand's Constitution also was *patriated* and when the New Zealand Parliament passed a new Constitution Act. Unlike the earlier one, the Constitution in New Zealand's *Constitution Act 1986* conspicuously makes no mention of anything to do with race or ethnicity.

Unlike Australia's, New Zealand's Constitution is brief, leaving more of the detail required to give it effect to Parliamentary legislation (such as the later *Bill of Rights Act 1990* and electoral legislation). Also, New Zealand's Parliament has been able since 1857 to amend both the Constitution and constitutional legislation more readily than Australia's, enabling it to be more flexible in addressing issues (even to the extent of abolishing its provinces, in 1876).

Neither of New Zealand's 1852 and 1986 Constitutions provided for a voice for Māori but its Parliament has legislated notably for Māori seats in Parliament (originally in the *Māori Representation Act 1867* and currently a matter of contention). Interestingly, barely half of those eligible today to enrol in Māori electorates (New Zealanders of Māori or mixed-Māori descent), choose to do so⁵.

Other examples of New Zealand legislation giving Māori a voice include for a Māori Council which advises Parliament (*Māori Social and Economic Advancement Act 1945* and *Māori Welfare Act 1962*) and a bookshelf of legislation relating to Māori rights since its first *Native Land Acts* of 1862 and 1865, the latter of which established a Māori Land Court.

Given the difficulties of amending Australia's nineteenth century Constitution whenever it is mistaken or irrelevant, I find it hard to see how an indigenous voice might be incorporated in it beyond references in a Preamble to the historical reality that the Commonwealth of Australia was formed out of Colonies that existed prior to 1900 and embraced [most of] the descendants of indigenous peoples who occupied the land before European settlement.

As I see it, the legislative pathway followed by New Zealand has been more flexible than Australia's and is to be preferred to the more legalistic and inflexible pathways implied in the Treaties and the Constitutional changes sought by some in Australia. However, as in Australia, some in New Zealand remain dissatisfied with the outcomes there, demanding self-determination for Māori.

New Zealand, like Australia, has ratified the United Nations *Declaration on the Rights of Indigenous People*, in which clauses 3 to 5 propose rights to 'self-determination' and 'autonomy' for indigenous

peoples⁶. However, like Australia with few indigenous people living in communities where they are ethnically dominant, it is hard to see how separate development can be possible in New Zealand.

Perhaps it is in New Zealand's long tradition of inclusive legislation rather than treaties and Constitutional change that Australia should look for solutions for the grievances of its indigenous peoples?

¹ https://www.creativespirits.info/aboriginalculture/land/aboriginal-homelands-outstations#Selected_statistics;
https://en.wikipedia.org/wiki/Demographics_of_New_Zealand#/media/File:NZCensus2013-Maori.png

² <http://nzdotstat.stats.govt.nz/>

³ Paul Callister, Robert Didham & Deborah Potter, *Ethnic Inter-marriage In New Zealand*, Statistics New Zealand Working Paper 2005. https://www.researchgate.net/publication/268285485_Ethnic_Inter-marriage_in_New_Zealand

⁴ It is unclear as to how many language groups, languages and dialects there were in Australia or how many Māori dialects there are but, as I understand it, Australia had many languages (and therefore cultural groups), making it analogous to Europe with many language groups and languages and dialects, while New Zealand with one indigenous language is analogous to Great Britain where English is the dominant language but with many dialects (and subcultures):

https://en.wikipedia.org/wiki/List_of_Australian_Aboriginal_languages

<https://aiatsis.gov.au/explore/articles/indigenous-australian-languages>

https://en.wikipedia.org/wiki/M%C4%81ori_language

⁵ [https://www.stats.govt.nz/information-releases/number-of-electoralates-and-electoral-populations-2018-](https://www.stats.govt.nz/information-releases/number-of-electoralates-and-electoral-populations-2018-census#download-data)

[census#download-data](https://www.stats.govt.nz/information-releases/number-of-electoralates-and-electoral-populations-2018-census#download-data) and <https://elections.nz/stats-and-research/enrolment-statistics/enrolment-by-maori-electorate/>

⁶ https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf