

# EXERCISING TINO RANGATIRATANGA IN SCHOOLING: WHERE IS CHANGE NEEDED?

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## ABSTRACT

*New Zealand's education system is sometimes criticised as being one-size-fits-all, despite efforts in recent decades to cater better for Māori. This paper considers how school-level education in Aotearoa, New Zealand could progress to enable Māori to exercise tino rangatiratanga, the preservation of which was promised by the Crown to Māori in Te Tiriti o Waitangi. It explores the legal and cultural concept of tino rangatiratanga and its application to education through the work of sociologists, jurisprudential thinking and international law. This exploration of tino rangatiratanga, which is to be used ahead of the western concept of self-determination, is then applied to identify implications for the existing provision of education. This paper finds if Māori are to be able to exercise tino rangatiratanga over education, they need to obtain real control of their schools and the curriculum they teach and be funded well enough not only to operate effectively, but to also address historic inequalities that continue to impact on learners today. The current legislative framework is not favourable to this, nor was the Kura Hourua Partnership School model, known colloquially in New Zealand as 'charter schools', both of which are considered in this article. With the ever-growing push by Māori for greater involvement in the education of their children, this paper advocates for a change in approach to help properly realise Te Tiriti o Waitangi.*

## I INTRODUCTION

‘Kohikohia ngā kākano, whakaritea te pārekereke, kia puāwai ngā hua – Gather the seeds, prepare the seedbed carefully, and you will be gifted with an abundance of food.’<sup>1</sup>

Cited by the Ministry of Education,<sup>2</sup> this whakatuakī is used to highlight the importance of education. The seedbed is a child and the abundance of food is a well-rounded and skilled person who graduates from their schooling knowing who they are.

There is substantial disagreement as to who is best to ‘prepare the seedbed’ – especially when it comes to how much input and control whānau, communities and central

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<sup>1</sup> Ministry of Education (NZ), *Te Whatu Pōkeka: Kaupapa Māori Assessment for Learning: Early Childhood Exemplars* (Learning Media, 2009) 53.

<sup>2</sup> Ibid.

government have. A tension exists, with some Māori viewing the current system as ‘a one size fits all’ model with ‘that size [being] Pakeha’.<sup>3</sup> In response, there is advocacy for much greater exercise of tino rangatiratanga over education to uphold Te Tiriti o Waitangi (‘Te Tiriti’).<sup>4</sup>

This paper aims to answer two questions:

1. Why is tino rangatiratanga prioritised ahead of self-determination?
2. How can Aotearoa New Zealand see tino rangatiratanga exercised in the provision of school level<sup>5</sup> education (‘schooling’)?

To answer these questions, this paper will explore the concept of tino rangatiratanga and how it relates to the provision of education through New Zealand jurisprudence, Te Ao Māori and international law.

## II TINO RANGATIRATANGA, NOT SELF-DETERMINATION

Self-determination when it comes to schooling is not new. However, when looking at the Aotearoa New Zealand and Māori context, the issue with the term self-determination (and other terms like devolution and self-governance) is that inherent in the term is that the powers and rights to self-determine are derived from, and are therefore subject or parallel with, an overriding state sovereignty – in New Zealand’s case, the sovereignty of the Crown.<sup>6</sup>

However, the inclusion of the term ‘tino rangatiratanga’ in Te Tiriti, which along with the English Treaty of Waitangi makes up one of New Zealand’s foundational constitutional documents,<sup>7</sup> challenges the notion that the powers and rights of Māori to self-determine can be subject to the Crown.<sup>8</sup>

Article II of Te Tiriti promised ‘tino rangatiratanga o ratou wenua o ratou kainga me o ratou taonga katoa’. Te Tiriti does not contain any definitions of the terms used within it.<sup>9</sup> Translated into English, the phrase can mean ‘paramount and ultimate power and authority over their lands, their villages and all their treasured possessions’.<sup>10</sup> However,

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<sup>3</sup> Peter Caccioppoli and Rhys Cullen, *Maori Education* (Kotahi Media, 2006) 9.

<sup>4</sup> Keaka Hemi, ‘Māori Education as Justice and Reckoning’ (2017) 15 *Yearbook of New Zealand Jurisprudence* 79, 96.

<sup>5</sup> Being primary and secondary level (Year 1 – 13) education.

<sup>6</sup> Valmaine Toki, ‘Māori Seeking Self-Determination or Tino Rangatiratanga?’ (2017) 5 *Journal of Māori and Indigenous Issues* 133, 143.

<sup>7</sup> See Waitangi Tribunal, *The Muriwhenua Fishing Report* (Wai 22, 1988) 173. New Zealand does not have a codified constitution. Sources for the constitution can be found amongst statute, convention, letters patent, international law and common law: see Phillip Joseph, *Constitutional & Administrative Law in New Zealand* (Thomson Brookers, 3rd ed, 2007) ch 5.

<sup>8</sup> See Ani Mikaere, ‘Seeing Human Rights Through Māori Eyes’ (2007) 10 *Yearbook of New Zealand Jurisprudence* 53, 57.

<sup>9</sup> In contemporary judicial consideration of tino rangatiratanga where, the Courts have dealt with the concept, they generally take their guidance from the work of the Waitangi Tribunal: see *Re Application by Tipene* [2016] NZHC 3199, [20].

<sup>10</sup> Margaret Mutu, ‘Constitutional Intentions: The Treaty of Waitangi Texts’ in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, 2010) 13, 25.

in te reo Māori,<sup>11</sup> tino rangatiratanga refers to the uniquely Māori concept that encompasses te Ao Māori approaches to leadership and governance which is more substantial than the western understanding of government.

Unhelpfully, the Treaty of Waitangi – written in English and more favourable to the Crown – promises ‘absolutely and without reservation all the rights and powers of Sovereignty to the Crown’.<sup>12</sup> Meanwhile, the equivalent article in Te Tiriti stated that Māori would cede ‘kāwanatanga’ to the Crown.<sup>13</sup> Kāwanatanga denotes a lesser term of political control when compared to tino rangatiratanga, and was quite possibly seen through the context of the Bible which used variations of kāwanatanga to describe the Roman Governor, Pontius Pilate.<sup>14</sup>

Further ambiguity arises from the historical context of the time; the overwhelming majority of rangatira<sup>15</sup> signed Te Tiriti and Māori were never likely to have agreed to the wholesale transfer of sovereignty through surrendering their tino rangatiratanga,<sup>16</sup> as to do so would have made ‘Māori society and culture ... almost meaningless’.<sup>17</sup> Additionally, five years earlier, under the watch of the Crown,<sup>18</sup> certain (predominately northern) Māori rangatira had used the term tino rangatiratanga to describe their sovereignty<sup>19</sup> in *He Whakaputanga*, which served as a declaration of independence and authority,<sup>20</sup> and is considered an antecedent to Te Tiriti.<sup>21</sup>

To address the conflict as to which text to give preference, the legal concept of *contra proferentem* is helpful, and endorsed by the Waitangi Tribunal.<sup>22</sup> Using the concept, Te Tiriti is the authoritative source because it contains the text that most rangatira believed they were agreeing to when they signed the document and the ambiguity around the surrender of sovereignty benefits Māori as they did not draft the document. This is also consistent with the Supreme Court of Canada’s ruling that the Crown ‘is always assumed ... [to] intend to fulfil its promises’ when it comes to treaties it has signed with indigenous populations.<sup>23</sup>

It is important to note that tino rangatiratanga is not a dormant concept, with the Crown promising to not only ‘enhance’ rangatiratanga as it was in 1840, but how it manifests itself today.<sup>24</sup> The High Court of New Zealand’s decision in *Taiaroa v Minister of Justice* was used as support for the tribunal’s position,<sup>25</sup> where Justice McGechan ruled

<sup>11</sup> The language of the Māori people which was used in Te Tiriti o Waitangi.

<sup>12</sup> *Te Tiriti o Waitangi 1840*, art 1.

<sup>13</sup> Matthew SR Palmer, *The Treaty of Waitangi in New Zealand’s Law and Constitution* (Victoria University Press, 2008) 62.

<sup>14</sup> *Ibid* 62–3.

<sup>15</sup> The leaders of hapū, the primary political unit in traditional Māori society. See John Patterson, *Exploring Maori Values* (Dunmore Publishing, 1992) 105.

<sup>16</sup> Mutu (n 10) 30–1.

<sup>17</sup> *Ibid* 32.

<sup>18</sup> Waitangi Tribunal *He Whakaputanga me Te Tiriti – The Declaration and the Treaty: Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) 154–5.

<sup>19</sup> *Ibid* 172 [4.4.2(1)].

<sup>20</sup> *Ibid* 154–5 [4.1.1].

<sup>21</sup> *Ibid* 521 [10.3.4(3)].

<sup>22</sup> Waitangi Tribunal *Report of the Waitangi Tribunal on the Orakei Claim* (Wai 9, 1987) 180 [11.3.1].

<sup>23</sup> *R v Badger* [1996] 1 SCR 771, 719 [41].

<sup>24</sup> Waitangi Tribunal, *Te Whanau o Waipareira Report* (Wai 414, 1998) 25 [1.5.4(4)].

<sup>25</sup> *Ibid*.

that tino rangatiratanga ‘[adapted] as time passed and the combined society developed’.<sup>26</sup>

Therefore, tino rangatiratanga is the appropriate concept to work with when considering the provision of education in Aotearoa New Zealand because it more accurately deals with what was agreed to in Te Tiriti and it acknowledges the uniqueness of Māori to the country.

### III EDUCATION AS PART OF TINO RANGATIRATANGA

It is important to note that tino rangatiratanga is more than a political or legal concept.

Margaret Mutu explains that rangatiratanga involves spiritual aspects that human-delegated sovereignty does not express.<sup>27</sup> While sharing similarities with sovereignty or self-determination, rangatiratanga is the exercising of leadership to keep people together and enhance the mana<sup>28</sup> of the people that the leader has responsibility for so they can prosper.<sup>29</sup> Mutu’s explanation in effect endorses the position of the New Zealand Māori Council’s 1983 *Kaupapa: Te Wahanga Tuatahi* which adds that the term is not static and represents the ‘moral contract’ between a leader, their people and the gods to wisely administrate for the benefit of the group.<sup>30</sup> As such, tino rangatiratanga guides the ‘power, control, sharing and authority’ arrangements that govern relationships within Māori society.<sup>31</sup>

Tino rangatiratanga also embraces the principle of mana motuhake<sup>32</sup> which enables iwi, hapū<sup>33</sup> and whānau<sup>34</sup> to make their own decisions, using their political structure to determine their futures by exercising control of their resources and creating of policy to govern their affairs.<sup>35</sup> The Waitangi Tribunal<sup>36</sup> in the *Taranaki Report* reported that Article II of the Te Tiriti o Waitangi recognises this autonomy.<sup>37</sup> This autonomy extends to non-traditional groups, with the Waitangi Tribunal finding that organisations that care

<sup>26</sup> *Taiaroa v Minister of Justice* (HC Wellington CP99/94, 4 October 1994) 69.

<sup>27</sup> Mutu (n 10) 26.

<sup>28</sup> A gift from the gods. See Patterson (n 15) 107.

<sup>29</sup> Mutu (n 10) 26.

<sup>30</sup> New Zealand Māori Council, *Kaupapa: Te Wahanga Tuatahi* (1983) 5.

<sup>31</sup> Mason Durie ‘Tino Rangatiratanga’ in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited* (Oxford University Press, 2005) 1, 6.

<sup>32</sup> Autonomy and control. See Waitangi Tribunal, *Whaia Te Mana Motuhake/In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Wai 2417, 2015) 2 [1.3] (‘Report on the Māori Community Development Act Claim’).

<sup>33</sup> Iwi and hapū are political entities that Māori commune in, generally having a tie to a specific locale and a common ancestor. See Palmer (n 13) 33.

<sup>34</sup> Families, the most basic unit of Māori society, being a distinguishable group of descendants of a contemporary ancestor within an iwi or hapū who share responsibilities, and obligations, to each other. See Chris Cunningham, Brendan Stevenson and Natasha Tassel *Analysis of the Characteristics of Whānau in Aotearoa* (Report, May 2005) 14–15 [6.2].

<sup>35</sup> Durie (n 31) 7–8.

<sup>36</sup> A judicial body established to consider claims from Māori when they consider their treaty rights are “prejudicially affected” by Crown actions. See *Treaty of Waitangi Act 1975* (NZ) s 6.

<sup>37</sup> Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wai 143, 1996) 5 [1.4].

and account for the interests of Māori in a geographic area,<sup>38</sup> or at a national level,<sup>39</sup> in accordance with tikanga Māori<sup>40</sup> are deserving of the same recognition as traditional iwi in regards to tino rangatiratanga.<sup>41</sup>

The Waitangi Tribunal has provided several ‘robust and [substantial] ... unambiguous legal statements’ about the role of education in the exercise of tino rangatiratanga.<sup>42</sup>

While considering the application of tino rangatiratanga in the tertiary context as part of its decision in the *Wananga Capital Establishment Report*, the Waitangi Tribunal established that control of education was a ‘vital exercise’ of tino rangatiratanga.<sup>43</sup> The report concluded this as providing for education was, and continues to be, part of meeting the responsibilities placed on iwi, hapū and whānau leaders to maintain the mana of their communities.<sup>44</sup> This was supported by historic evidence that demonstrated that education served a key role in upholding Māori society prior to colonisation, with ‘the proper maintenance and transmittal of knowledge to succeeding generations [being] vital to the survival of iwi and hapū’.<sup>45</sup> Consequently, iwi, hapū and whānau ‘maintained various institutions for [knowledge] preservation and its dissemination at different levels’.<sup>46</sup>

In *The Mōkai School Report*, the Waitangi Tribunal further added that ‘the welfare of the children’ cannot be separated ‘from the welfare of the community, nor the role of the school from the role of ... marae and village, which are also critical elements in the community’s survival.... [The] education of [Māori] children into their own community is a responsibility of tino rangatiratanga’.<sup>47</sup>

Additionally, with education playing a critical role in the teaching, and ultimately the survival of te reo Māori – which is considered ‘the core of ... Māori culture and mana’<sup>48</sup> – the Waitangi Tribunal stressed in its *Matua Rautia: Report on the Kōhanga Reo Claim* that Māori educational initiatives to support te reo Māori are an exercise of tino rangatiratanga that should not be undermined.<sup>49</sup>

The Waitangi Tribunal is due to hold a full enquiry into the whole of the education system and its outcomes within the next few years.<sup>50</sup> Additionally, in late 2022, an

<sup>38</sup> See *Te Whanau o Waipareira Report* (n 24) 79 [7.4].

<sup>39</sup> Waitangi Tribunal, *Matua Rautia: Report on the Kōhanga Reo Claim* (Wai 2336, 2012) 93 [3.2.4(3)] (‘*Kōhanga Reo Report*’).

<sup>40</sup> The customary values system, observances and practices of Māori. See Law Commission *He Poutama* (NZLC SP24, 2023).

<sup>41</sup> *Te Whanau o Waipareira Report* (n 24) 235-6 [8.4].

<sup>42</sup> Hemi (n 4) 95-6.

<sup>43</sup> Waitangi Tribunal, *Wananga Capital Establishment Report* (Wai 718, 1999) 48 [5.7] (‘*Wananga Capital Establishment Report*’).

<sup>44</sup> *Ibid* 4 [2.2].

<sup>45</sup> *Ibid*.

<sup>46</sup> *Ibid*.

<sup>47</sup> Waitangi Tribunal, *The Mōkai School Report* (Wai 789, 2000) 11 [1.5.3] (‘*Mōkai School Report*’).

<sup>48</sup> Waitangi Tribunal, *Report of the Waitangi Tribunal on the Te Reo Maori Claim* (Wai 11, 1986) 34 [6.1.21].

<sup>49</sup> *Kohanga Reo Report* (n 39) 326 [11.3.2].

<sup>50</sup> The enquiry is currently third in the queue for consideration by the Tribunal. See ‘Appendix B. The kaupapa inquiry programme’, *Waitangi Tribunal* (Web Page, January 2021) <<https://www.waitangitribunal.govt.nz/assets/Kaupapa-inquiry-programme-App-B-updated-Jan-2021.pdf>>.

application for urgency for a claim regarding the Crown's reforms to the schooling system was granted.<sup>51</sup> Hearings were held in 2023<sup>52</sup> and the Waitangi Tribunal is due to report its findings in the near future.<sup>53</sup> These considerations may very well provide further useful statements on this topic, especially in the context of primary and secondary schooling. In the meantime, however, the already existing findings of the Waitangi Tribunal clearly establish an inherent connection between the exercise of tino rangatiratanga and the provision of education.

#### IV TINO RANGATIRATANGA AND THE EXISTING LEGISLATIVE FRAMEWORK

The *Education and Training Act 2020* ('the Act') provides the framework for the operation of schools in Aotearoa New Zealand.

The vast majority of these schools receive public funding.<sup>54</sup> In return for public funding, the legislative framework vests major decision making in the Crown (through the Minister of Education and the Secretary for Education),<sup>55</sup> controls the schools' ability as to who it can employ,<sup>56</sup> and constitutes them as special Crown Entities, accountable to the Crown with elected boards that are not required to have representatives of iwi, hapū or whānau on them.<sup>57</sup> It also, by way of s 90 of the Act, dictates what these schools should teach through curriculum statements made by way of the Minister of Education. These statements are published as the *New Zealand Curriculum* and *Te Marautanga o Aotearoa*, the latter being the statement for Māori medium schools.<sup>58</sup> Compliance with the statements is enforced through regular performance evaluations by the Education Review Office, who are used to ensure that the curriculum is being taught to the Crown's satisfaction.<sup>59</sup>

These boards can only exercise the powers given to them by ss 118–137 of the Act. These are primarily functional governance powers, in which a school board is able to set strategic goals and school-wide policy and hold employee management to account<sup>60</sup> in the areas of student achievement (which is measured against the curriculum set by the Crown under s 90 of the Act), health and safety of the learning environment, giving effect to Te Tiriti, and the use of the money and property of the school.<sup>61</sup>

<sup>51</sup> Waitangi Tribunal *Kura Kaupapa Māori (Dewes) Claim* (Wai 1718, #2.5.015) 104 [118].

<sup>52</sup> Waitangi Tribunal, 'Kura Kaupapa Urgent Inquiry' 80 (July 2023) *Te Manutukutuku* 5, 5.

<sup>53</sup> The report had not been released at the time of publication.

<sup>54</sup> Only 5% of school students in New Zealand attend a private school, see New Zealand Institute of Economic Research, *Independent schools: What would a smart state do?* (Report, June 2020).

<sup>55</sup> See *Education and Training Act 2020* (NZ) s 171.

<sup>56</sup> *Ibid* s 92.

<sup>57</sup> *Ibid* ss 119, 153.

<sup>58</sup> See generally 'New Zealand Curriculum', *Ministry of Education* (NZ) (Web Page, 27 November 2023) <<https://parents.education.govt.nz/primary-school/learning-at-school/new-zealand-curriculum>>.

<sup>59</sup> Dominic O'Sullivan, 'Māori Education and Principles of Self-Determination in the Twenty- First Century' (2001) 7 *Waikato Journal of Education* 157, 163.

<sup>60</sup> Usually the Principal.

<sup>61</sup> 'An introduction to school boards', *NZSTA Resource Centre* (Web Page) <<https://www.nzstaresourcecentre.org.nz/helpforboards?aId=ka00o000000pO7KAAU>>.

The Waitangi Tribunal has found that the Act<sup>62</sup> is one that ‘[tilts] the balance between kāwanatanga and tino rangatiratanga firmly in favour of the Crown’,<sup>63</sup> and has seen the Crown fail to give ‘sufficient consideration to how it may fulfil its Treaty obligations’.<sup>64</sup> The legislation is also critiqued as preventing iwi-, hapū- and whānau-led education initiatives from adapting ‘to meet changing times and changing needs’.<sup>65</sup> The issues with the existing framework are evidenced by the current situation facing iwi, hapū and whānau under the framework.

Most Māori students<sup>66</sup> have to attend<sup>67</sup> a publicly funded state or state-integrated school which teaches using the mainstream western pedagogical approach in English (‘English-medium schools’). The 2019 report of the Tomorrow's Schools Independent Taskforce (‘the 2019 Taskforce’) found ‘real [challenges]’ in English medium schools due to iwi and hapū interests not being able to be ‘adequately [represented]’ in the governance of the school due to the way boards are constituted under the Act.<sup>68</sup> Additionally, in a 2022 report by the Ministry of Education’s Te Pae Roa oversight group – which undertook a nationwide consultation to prepare its report – documented that participants expressed significant ‘concern at the Crown’s assumed ownership and governance over ... mātauranga Māori delivered’ in English-medium schools through the promulgation of the curriculum.<sup>69</sup> To this, Māori learners and their families in these schools often report a lack of commitment to te reo Māori, attitudes that undervalue, or outright belittle Māori individuals and their culture<sup>70</sup> and a curriculum and pedagogy that fails to properly engage Māori learners.<sup>71</sup> There is a frustration, as Professor Graham Smith has put it, that the Act ultimately, ‘no matter how much emphasis is given to adjusting, adding or initiating programmes to meet [Māori] needs, [makes them] subject to dominant interests’.<sup>72</sup>

The legislative framework does provide for state-funded Māori-medium Kaupapa Māori schools. Around 15% of Māori students<sup>73</sup> attend either a:

<sup>62</sup> Most existing analysis by the Tribunal was done with reference to the *Education Act 1989* (NZ), which the *Education and Training Act 2020* (NZ) replaced. The 2020 Act was described as “tidying up” education legislation (see then Minister of Education Chris Hipkins’ comments at (4 June 2013) 743 NZPD 15648) and, for the most part, the provisions of concern to the Tribunal have remained.

<sup>63</sup> *Mōkai School Report* (n 47) 131 [4.8.2]

<sup>64</sup> *Ibid* 124 [4.4.2]; See also *Kōhanga Reo Report* (n 39).

<sup>65</sup> Waitangi Tribunal, *The Report on the Aotearoa Institute Claim Concerning Te Wānanga o Aotearoa* (Wai 1298, 2005) 50 [5.1] (‘*Report Concerning Te Wānanga o Aotearoa*’).

<sup>66</sup> Ministry of Education, (NZ) *Ngā Haeata o Aotearoa: Ka Hikitia 2019 Report* (Report, July 2020) 8 (‘*Ka Hikitia 2019 Report*’); Students may learn in Te Reo Māori up to 12.5 hours per week: at 32.

<sup>67</sup> Tomorrow’s Schools Independent Taskforce, *Our Schooling Futures: Stronger Together Whiria Ngā Kura Tūātititini* (Final Report, September 2019) 50 (‘*Our Schooling Futures*’).

<sup>68</sup> *Ibid* 22.

<sup>69</sup> Te Pae Roa, *The Future of Kaupapa Māori and Māori medium education* (Report, April 2022) 5 [22] (‘*Te Pae Roa Report*’).

<sup>70</sup> Alex Barnes et al., ‘Critical issues for whānau in English-medium schools’ (2012) 2 *Set: Research Information for Teachers* 12, 16.

<sup>71</sup> *Ibid* 17.

<sup>72</sup> See Geroge Hingangaroa Smith, ‘The Politics of Reforming Maori Education: The Transforming Potential of Kura Kaupapa Maori’ in Hugh Lauder and Cathy Wylie (eds) *Towards Successful Schooling* (Routledge, rev ed, 2012) 73, 80.

<sup>73</sup> See *Ka Hikitia 2019 Report* (n 66).

- *Kura Kaupapa Māori*,<sup>74</sup> which are established under s 201 of the Act and use the principles of Te Aho Matua (a shared philosophy of teaching in a te Ao Māori context),<sup>75</sup> or
- *Kura-a-iwi*, which are designated character schools,<sup>76</sup> teaching according to the iwi's local philosophy.<sup>77</sup>

While achieving better educational outcomes for their students than their Māori peers in English-medium schools,<sup>78</sup> they are still within the framework of the Act, and the restrictive provisions previously mentioned that apply to English-medium schools also apply to them. Notably, the Minister of Education has total discretion as to whether a Kura Kaupapa Māori, or a Kura-a-iwi designated character school, is established or not.<sup>79</sup>

As a result, there is an emerging belief that Kaupapa Māori schools have not been 'enhanced' by, but have 'succeeded [in spite] of', the legislative framework.<sup>80</sup> The 2019 Taskforce went so far as to recommend the establishment of a parallel pathway, as the taskforce saw it as 'impossible to meet the Crown's obligations under Te Tiriti o Waitangi without [it]'.<sup>81</sup> The taskforce also referred to widespread 'frustration' from Kaupapa Māori schools from having to fit into the model of governance required by the Act.<sup>82</sup> Additionally, Te Pae Roa reported that none of the Māori leadership groups, or individuals who attended their regional hui, supported 'the Ministry of Education continuing to govern the Māori education continuum'<sup>83</sup> and expressed strong support for Māori exercising their 'tino rangatiratanga' and 'mana motuhake over ... the current and future direction' of Māori-medium education'.<sup>84</sup>

The dissatisfaction with the existing legislative framework adds further weight to the Waitangi Tribunal's findings that the existing framework is unsatisfactory when it comes to iwi, hapū and whānau exercising tino rangatiratanga over the provision of schooling. The current system, which reserves the most consequential decisions for the Crown, strips iwi, hapū and whānau of their ability to make the meaningful decisions, and undertake the actions, that would allow them to exercise tino rangatiratanga – effectively doing the 'job ... for them before they [are] even allowed to think'.<sup>85</sup>

Being inconsistent with Te Tiriti, how does the existing framework need to change to

<sup>74</sup> Kura Kaupapa Māori trace their origins to the Kōhanga Reo movement of the 1980s and its goals of protecting te reo Māori and creating a schooling option that caters for the needs of Māori children, see Smith (n 72) 78.

<sup>75</sup> 'Official Version of Te Aho Matua o ngā Kura Kaupapa Māori and an explanation in English' (22 February 2008) 32 *New Zealand Gazette* 73, 740.

<sup>76</sup> Constituted under s 204 of the *Education and Training Act 2020* (NZ).

<sup>77</sup> Te Pou Mataaho | Evaluation and Research Māori, Education Review Office (NZ), 'Hi Iho Ruruku - Ngā Kura ā Iwi perspectives' (Research Report, Education Review Office (NZ), 28 January 2022) 4.

<sup>78</sup> Ministry of Education, (NZ) *Ngā Haeata o Aotearoa: 2020 Report* (Report, July 2020) 31–5.

<sup>79</sup> *Education and Training Act 2020* (NZ) ss 201(2), 204(2).

<sup>80</sup> Peter Appleby 'Kura Kaupapa Maori: Tomorrow's Schools and Beyond' [2002] 11 *New Zealand Annual Review of Education* 105, 118.

<sup>81</sup> Our Schooling Futures (n 67) 63.

<sup>82</sup> Ibid 22.

<sup>83</sup> Te Pae Roa Report (n 69) 5 [17].

<sup>84</sup> Ibid 5 [24].

<sup>85</sup> O'Sullivan (n 59) 162.



allow greater exercise of tino rangatiratanga by iwi, hapū and whānau?

## V EXERCISING TINO RANGATIRATANGA – WHERE IS CHANGE NEEDED?

### A Control

Dominic O’Sullivan posits that ‘the ultimate realisation of [tino rangatiratanga] is the ability of Māori families and individuals to take control of the education of their children’<sup>86</sup> by way of ‘[recovering] ... primary responsibility for making decisions about what should be taught, to whom and by whom’.<sup>87</sup>

This is consistent with the United Nations Declaration on the Rights of Indigenous Peoples (‘UNDRIP’) which, while not been codified into legislation,<sup>88</sup> has through the international law concept of opinion juris<sup>89</sup> become a potential relevant factor for the court to consider, and is being applied by New Zealand courts.<sup>90</sup> The Waitangi Tribunal has also relied upon the declaration as a tool to ‘[assess] the Crown’s actions’.<sup>91</sup> UNDRIP is not an instrument that ‘reinvents the wheel’ but a ‘repetition’ of Te Tiriti<sup>92</sup> and can serve as a guide to honouring the promises contained within it – like that of tino rangatiratanga.

UNDRIP holds that indigenous people, like Māori, have ‘the right to freely ... pursue their ... social and cultural development’,<sup>93</sup> have ‘autonomy ... in matters relating to their internal and local affairs’<sup>94</sup> and to ‘establish and control their educational systems and institutions providing education ... appropriate to their cultural methods of teaching and learning’.<sup>95</sup>

The Waitangi Tribunal has consistently called for iwi and hapū control over educational entities as part of the exercise of tino rangatiratanga since it first endorsed the idea in its

<sup>86</sup> Ibid.

<sup>87</sup> Ibid 165.

<sup>88</sup> *Ngāti Whātua Ōrākei Trust v Attorney-General* [2017] NZHC 389, [111].

<sup>89</sup> See Siegfried Wiessner, ‘Indigenous self-determination, culture and land: a reassessment in light of the 2007 UN Declaration on the Rights of Indigenous Peoples’ in Elvira Pulitano (ed) *Indigenous Rights in the Age of the UN Declaration* (Cambridge University Press, 2012, New York) 31, 42.

<sup>90</sup> See *New Zealand Māori Council v Attorney-General* [2013] NZSC 31, [92]; *Taranaki-Whanganui Conservation Board v Environmental Protection Authority* [2018] NZHC 2217, [234]–[237]; *Te Ara Rangatū O Te Iwi O Ngāti Te Ata Waiohū v Attorney-General* [2018] NZHC 2550, [67]; *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17, [491]. This approach is based off the principle that while UNDRIP is not binding, the nation has expressly supported it and is also party to the human rights instruments that the declaration is based upon: *Takemore v Clark* [2011] NZCA 587, [253].

<sup>91</sup> *Report on the Māori Community Development Act Claim* (n 32) 38 [2.5.4(3)]; 391–3, [10.6.2]. See also Waitangi Tribunal, *Kāinga Kore: The Stage One Report of the Housing Policy and Services Kaupapa Inquiry on Māori Homelessness* (Wai 2570, 2023) 129 [4.3.1.1].

<sup>92</sup> Naida Glavish, ‘Whānau, hapu and iwi’ in Selwyn Katene and Rawiri Taonui (eds) *Conversations about Indigenous rights: the UN Declaration on the Rights of Indigenous Peoples in Aotearoa New Zealand* (Massey University Press, 2018) 67, 72.

<sup>93</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res A/RES/61/295 (2 October 2007, adopted 13 September 2007) 3.

<sup>94</sup> Ibid 4.

<sup>95</sup> Ibid 14.

1999 consideration of the *Wananga Capital Establishment Report* – the first wholly education claim it considered. The Tribunal opined that ‘[rangatiratanga] involves, at the very least, a concept of tribal self-management’.<sup>96</sup> In the later *Matua Rautia: Report on the Kōhanga Reo Claim*, the Crown was advised it needed to ‘provide for a high degree of autonomy and control’.<sup>97</sup>

What this indicates is that for tino rangatiratanga to be properly exercised, control needs to be given to iwi, hapū and whānau and it needs to be more than the control supposedly provided by the existing legislative framework.

A key area that needs to be given control over is that of curriculum and pedagogy. O’Sullivan argues that tino rangatiratanga can be enhanced by a ‘flexible but rigorous ... approach to curriculum and pedagogy’ that allows iwi and hapū to determine ‘what should be taught and how it should be taught’.<sup>98</sup> Ultimately, the Crown would need to relinquish some of the powers it has under s 90 of the Act in order for this to be achieved. By loosening the legal requirement so iwi-, hapū- and whānau-led schools do not have to choose between teaching the New Zealand Curriculum, or Te Marautanga o Aotearoa, or losing their funding, would allow for the ability to set and determine their own curriculum and which pedagogical approaches to use in teaching that curriculum ‘according to the philosophy and aspirations of the iwi and all the communities of interest associated with it’.<sup>99</sup> By being able to embrace their cultural methods of teaching and learning for the betterment of their students, and ultimately their community, tino rangatiratanga would be able to be exercised<sup>100</sup> and the Crown would act in accordance with Te Tiriti when it comes to the provision of education for Māori.

In order to avoid ‘[injury] to the common good’, a breach of ‘its fiduciary duty to Māori’ and, what O’Sullivan alludes to as risk of ‘factional interest groups within communities’ who could be empowered without scrutiny, the Waitangi Tribunal believes that the Crown does retain a kāwanatanga right to oversight to ‘ensure that resources are used in ... an effective way. However, this must be done in a way that ‘does not undermine the rangatiratanga rights of Māori’.<sup>101</sup>

Additionally, the success of teaching a curriculum is inherently influenced by the operational decisions that occur around it.<sup>102</sup> Operational control being handed over to iwi, hapū and whānau is integral to tino rangatiratanga. Without it, the aims and aspirations for their communities expressed in their curriculum and chosen pedagogy are likely to be stymied by the Act which relies on a one-size-fits all western approach to education antithetical to these goals.<sup>103</sup> O’Sullivan notes that exercising tino rangatiratanga includes ‘[establishing] the means by which to achieve those expectations’ and this cannot be done if the power to make supporting operational decisions, especially those that impact on their students, curriculum and pedagogy, is

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<sup>96</sup> *Wananga Capital Establishment Report* (n 43) 47 [5.5].

<sup>97</sup> *Kōhanga Reo Report* (n 39).

<sup>98</sup> O’Sullivan (n 59) 163.

<sup>99</sup> *Report Concerning Te Wānanga o Aotearoa* (n 65).

<sup>100</sup> *Wananga Capital Establishment Report* (n 43) 47 [5.5].

<sup>101</sup> *Ibid.* See also O’Sullivan (n 59) 163.

<sup>102</sup> See generally Njabulo Sithole ‘Promoting a positive learning environment: school setting investigation’ (MEd Dissertation, University of South Africa, 2017).

<sup>103</sup> See Smith (n 72) 79.

not able to be exercised.

The parameters for just how much control should be given to iwi, hapū and whānau are likely the same as those set out for iwi- and hapū-run tertiary providers, as set out in *The Report Concerning Te Wānanga o Aotearoa*. The Crown, in exercising its kāwanatanga role, should not interfere with a iwi, hapū or whānau school unless ‘through inadequate governance and financial mismanagement, it faces serious difficulties’.<sup>104</sup> The definition of a *serious* difficulty would be determined in line with the Crown’s obligations under Te Tiriti.

Tino rangatiratanga over the provision of education involves iwi, hapū or whānau having control of their curriculum and pedagogical approaches within schools that they can control appropriate to achieving their goals and aspirations. The Crown would only intervene in operations in serious situations of mismanagement, or where the curriculum and associated pedagogical approach is not effective (albeit based on a measure of effectiveness that respects tino rangatiratanga). Whether that is through the parallel system proposed by the 2019 Taskforce or not is beyond this conclusion, as ultimately the more finite details, such as the model, need to be led and made by iwi, hapū and whānau themselves, conscious of the needs of their own communities.<sup>105</sup> Such an approach is consistent with tino rangatiratanga.

## B Funding

Iwi, hapū and whānau cannot be expected to take control over curriculum, pedagogy and operations without financial support.

In *Ko Aotearoa Tēnei: Te Taumata Taurua*, the Waitangi Tribunal noted that the Crown has a general responsibility under Te Tiriti to provide ‘the necessary ... financial support’ to the development and success of Māori initiatives to maintain and revitalise Māori culture.<sup>106</sup> It went as far to say when policy is being developed, it should see ‘the funding allocated ... be whatever is sufficient to implement the policy’.<sup>107</sup> This includes making ‘amends for the assimilationist policies of the past’.<sup>108</sup> Due to the unique place of Māori as being the indigenous population of New Zealand, ‘a reasonable degree of preference’ is also to be given to Te Reo Māori ahead of other ‘minority’ language initiatives.<sup>109</sup>

With relation to the education initiatives, *The Wananga Capital Establishment Report* found the Crown has an obligation to ‘foster, support and assist’ the efforts of those establishing wananga financially.<sup>110</sup> The Crown can then breach ‘the guarantee of rangatiratanga under [Te Tiriti]’ by way of funding arrangements for Māori education

<sup>104</sup> See *Report Concerning Te Wānanga o Aotearoa* (n 65).

<sup>105</sup> See also Waitangi Tribunal, *Ko Aotearoa Tēnei: Te Taumata Taurua* (Wai 262, 2011) 450 [5.5.3(1)] (*‘Ko Aotearoa Tēnei’*).

<sup>106</sup> Ibid; O’Sullivan (n 59) 165.

<sup>107</sup> *Ko Aotearoa Tēnei* (n 105) 452 [5.5.3(4)].

<sup>108</sup> Ibid 556 [6.4.4(2)].

<sup>109</sup> Ibid 442 [5.5.1(2)].

<sup>110</sup> *Wananga Capital Establishment Report* (n 43).

initiatives that disadvantage them in relation to non-Māori education initiatives.<sup>111</sup>

Additional weight to this position is given by the work of the 1996 Canadian Royal Commission on Aboriginal Peoples ('the Royal Commission'), which also considered control over education within treaty promises made by the colonising Crown.<sup>112</sup> The Royal Commission came to the same conclusion with regard to First Nations people as the Waitangi Tribunal did, considering funding to be integral to honouring the treaty promises regarding education.<sup>113</sup> It called for 'support [to develop] ... aboriginally controlled education systems', with funding that acknowledges the need for 'program development, [the costs] of serving small or disperse communities and special needs accruing from past failures of education services'.<sup>114</sup>

What the Waitangi Tribunal, and the Royal Commission, identify is that funding is integral to the success of an indigenous population when it comes to taking control of education. Funding must also factor in the intergenerational inertia that comes from failures in education for indigenous populations. This means, in a move to recognise tino rangatiratanga through curriculum, pedagogy and operational control in the provision of schooling, the Crown cannot simply adapt existing funding arrangements. Tino rangatiratanga conscious funding needs to acknowledge that iwi, hapū and whānau would be:

- (often) developing, from scratch, a curriculum that is aligned with the philosophy and aspirations of their iwi, hapū or whānau, which needs to then be maintained;
- part of the maintenance and revitalisation of Te Reo Māori;
- overcoming persistent disadvantage caused by colonialism and breaches of Te Tiriti, which have manifested itself in poorer educational outcomes for Māori learners; and
- guided by the concept of tino rangatiratanga which may result in decisions and operational models that are consistent with Tikanga Māori but go against mainstream western concepts such as economies of scale or rationalisation.<sup>115</sup>

Essentially, if tino rangatiratanga is to be exercised over the provision of education, it must be set up with funding that would let it succeed. The absence of an appropriate funding model, that is designed with the intent to uphold tino rangatiratanga, could ultimately set up any arrangement to become another breach of Te Tiriti.

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<sup>111</sup> *Kōhanga Reo Report* (n 39) 225 [8.3.1(4)].

<sup>112</sup> Shelia Carr-Stewart, 'A Treaty Right to Education' (2001) 26 *Canadian Journal of Education/Revue canadienne de l'éducation* 125, 128–30.

<sup>113</sup> Canada, Royal Commission on Aboriginal Peoples, *Volume 3 – Gathering Strength* (Ottawa: Canada Communication Group, 1996) 413.

<sup>114</sup> *Ibid* 414.

<sup>115</sup> For example, it would be inappropriate to expect that iwi or hapū in a geographic area share resources to save costs just because of their proximity to each other.

## VI WERE CHARTER SCHOOLS THE SOLUTION?

Control by iwi, hapū and whānau over curriculum, pedagogy and operations, with appropriate funding to support them, have been identified as key factors in the exercise of tino rangatiratanga in the provision of school level education in Aotearoa New Zealand.

As an exercise, we can analyse the Partnership Schools Kura Hourua ('charter school') model as operated in New Zealand between 2013 and 2018 against these factors. Nine iwi ('sponsors') utilised the charter school model while it was in operation<sup>116</sup> – did the model itself allow for the exercise of tino rangatiratanga for these sponsors?

### *A A model that empowered the exercise of Māori control over the provision of education*

The model received an early and high profile endorsement from Dr Toby Curtis of the Iwi Education Authority of Ngā Kura ā Iwi o Aotearoa, who gave his 'total and unequivocal support for their establishment'<sup>117</sup> due to way the model gave options the existing system did not.<sup>118</sup> He noted that the model would complement the Kaupapa Māori education models they were using.<sup>119</sup> This is consistent with a line of thinking amongst Māori educational activists to see Kaupapa Māori schools 'no longer [requiring] the mainstream "nod of approval"'<sup>120</sup> since 'Kaupapa [Māori] schooling by its mere presence, demands that dominant Pakeha interest groups relinquish power and resources to [Māori] people to enable [Māori] people to take greater control over their own lives'.<sup>121</sup>

Māori control was visible in how the model let the sponsors utilising the model determine their own curriculum (and the pedagogy that supported it) with very little interference from the Crown.<sup>122</sup> These schools effectively enjoyed an opt out of the then s 60A of the *Education Act 1989*,<sup>123</sup> with the Crown expecting non-traditional curricula<sup>124</sup> and stipulating at law that a proposed curriculum only needed to be benchmarked off the standards in the New Zealand Curriculum, or Te Marautanga o Aotearoa.<sup>125</sup> Beyond this, the sponsor's curriculum was only scrutinised by the Crown

<sup>116</sup> See 'Former Charter Schools', *Ministry of Education (NZ)* (Web Page, 22 April 2022) <<https://www.education.govt.nz/our-work/information-releases/information-releases-from-2018/partnership-schools-kura-hourua-information-release/former-charter-schools>>.

<sup>117</sup> Toby Curtis, Submission to the Education and Science Select Committee, Parliament of New Zealand (2012) 2 [1.7].

<sup>118</sup> Ibid 1–2 [1.4]–[1.8].

<sup>119</sup> Ibid 5 [4.8].

<sup>120</sup> Andrew Vercoe, 'Resistance in Māori Education' (1994) 1 *Waikato Journal of Education* 119, 130.

<sup>121</sup> Smith (n 72) 82.

<sup>122</sup> Martin, Jenkins and Associates, *Innovations in Partnership Schools | Kura Hourua: First Annual Interim Report: Evaluation of Partnership schools | Kura Hourua policy for the Ministry of Education* (Report, May 2015) 42 ('Martin Jenkins Report').

<sup>123</sup> Now s 90 of the *Education and Training Act 2020*.

<sup>124</sup> See Bill Courtney, 'Unpacking the initial development of New Zealand's charter schools' (2017) 22 *Waikato Journal of Education* 42, 53

<sup>125</sup> *Education Act 1989* (NZ) s 158G.

if it failed to achieve the contractually agreed targets around student achievement.<sup>126</sup> The model gave control to the sponsors by making them the primary decision makers on what was taught, through curriculum development and provision. While in practice, all chose to use the New Zealand Curriculum/Te Marautanga o Aotearoa and tailor it,<sup>127</sup> the fact the sponsors had the decision as to whether they used it, and were given near unlimited breadth of freedom as to how they taught that curriculum, is an unparalleled level of control when compared to the other state funded options that were practically available for them to use.

With regard to operational control, the model did effectively provide charter schools a blank slate to determine their governance and leadership approaches.<sup>128</sup> This avoided these schools having to use a governance and operation model that was not aligned practically, or ideologically, with their iwi's worldview, aspirations and existing power structures. This was combined with the narrower provisions for the Secretary of Education's intervention in a school – only being able to intervene in 'an emergency' that affected 'the education or welfare' of students where the sponsor was 'unwilling or unable' to respond to the emergency to the satisfaction of the Secretary,<sup>129</sup> or as stipulated in the contract.<sup>130</sup> This echoed the arrangement the Waitangi Tribunal believes is appropriate for the Māori provision of education – that the Crown should not interfere with an educational institute unless it is sufficiently serious. The lack of dictation reflected a respect for the role of the sponsors to undertake control of their learning communities and establish the means of achieving their expectations, without the domination of the Ministry. These schools were given significant leeway to establish, manage and govern their schools, to be trusted in this decision and, provided they meet their agreed contractual targets, be permitted to continue.

The funding arrangements of the model enhanced the control the sponsors could undertake. Initially, funding was provided in bulk to support the establishment of the schools, including the initial employment of a principal and to support property leasing, purchase or building.<sup>131</sup> A cashed-up payment, using a simplified calculation, when compared to state-funded schools, supported the ongoing operations of the school to comparable amounts that a state-schools received. The exact amount of both payments was tied to the contractually agreed maximum proposed roll of the school.<sup>132</sup> Before the institution of charter schools, an iwi had never had the opportunity to receive a bulk fund from the Crown and establish a new school on their own terms. Such provision of funding, and then allowing the sponsor to implement according to their needs and direction, was an enabling of the exercise of control. The use of cashed up funding

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<sup>126</sup> Advisory Group on Charter Schools (NZ), *Report to the Minister of Education on Charter Schools' 2018 Performance* (Report, 28 March 2019) 47 [7]–[8]; Cabinet Social Policy Committee (NZ), *Developing and Implementing a New Zealand Model of Charter School* (Cabinet Paper, 2012) 4 ('Cabinet Paper on Development'). See also Courtney (n 124) 53.

<sup>127</sup> Martin, Jenkins and Associates, *Evaluation of Partnership Schools | Kura Hourua: Year 2 – Focus on delivery approaches and assessment* (Report, 28 November 2016) 30.

<sup>128</sup> Martin Jenkins Report (n 122) 28.

<sup>129</sup> *Education Report: A Performance Management System for Partnership Schools* (Report, 11 September 2013) [45].

<sup>130</sup> *Ibid* [44].

<sup>131</sup> *Rapid Response: Current PSKH resourcing model* (Report, 23 January 2015) [2]–[11].

<sup>132</sup> *Ibid*.

supported this, in so far that the sponsor was able to allocate money according to its needs as ascertained on the ground, instead of according to the Crown's dictations.

As a whole, Māori charter schools were the only non-private schools in New Zealand being run by iwi, but funded by the Crown, that could make the primary decisions on what they taught and who taught it within schools that they were almost entirely left to run. The model created a practical pathway that allowed iwi, hapū and whānau who wished to engage in such an endeavour to establish and control an educational system and institutions by Māori for Māori. The initial funding arrangements supported these endeavours.

### **B *Ultimately subject to the governance of the Crown***

The previous section noted significant aspects of control being given to the sponsors of charter schools with respect to how it allowed the sponsors to have control of curriculum, pedagogy and operations and the funding arrangements for that. It could have provided a great opportunity towards empowering tino rangatiratanga. However, tino rangatiratanga fundamentally cannot be subject to the governance of the Crown. The way the Crown ultimately treated the charter school model made it exactly that.

The politics around the model made it almost inevitable that it would exist only as long as it was politically expedient to the political majority exercising power on behalf of the Crown. While a prominent Māori academic was part of the working group appointed by Cabinet to develop the model, and iwi were consulted on the model as it was developed,<sup>133</sup> the push for the model itself came from the free-market ideology ACT Party.<sup>134</sup> The model had little focus on matters like tino rangatiratanga, with initial advice to education ministers and Cabinet making no mention of it or empowering Māori self-governance<sup>135</sup> and only a passing reference to Māori among a group of 'underserved' learners who could be served by the model.<sup>136</sup> The *Education Amendment Act 2012*, which set the legislative framework for the model, passed 62–59 at its third reading. Following its passing, several political parties made disestablishing the model part of their education policy.<sup>137</sup> This then occurred in 2018.<sup>138</sup> This approach meant that any achievements made by the sponsors using the model always had the potential of the Crown removing the model hanging over them. That is inconsistent with what tino rangatiratanga is, because the ultimate power remained with the Crown.

The Crown opened the door to the model. When it became clear the model was being utilised predominately by Māori, both sides of politics should have adopted a different approach to the ongoing existence of the model, or further reform, apprised of their

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<sup>133</sup> Cabinet Paper on Development (n 126) [66].

<sup>134</sup> Courtney (n 124).

<sup>135</sup> *Education Report: Initial Advice on Charter Schools* (Report, 11 September 2013).

<sup>136</sup> *Ibid* 4 [6].

<sup>137</sup> New Zealand Labour Party 'Charter school applicants put on notice' (Press Release, 21 November 2013); Green Party of Aotearoa New Zealand 'Green Party Will Undo Charter Schools' (Press Release, 17 September 2013).

<sup>138</sup> 'Education Amendment Bill 2018 information release' *Ministry of Education* (NZ) (Web Page, 28 August 2019) <<https://www.education.govt.nz/our-work/information-releases/issue-specific-releases/education-amendment-bill-2018-information-release>>.

obligations under Te Tiriti.

Subjectivity to the Crown was also visible in practical aspects. Being a creature of both statute and contract, the school's existence was also tied to the continuance of its fixed-term contract.<sup>139</sup> The performance of charter schools was evaluated against the standards set in the contract.<sup>140</sup> This meant that a charter school's ongoing existence was governed by the law of contract, and ultimately subject to the Crown deciding to renew that contract. One of the selling points of the model was that a charter school could be closed faster than closing a school in the state system.<sup>141</sup> This very much put the determination in the hands of the Crown, because it had the final say. This made the sponsors ultimately responsible to the Crown, not their communities. This again is inconsistent with tino rangatiratanga. Additionally, in 2015, Cabinet modified the model to provide new schools with a fixed amount of \$250,000 or \$400,000 for startup costs<sup>142</sup> and moved towards an incentive system based on enrolment growth.<sup>143</sup> This was designed to promote the sourcing of external funding.<sup>144</sup> Such a move was also inconsistent with the exercise of tino rangatiratanga by new sponsors, as it introduced a very much essential western driver into the decision making the sponsors would have to undertake. At the same time, the funding model overall did not acknowledge the roles these schools took in protecting and revitalising Te Reo Māori, or the historical inequities the sponsors needed to overcome through their work.

While the schools were certainly great examples of allowing iwi, hapū and whānau to control their education, the fact that they could be removed so easily, through the means of western contract law or the parliamentary process, without regard for Te Tiriti, means the model as a whole was more a case of interest convergence than one that empowered tino rangatiratanga. While exercise of control was allowed to be relatively unimpeded, iwi, hapū and whānau control was not permanent because the sponsors still needed the mainstream nod of approval and, while the Crown relinquished some resources, it did not ultimately relinquish power.

This experience serves as a precautionary tale for the Crown for its future design of the provision of schooling. A system cannot be designed to empower iwi, hapū and whānau to exercise tino rangatiratanga (through giving control over curriculum, pedagogy and operations, and appropriate funding) if the ultimate decision over existence, and the parameters for making that decision, is left to the Crown. As Professor Smith says – there needs to also be a relinquishment of power.

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<sup>139</sup> See *Martin Jenkins Report* (n 122) 1.

<sup>140</sup> (18 October 2012) 684 NZPD 5986.

<sup>141</sup> David Seymour, *Own Your Future* (ACT New Zealand, 2017) 76.

<sup>142</sup> Cabinet (NZ), *Developing and Implementing a New Zealand Model of Charter School* (Cabinet Minute, 2012) 2 [9].

<sup>143</sup> *Ibid* 2 [15].

<sup>144</sup> Ministry of Education (NZ), *Partnership School Kura Hourua Contract Accountability Enhancements* (Briefing Note, 22 June 2017) [18].



## VII CONCLUSION

Tino rangatiratanga embodies the aspirations and goals of Māori to enhance mana through leadership and to have control over their future. It is a unique concept to New Zealand, promised through Te Tiriti o Waitangi and, as such, is to be prioritised, against the western concept of self-determination.

To see tino rangatiratanga exercised in the provision of schooling, there needs to be a shift that allows iwi, hapū and whānau to have control over their schools and their curriculum with a commitment from the Crown to fund these schools appropriately given the historical and legal context they operate in.

The charter school model did allow for the exercise of control. However, its ultimate scuttling by the Crown reiterates the issue of tino rangatiratanga being seen to be subject to the Crown's governance.

As for the future, it is notable that the recently passed *Education and Training Amendment Act 2023* provided a new pathway to allow wānanga to exist as 'non-Crown entities',<sup>145</sup> accountable to iwi or hapū instead of the Crown.<sup>146</sup> This new constitution sits alongside the greater autonomy and discretion they have over what they teach. The new s 398D codifies the role of wānanga education in '... the promotion and maintenance of social, spiritual, cultural, political, and economic well-being in the community'. The Hon Kelvin Davis, then Associate Minister for Education, described this as recognising that iwi and hapū can 'make ... wānanga through [tino] rangatiratanga'.<sup>147</sup>

The extension of the wānanga model to iwi, hapū and whānau provision of schooling, provided it was funded to acknowledge historical inequities, could serve as a good start to enabling exercise of tino rangatiratanga. However, a truly tino rangatiratanga model of education cannot come from amendments to the *Education and Training Act* alone. It has to come from iwi, hapū and whānau themselves, being given room, control and funding to enhance mana through education as part of their exercise of tino rangatiratanga. Time will tell whether iwi, hapū and whānau will be empowered to exercise tino rangatiratanga over their seedbed.

### *Keywords:*

Tino rangatiratanga, Māori education, control, funding

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<sup>145</sup> 'Wānanga Enabling Framework', *Ministry of Education* (NZ) (Web Page, 28 August 2023) <<https://www.education.govt.nz/our-work/legislation/wananga-sector-framework/>>.

<sup>146</sup> *Education and Training Amendment Act 2023* (NZ) s 10.

<sup>147</sup> (15 August 2023) 770 NZPD 18802.