Does Geoffrey Palmer and Andrew Butler's 'Constitution Aotearoa' give effect to the rights guaranteed in te Tiriti o Waitangi?

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Introduction

In 1840, Māori rangatira from hapū across Aotearoa signed te Tiriti o Waitangi[1] with the British Crown, while the Queen's representatives signed the Treaty of Waitangi.[2] The two documents had vastly different meanings, as the English text, the Treaty of Waitangi, aimed to transfer sovereignty over Aotearoa New Zealand from Māori to the British, while the Māori text, te Tiriti o Waitangi, aimed to provide a framework for how power was distributed in Aotearoa New Zealand, where Māori retained autonomy over their lands and people.[3] Over 180 years later, Matthew Palmer claims it remains the most important document in Aotearoa New Zealand's history.[4] However, since 1840, the text of te Tiriti o Waitangi has been systematically rejected, while more recently, it has been assimilated into our Westminster system of government.[5] Consequently, there have been many attempts to provide increased recognition to te Tiriti. In their 2018 book, *Towards Democratic Renewal,* Geoffrey Palmer and Andrew Butler propose Constitution Aotearoa; a written, codified constitution for Aotearoa New Zealand. Within this, it proposes to provide constitutional recognition to the Treaty.[6]

In this essay, I will assess whether the Treaty provisions within Constitution Aotearoa give effect to the rights guaranteed in te Tiriti o Waitangi. To do this, I will first outline the rights conferred in te Tiriti o Waitangi. Then I will discuss Aotearoa New Zealand's current constitutional arrangements and look at the influence te Tiriti currently has within Aotearoa New Zealand's legal system. Through this discussion, I will show why the foundational significance of te Tiriti and the rights conferred in it are not currently upheld within our

[1] Throughout this essay, when I refer to te Tiriti o Waitangi or te Tiriti, I am referring to the te reo Māori text of the Treaty of Waitangi. When I refer to the Treaty of Waitangi, I am referring to the English text of the Treaty of Waitangi. When I refer to 'the Treaty' I am referring to both documents and the agreement signed in 1840 generally.
[2] Mutu, 'Constitutional Intentions: The Treaty of Waitangi Texts'.
[3] Mutu.
[4] Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution*.
[5] Williams, 'Unique Treaty-Based Relationships Remain Elusive'.
[6] Palmer and Butler, *Towards Democratic Renewal: Ideas for Constitutional Change in New Zealand*.

constitutional arrangements and legal system. I will then outline the parameters of Palmer and Butler's proposal and their Treaty provisions. Subsequently, I will discuss how te Tiriti may be given effect in contemporary Aotearoa New Zealand. To do this, I will look at the kāwanatanga-tino rangatiratanga relationship that was established in te Tiriti, then outline the proposal in Matike Mai Aotearoa's '*Report on Constitutional Transformation'* which provides an example of how this kāwanatanga-tino rangatiratanga relationship may be given effect. This discussion will provide the requisite overview to then answer whether Palmer and Butler's proposal does give effect to the rights guaranteed in te Tiriti. Ultimately, I will conclude that Palmer and Butler's proposal does not give effect to the rights guaranteed in te Tiriti. This is because these rights and the kāwanatanga-tino rangatiratanga relationship cannot be expressed within our current Westminster system of government.

The rights conferred in te Tiriti o Waitangi

To understand whether Palmer and Butler's proposal gives effect to the rights guaranteed under te Tiriti o Waitangi, it must be assessed what these rights are, and what was guaranteed in 1840. Carwyn Jones argues that through understanding its meaning, it can be ascertained how it can be given effect within our constitutional arrangements.[7] However, because the Treaty broadly contains two different documents (te Tiriti o Waitangi and the Treaty of Waitangi), it is contentious where the rights and obligations of Māori and the Crown are drawn from.[8] Margaret Mutu argues that te Tiriti, and not the Treaty of Waitangi, is the only document which Māori rights can be prescribed from.[9] Mutu explains the basis for this claim as:[10]

> It was the only document the rangatira understood and the one almost all of them signed. Te Tiriti as it was read and explained to the rangatira in Waitangi confirmed the paramount authority and power, or sovereignty, of the rangatira and concentrated on promising to deal with the problems created by Pakeha immigrants.

Mutu's claim is affirmed by David Williams, who explains that to prescribe the rights ascertained by Māori under the Treaty of Waitangi, and not te Tiriti, would go against the foundational principle of the common law, contra proferendum.[11] This principle provides that

[7] Jones, 'Tāwhaki and te Tiriti'.
[8] Williams, 'Unique Treaty-Based Relationships Remain Elusive'.
[9] Mutu, 'Constitutional Intentions: The Treaty of Waitangi Texts'.
[10] Mutu, 19-20.
[11] Williams, 'Unique Treaty-Based Relationships Remain Elusive'.

ambiguous clauses within a contract or agreement should be interpreted against the party which drafted the agreement.[12] Subsequently, as both texts were written by the Crown, the Māori text and understanding of its meaning should prevail over the English text.[13] Ultimately, it would be unjust, and unlawful for a document that differed from the document that the majority of Māori signed and understood to be held to contain the rights that Māori gained and gave away.

Therefore, an analysis of the wording of te Tiriti must occur to ascertain the rights and guarantees under it. In her publication, *Constitutional Intentions: The Treaty of Waitangi Texts,* Margaret Mutu goes through an article-by-article analysis of the wording of te Tiriti o Waitangi. The preamble of te Tiriti acknowledges the rangatiratanga of the rangatira and hapū.[14] Article 1 of te Tiriti aims to provide the Crown with the right of kāwanatanga.[15] Kāwanatanga has often been translated to governance or law-making powers in English.[16] Mutu explains that the use of kāwanatanga in te Tiriti is consistent with He Whakaputanga, the 1935 Declaration of Independence.[17] When kāwanatanga was used in He Whakaputanga, Mutu states this was "in the context of not allowing any kāwanatanga to have any law-making power over the lands of the rangatira."[18] Mutu argues that you need to look at the intentions of those signing te Tiriti to confirm what was wanted under each article. In signing the Treaty, rangatira, Mutu claims, wished control from the Crown over the lawless British settlers.[19] It was through the granting of kāwanatanga, or governance rights, to the Crown that this could occur.[20]

Article 2 of te Tiriti o Waitangi affirms that Māori continue to exercise tino rangatiratanga over their lands, villages and taonga.[21] Mutu explains that Article 2 "confirms the Queen's formal recognition of the paramount power and authority of the rangatira throughout the country."[22] Further, Article 2 provided that Māori could only sell the rights to land to the Queen, or an

[12] Williams.
[13] Williams.
[14] Mutu, 'Constitutional Intentions: The Treaty of Waitangi Texts'; Te Tiriti o Waitangi.
[15] Mutu, 'Constitutional Intentions: The Treaty of Waitangi Texts'; Te Tiriti o Waitangi.
[16] Mutu, 'Constitutional Intentions: The Treaty of Waitangi Texts'; Durie, 'Tino Rangatiratanga'.
[17] Mutu, 'Constitutional Intentions: The Treaty of Waitangi Texts'.
[18] Mutu, 24.
[19] Mutu.
[20] Mutu.
[21] Mutu.
[22] Mutu, 25.

agent of the Crown at the price agreed upon by the two parties.[23] Tino rangatiratanga has often been translated to sovereignty.[24] However, Mason Durie explains the concept tino rangatiratanga extends further than the English view of sovereignty.[25] This is affirmed by Mutu who equates tino rangatiratanga as "the exercise of paramount and spiritually sanctioned power and authority. It includes aspects of the English notions of ownership, status, influence, dignity, respect and sovereignty, and has strong spiritual connections."[26] It is this spiritual connection that differentiates tino rangatiratanga from the English conception of sovereignty, as sovereignty is solely established through man-made laws and rules.[27]

Mutu finds that Article 3 of te Tiriti reciprocates the rights that Māori provide to the Queen over the British subjects in New Zealand to Māori.[28] She explains that while the main object of te Tiriti for the British was to obtain the ability to enforce and control unruly British who were in the country, Article 3 ensures that the British would concurrently care for Māori.[29] Mutu points out that this included providing Māori access to British technologies to aid in their development.[30] I will now discuss how these guarantees are reflected in Aotearoa New Zealand's constitutional arrangements and legal system.

Aotearoa New Zealand's current constitutional arrangements

Geoffrey and Matthew Palmer set out that "a constitution is the system or body of fundamental principles which a nation is constituted or governed; it sets up the framework for government itself."[31] Unlike most countries around the world, Aotearoa New Zealand does not have a written, codified constitution. Rather, Aotearoa New Zealand's constitutional arrangements are centred around an unwritten constitution.[32] Instead of containing all of the provisions of our constitution in one document, our unwritten constitution is located through a variety of

[23] Mutu.
[24] Palmer and Butler, *Towards Democratic Renewal: Ideas for Constitutional Change in New Zealand*.
[25] Durie, 'Tino Rangatiratanga'.
[26] Mutu, 'Constitutional Intentions: The Treaty of Waitangi Texts', 26.
[27] Mutu.
[28] Mutu.
[29] Mutu.
[30] Mutu.
[31] Palmer and Palmer, *Bridled Power: New Zealand's Constitution and Government,* 4.
[32] Joseph, *Joseph on Constitutional and Administrative Law*.

sources.[33] This includes, but is not limited to, te Tiriti o Waitangi/the Treaty of Waitangi, the Electoral Act 1993, the Constitution Act 1986, the New Zealand Bill of Rights Act 1990, the New Zealand common law, Parliamentary Standing Orders, the Cabinet Manual, and constitutional principles, including democracy, the rule of law and the separation of powers.[34] The nature and form of our constitution ensures it remains easily amendable by Parliament.[35]

The influence of te Tiriti o Waitangi within Aotearoa New Zealand's legal system

While te Tiriti o Waitangi sits within our unwritten constitution, it does not hold direct legal standing, as the document's text has not been directly enacted into legislation.[36] This lack of standing has been upheld by the Courts, where in *Hoani Te Heuheu Tukino* [1941] it was set out that rights "conferred by a Treaty of cession cannot be enforced in the Courts, except so far as they have been incorporated into municipal law."[37] While the Treaty remains directly unenforceable, it may be used by the courts for statutory interpretation, even with the absence of a statutory reference to the Treaty.[38] Despite its lack of enforceability, Palmer claims the Treaty exerts influence through the actions of those within our constitutional framework. This includes when Parliament enacts legislation, when the Waitangi Tribunal hears Treaty claims, and writes reports on these claims, when the courts interpret the Treaty in their judgments and when cabinet applies the Treaty in policy decisions.[39] It is through the varied application and use of the Treaty, that Palmer claims a "contemporary reconciliation" occurs to provide the Treaty with legal influence.[40]

While the Treaty's influence carries across the various branches of our government, legislature and judiciary, the legal force of the Treaty is constrained by the power given to it by the executive government.[41] This force is generally limited to the 'principles' of the Treaty,[42] and

[33] Palmer and Palmer, *Bridled Power: New Zealand's Constitution and Government*.
[34] Palmer and Palmer.
[35] Palmer and Palmer; Harris, *New Zealand Constitution: An Analysis in Terms of Principles*.
[36] Joseph, *Joseph on Constitutional and Administrative Law*.
[37] *Hoani Te Heuheu Tukino v Aotea Māori Trust Board*, 6.
[38] *Huakina Development Trust v Waikato River Authority*.
[39] Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution*.
[40] Palmer, 88.
[41] Palmer.
[42] Even though Treaty principles have dominated the way the courts and the Waitangi Tribunal have interpreted the Treaty of Waitangi, the focus of this essay remains the application of te Tiriti. Therefore, there is little

therefore not the direct text of the Treaty itself.[43] While the predominant use of the Treaty in legislation is limited to the principles of the Treaty, Carwyn Jones has argued that this is a "pragmatic dilution of the Treaty."[44] This leaves us in a position where, as Palmer states, "the Treaty's importance is not fully reflected in its current legal status, which is incoherent, and its legal force, which is inconsistent."[45] Further, upon reviewing our constitutional framework, the Constitutional Arrangements Committee found that the Treaty's lack of recognition serves as "the greatest shortcoming of our current constitutional arrangements."[46] Ultimately, this places Aotearoa New Zealand in a position where recognition of te Tiriti o Waitangi and the preservation of indigenous rights is dependent on the government of the day.[47]

Palmer and Butler's proposed constitution

In 2016, in response to their concerns surrounding our constitutional arrangements, Geoffrey Palmer and Andrew Butler released *A Constitution for Aotearoa New Zealand.* In this book, they proposed a written, codified constitution for Aotearoa New Zealand.[48] Their proposed constitution includes direct incorporation of the texts of te Tiriti o Waitangi and the Treaty of Waitangi.[49] Following the release of their first book, Palmer and Butler recognised that their consultation with Māori concerning their first proposal, and its Treaty provisions were deemed inadequate.[50] There was significant pushback by Māori against the incorporation of the two Treaty texts.[51] Subsequently, Palmer and Butler went into public consultation to improve the deficiencies of the proposal.[52] As a result of this consultation, they released a revised proposal for their written, codified constitution in their book, *Towards Democratic Renewal: Ideas for Constitutional Change in New Zealand.*[53]

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further discussion on Treaty principles. For further discussion on the application, use and meaning of Treaty principles, see Jones, 'Tāwhaki and Te Tiriti'.

[43] Ruru, 'The Failing Modern Jurisprudence of the Treaty of Waitangi'.

[44] Jones, 'Tāwhaki and Te Tiriti', 704.

[45] Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution,* 351.

[46] Constitutional Advisory Panel, *New Zealand's Constitution: A Report on Conversation He Kōtuinga Kōrero Mō Te Kaupapa Ture o Aotearoa,* 8.

[47] Coates, 'Future Contexts for Treaty Interpretation'.

[48] Palmer and Butler, *A Constitution for Aotearoa New Zealand*.

[49] Palmer and Butler.

[50] Palmer and Butler, *Towards Democratic Renewal: Ideas for Constitutional Change in New Zealand*.

[51] Stephens, '"He Rangi Tā Matawhāiti, He Rangi Tā Matawhānui"'.

[52] Palmer and Butler, *Towards Democratic Renewal: Ideas for Constitutional Change in New Zealand*.

[53] Palmer and Butler.

Their revised constitution in *Towards Democratic Renewal* includes the parameters of the powers of the state, government and the judiciary; an enforceable bill of rights, and how Māori constitutional issues and the Treaty is to be applied.[54] In contrast to their original proposal, Palmer and Butler do not include the full texts of te Tiriti o Waitangi and the Treaty of Waitangi in their constitution.[55] In their second book, Palmer and Butler focus on giving effect to the Treaty generally, as opposed to giving effect to the Māori text, te Tiriti. As I will discuss later in the essay, their focus on the Treaty broadly, as opposed to the rights contained in te Tiriti result in Constitution Aotearoa fails to give effect to the rights guaranteed in te Tiriti.

Palmer and Butler argue that the proposed Treaty provisions should be included within their proposed constitution for two main reasons. Firstly, they identify that te Tiriti remains Aotearoa New Zealand's founding document, which provides the Crown's authority to govern.[56] Secondly, they note that while the Treaty sits firmly within our legal and constitutional arrangements, the legal status of the Treaty remains unclear and uncertain.[57] Rather, the main Treaty provision establishes: [58]

> **Art 37(1):** The rights that persons of Māori descent enjoy at the commencement of this Constitution as indigenous people under te Tiriti o Waitangi/the Treaty of Waitangi are hereby recognised and affirmed.[59]

Under their proposal, this provides the Courts with the power to declare any law invalid to the extent that it is inconsistent with any of the rights conferred in Constitution Aotearoa.[60] This includes the provision which states that the rights of persons of Māori descent under te Tiriti o Waitangi are recognised and affirmed. The constitution provides for the continuation of the Waitangi Tribunal to hear claims and provide an opinion to Parliament and the Courts on issues relating to te Tiriti o Waitangi and Tikanga Māori.[61]

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[54] Palmer and Butler.
[55] Palmer and Butler, *A Constitution for Aotearoa New Zealand*; Palmer and Butler, *Towards Democratic Renewal: Ideas for Constitutional Change in New Zealand*.
[56] Palmer and Butler.
[57] Palmer and Butler.
[58] Palmer and Butler, *Towards Democratic Renewal: Ideas for Constitutional Change in New Zealand,* 308.
[59] In stating that the rights are 'recognised and affirmed', Palmer and Butler use the same language within the Canadian Charter of Rights and Freedoms. This document serves as the entrenched constitution in Canada.
[60] Palmer and Butler, *Towards Democratic Renewal: Ideas for Constitutional Change in New Zealand*.
[61] Palmer and Butler.

Palmer and Butler then include a process of consultation within the constitution for defining what tino rangatiratanga and the other rights contained in the Treaty mean in contemporary Aotearoa New Zealand.[62] Upon the enactment of Constitution Aotearoa, Parliament must select a panel of distinguished persons and kaumātua to recommend to Parliament any changes to the constitution to uphold the Treaty.[63] Further, the government must coordinate hui for both Māori and the wider community to allow these groups to voice how the Treaty can be given effect within the constitution.[64] These hui will result in the production of reports for the panel to consider. Within seven years after the enactment of the constitution, a report must be presented to Parliament, by the panel, with a recommendation of how to expressly provide for the rights guaranteed within the Treaty.[65] While this report is presented to Parliament, Parliament is not required to enact these recommendations into the constitution.[66] This places a weak obligation on Parliament, as the proposal does not ensure it expressly includes Māori's right to tino rangatiratanga, as guaranteed under article 2 of te Tiriti o Waitangi.[67]

How do the rights in te Tiriti apply in contemporary Aotearoa New Zealand?

Jacinta Ruru and Jacobi Kohu-Morris explain that the Treaty remains a framework for the distribution of rights and powers between Māori and the Crown.[68] This is established through the text of te Tiriti, in which Jones explains, "the chiefs cede a form of governmental authority (expressed as kāwanatanga) and retain their tino rangatiratanga (usually translated in this context as unqualified exercise of their chieftainship)."[69] Subsequently, Jones continues by stating "it is clear that the treaty relationship envisaged a framework within which the two forms of political and legal authority would co-exist."[70] Because this was viewed as a power-sharing agreement, as opposed to a Treaty of cession, the Waitangi Tribunal unequivocally stated:[71]

[62] Palmer and Butler.
[63] Palmer and Butler.
[64] Palmer and Butler.
[65] Palmer and Butler.
[66] Palmer and Butler.
[67] Te Tiriti o Waitangi.
[68] Ruru and Kohu-Morris, '"Maranga Ake Ai" The Heroics of Constitutionalising Te Tiriti O Waitangi/The Treaty of Waitangi in Aotearoa New Zealand'.
[69] Jones, *New Treaty New Tradition: Reconciling New Zealand and Māori Law,* 42.
[70] Jones, 42.
[71] Waitangi Tribunal, 'He Whakaputanga Me Te Tiriti The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry', xxiii.

> We have concluded that in February 1840 the rangatira who signed te Tiriti did not cede their sovereignty. That is, they did not cede their authority to make and enforce law over their people or their territories. Rather, they agreed to share power and authority with the Governor. They agreed to a relationship one in which they and Hobson were to be equal.

Consequently, this framework for sharing power, therefore, created a relationship between kāwanatanga (as affirmed in art 1) and tino rangatiratanga (as affirmed in art 2). In the next portion of this essay, I will look to what the parameters of the kāwantanga-tino rangatiratanga relationship, and how this relationship may be given effect. This discussion will provide a basis from which I will assess whether Palmer and Butler's proposal effectively allows for this relationship, and therefore upholds the guarantees within te Tiriti.

The kāwanatanga-tino rangatiratanga relationship

In ascertaining the parameters of the relationship between Māori and the Crown under te Tiriti, Jones focuses on the work of Canadian philosopher James Tully who explains the relationships that are established between indigenous peoples and the state upon signing a treaty.[72] It is from these relationships that the obligations of the state under a treaty with indigenous peoples may be drawn.[73] Tully's scholarship is generally based on the interaction between the state and indigenous peoples in Canada. However, Jones argues that his analysis can be imported to Aotearoa New Zealand.[74] Tully outlines that five principles underpin the relationship between the state and indigenous peoples. These are mutual recognition, intercultural negotiation, mutual respect, sharing and mutual responsibility.[75] For this essay, I will focus on the principle of mutual recognition, to see how it applies to the kāwanatanga-tino rangatiratanga relationship.

Tully explains the basis of the principle of mutual recognition, as recognising indigenous people not as subordinate under the colonial government, but rather as functioning independent peoples.[76] I argue that this principle of mutual recognition serves as the foundation for the

[72] Jones, *New Treaty New Tradition: Reconciling New Zealand and Māori Law*.
[73] Tully, *Public Philosophy in a New Key: Vol. 1. - Democracy and Civic Freedom*.
[74] Jones, *New Treaty New Tradition: Reconciling New Zealand and Māori Law*.
[75] Tully, *Public Philosophy in a New Key: Vol. 1. - Democracy and Civic Freedom*, 229.
[76] Tully.

relationship between kāwanatanga and tino rangatiratanga. Tully explains that mutual recognition holds three features; equality, coexistence and self-government.[77] The principle of equality centres around equality between the colonial and indigenous peoples' cultures and governments.[78] Within Aotearoa New Zealand, this equality has been disregarded since signing te Tiriti, as Moana Jackson claims "the establishment of the 'New Zealand' nation-state thus required the dismissal of the interwoven legal and political processes of Māori."[79] This resulted in the subordination of Māori culture and tikanga below the new colonial government.[80] Secondly, Tully explains that "coexistence means that the governments and cultures of Aboriginal and non-Aboriginal peoples coexist or continue through all their relations and interdependence over time."[81] Tully notes that this involves a rejection of past assimilation policies from the colonial government. Therefore, coexistence would allow for both Māori and Pākehā to govern their own affairs according to their distinct customs.[82] Lastly, the principle of self-government provides that each party to the Treaty acknowledges the other's capacity to govern their people and lands following their culture.[83] Tully notes that this principle does not advocate for separatism between the two Treaty parties, but rather allows for a recognition of each party's independence.[84] Consequently, Tully's principle of mutual recognition sits at the heart of the application of the kāwanatanga and tino rangatiratanga relationship, as it remains both need to be balanced to allow for the mutual recognition of both parties.

This relationship of mutual recognition under the Treaty has been disregarded since 1840 due to the subordination and assimilation of Māori culture and tikanga by the colonial legal system and government.[85] However, I will now look at how the relationship of mutual recognition may be given effect through the balancing of kāwanatanga and tino rangatiratanga. To do this, an analysis of what tino rangatiratanga is and how it applies in contemporary Aotearoa must occur. Prominent academics, lawyers, judges and Māori leaders have all provided various definitions of what tino rangatiratanga is. Kaapua Smith outlines that tino rangatiratanga is "absolute

[77] Tully, 231.
[78] Tully.
[79] Jackson, 'Changing Realities: Unchanging Truths', 122.
[80] Jackson.
[81] Tully, *Public Philosophy in a New Key: Vol. 1. - Democracy and Civic Freedom,* 231.
[82] Tully.
[83] Tully.
[84] Tully.
[85] Jackson, 'Changing Realities: Unchanging Truths'; Williams, 'Unique Treaty-Based Relationships Remain Elusive'.

autonomy or sovereignty";[86] Ani Mikaere claims "tino rangatiratanga is the exercise of paramount and spiritually sanctioned power and authority. It includes English notions of ownership, status, influence, dignity, respect and sovereignty and has strong spiritual connections";[87] while the Waitangi Tribunal in the Orakei claim found that tino rangatiratanga was the full authority over your lands and peoples and held a similar meaning to mana.[88] In his article, *Tino Rangatiratanga*, Mason Durie identifies the difficulties of defining tino rangatiratanga, but claims there are two facets in which tino rangatiratanga operates.[89] These are "the way in which Māori and the Crown share power; and the way in which power-sharing occurs within Māori society."[90]

In looking at how tino rangatiratanga applies, Durie points to the principles of tino rangatiratanga which were identified by the Māori congress at Mururaupatu in 1995.[91] The Māori Congress suggested three principles that can be drawn from tino rangatiratanga to show how it applies in contemporary society.[92] These principles are nga matatini Māori (Māori diversity), whakakotahi (Māori unity) and mana motuhake Māori (Māori autonomy and control).[93] Nga matatini Māori recognises that Māori live in a range of social, economic and cultural circumstances, where many Māori have affiliation of multiple iwi and hapū. The second principle, whakakotahi acknowledges that despite nga matatini Māori, there remains the potential for Māori consensus due to shared aspirations. While this is present, Durie argues this consensus has not been reached, as "there has been no mechanism to bring disparate factions together."[94] However, he explains the principle "recognises commonalities shared by all Māori and anticipates greater strength from a unified base."[95] Lastly, the principle of mana Motuhake Māori reflects that through tino rangatiratanga, Māori hold autonomy over their lives and resources. It is through mana Motuhake Māori and tino rangatiratanga that Māori retain the ability to make decisions for their iwi and hapū within their own political and decision-

[86] Smith, 'Māori Political Parties', 208.
[87] Mikaere, 'The Treaty of Waitangi and Recognition of Tikanga Māori', 26.
[88] Waitangi Tribunal, 'Report of The Waitangi Tribunal on The Orakei Claim'.
[89] Durie, 'Tino Rangatiratanga'.
[90] Durie, 6.
[91] Durie.
[92] Durie.
[93] Durie, 6.
[94] Durie, 7.
[95] Durie, 7.

making structures.[96] Therefore, tino rangatiratanga may be viewed as the ability of Māori to exercise control over their lives, people and lands, as distinct from the Crown. This aligns itself with Tully's principle of mutual recognition within a treaty relationship.

The conception of tino rangatiratanga being the ability of Māori to exercise control over their own lives, people and lands affirms that tino rangatiratanga is exercised locally. This is because tino rangatiratanga is exercised distinctly by each iwi and hapū within the area in which they hold mana whenua.[97] This locality-based application of tino rangatiratanga is argued by Hohaia Collins, who claims that exercising tino rangatiratanga should occur at a hapū level across Aotearoa New Zealand.[98] Collins' view that tino rangatiratanga is exercised locally is shared by Mason Durie, Moana Jackson, David Williams and Ani Mikaere.[99] The requirement of individual iwi and hapū to exercise tino rangatiratanga is due to the Māori worldview.[100] Arohia Durie explains that within te ao Māori, instead of viewing Māori as a single state, there are distinct communities which are separated by iwi and hapū.[101] While each iwi has authority over their communities, Jackson claims that it would be unthinkable for an iwi to hold authority over another.[102] Further, Jackson explains, "it was equally impossible for any iwi to give away its sovereignty to another."[103] This is because the powers of tino rangatiratanga are passed down from one generation to the next.[104] The exercise of tino rangatiratanga within hapū runs parallel to the same exercise from another hapū across Aotearoa New Zealand.[105] Therefore, the right to tino rangatiratanga is held by all Māori, but this does not allow Māori to exercise tino rangatiratanga over those not within their iwi or hapū.[106]

While tino rangatiratanga is to be exercised locally, currently, the government generally interacts with Māori at either a national or iwi level.[107] However, Collier argues that this

[96] Durie.
[97] Collier, 'A Kaupapa-Based Constitution'.
[98] Collier.
[99] Durie, 'Tino Rangatiratanga'; Jackson, 'The Colonization of Māori Philosophy'; Williams, 'Unique Treaty-Based Relationships Remain Elusive'; Mikaere, 'The Treaty of Waitangi and Recognition of Tikanga Māori'.
[100] Jackson, 'The Colonization of Māori Philosophy'.
[101] Durie, 'The Pacific Way'.
[102] Jackson, 'The Colonization of Māori Philosophy'.
[103] Jackson, 7.
[104] Jackson.
[105] Durie, 'Tino Rangatiratanga'.
[106] Durie; Jackson, 'The Colonization of Māori Philosophy'.
[107] Collier, 'A Kaupapa-Based Constitution'.

interaction should occur with hapū to ensure that Māori are being represented by those who share their whakapapa and mana whenua.[108] Consequently, Collier claims it is through "the formal recognition of hapū as political authority representing the people in any given geographic area, if respected, has the potential to acknowledge the mana and tino rangatiratanga of hapū as promised in te Tiriti o Waitangi."[109] Mason Durie explains that tino rangatiratanga is exercised within hapū through the creation of a formal direction in which hapū intend to exercise control over their lives, people and lands.[110] It is through the implementation of that direction that tino rangatiratanga is carried out.[111] Further, Durie argues that: [112]

> Tino rangatiratanga is more likely to be realised at whanau, hapū and community levels where there are opportunities for concerted action, partnership with others, negotiation with a range of agencies, and leadership that can embrace heritage, development and the attainment of consensus among members.

Morgan Godfrey explains that the Treaty firstly reaffirmed Māori continued political autonomy, through their ability to exercise tino rangatiratanga while providing the settlers with governance powers in kāwanatanga.[113] The Waitangi Tribunal found that this created different spheres of influence for Māori and the Crown.[114] Under this, Māori continued to hold authority over their hapū and lands, while the Crown was provided with authority over the incoming settlers.[115] This balance between kāwanatanga and tino rangatiratanga, Jones claims, created a "just means for sharing power" within Aotearoa New Zealand.[116] Consequently, Jones argues that "the role of the Treaty in our constitutional arrangements should centre around the kāwanatanga-tino rangatiratanga relationship affirmed in the Treaty."[117] This view is shared by Ruru and Kohu-Morris, who set out that both the Crown's powers of governance and their protection of Māori tino rangatiratanga, must be upheld within our constitutional

[108] Collier.
[109] Collier, 318.
[110] Durie, 'Tino Rangatiratanga'.
[111] Durie.
[112] Durie, 17.
[113] Godfery, 'The Political Constitution'.
[114] Waitangi Tribunal, 'He Whakaputanga Me Te Tiriti The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry'.
[115] Waitangi Tribunal.
[116] Jones, *New Treaty New Tradition: Reconciling New Zealand and Māori Law*, 61.
[117] Jones, 'Tāwhaki and Te Tiriti', 711.

arrangements.[118] However, the balancing of both kāwanatanga and tino rangatiratanga remains elusive, as Durie argues that it is questionable how this relationship can be upheld within the current parameters of our unitary state.[119] Subsequently, Ruru and Kohu-Morris argue, that if te Tiriti is to truly be upheld, "parliamentary supremacy must be read as subject to Māori sovereignty to enable the intent of te Tiriti: bicultural power sharing in a relationship of equals."[120] However, for this to occur, this would require a fundamental shift within our constitutional arrangements.[121] To discuss how this 'bicultural power sharing' may be given effect, I will look to the report of Matike Mai Aotearoa, who propose constitutional transformation, to give effect to the guarantees within te Tiriti o Waitangi.[122]

Matike Mai Aotearoa: 'The Report on Constitutional Transformation'

In 2010, Matike Mai Aotearoa, the Independent Working Group on Constitutional Transformation was established.[123] The Working Group of Matike Mai Aotearoa (Working Group) was chaired by Margaret Mutu and convened by Moana Jackson.[124] The Working Group were provided with the broad terms of reference: [125]

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

From these terms of reference, the Working Group conducted 252 hui between 2012 and 2015.[126] Subsequently, they produced a report which set out how the terms of reference may be implemented. While they provide recommendations on how te Tiriti may be upheld, the Working Group explains that their findings reflect a dialogue of how this may occur since te Tiriti was signed in 1840.[127] Significantly, the report states that "due to [the Working Group's]

[118] Ruru and Kohu-Morris, '"Maranga Ake Ai" The Heroics of Constitutionalising Te Tiriti O Waitangi/The Treaty of Waitangi in Aotearoa New Zealand'.
[119] Durie, 'Tino Rangatiratanga'.
[120] Ruru and Kohu-Morris, 569.
[121] Ruru and Kohu-Morris, '"Maranga Ake Ai" The Heroics of Constitutionalising Te Tiriti O Waitangi/The Treaty of Waitangi in Aotearoa New Zealand'.
[122] Matike Mai Aotearoa, 'He Whakaaro Here Whakaumu Mō Aotearoa: The Report of Matike Mai Aotearoa - The Independent Working Group on Constitutional Transformation'.
[123] Matike Mai Aotearoa.
[124] Matike Mai Aotearoa.
[125] Matike Mai Aotearoa, 7.
[126] Matike Mai Aotearoa.
[127] Matike Mai Aotearoa.

terms of reference, it did not consider how te Tiriti fits within our current Westminster system. Rather, they looked at constitutionalism that is founded on He Whakaputanga and the Treaty."[128]

The Working Group affirmed the findings of Carwyn Jones and Mason Durie, that "te Tiriti envisaged the continuing exercise of rangatiratanga while granting a place for kāwanatanga."[129] Subsequently, in their report, the Working Group expands on the Waitangi Tribunal's conception of 'spheres of influence' held by Māori and the Crown. An example of how these spheres overlap is pictured below:[130]

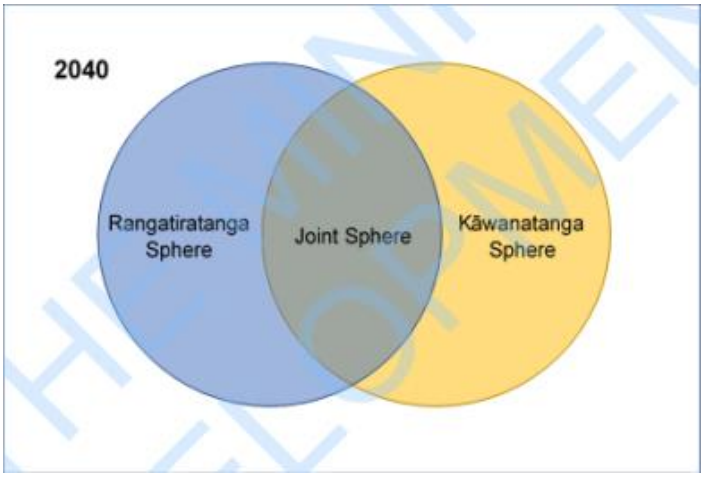

Figure 1: Rangatiratanga, Joint and Kāwanatanga Spheres

This conception finds that te Tiriti established a framework where Māori can exercise tino rangatiratanga independently from the Crown, while the Crown may exercise kāwanatanga. In between these two spheres, there is a third interconnected sphere, where Māori and the Crown may make joint decisions.[131] These findings of 'spheres of influence' are affirmed and explained by the Declaration Working Group in their report He Puapua.[132] He Puapua was a

[128] Matike Mai Aotearoa, 6.
[129] Matike Mai Aotearoa, 9.
[130] Charters et al., 'He Puapua: Report of the Working Group on a Plan to Realise the UN Declaration on the Rights of Indigenous Peoples in Aotearoa/New Zealand'.
[131] Matike Mai Aotearoa, 'He Whakaaro Here Whakaumu Mō Aotearoa: The Report of Matike Mai Aotearoa - The Independent Working Group on Constitutional Transformation'.
[132] Charters et al., 'He Puapua: Report of the Working Group on a Plan to Realise the UN Declaration on the Rights of Indigenous Peoples in Aotearoa/New Zealand'.

report commissioned by Te Puni Kōkiri, which was established to provide recommendations to the New Zealand government on how to uphold the Declaration on the Rights of Indigenous Peoples' and te Tiriti o Waitangi.[133] In regards to the 'spheres of influence', they stated, broadly: [134]

> The rangatiratanga sphere reflects Māori governance over people and places. The kāwanatanga sphere represents Crown governance. There is a large 'joint sphere', in which Māori and the Crown share governance over issues of mutual concern.

From their consultation process, the Working Group found that the constitutional model they produce should be based on values. These values were the value of tikanga, belonging, place, balance, conciliation and structure.[135] The Working Group focused on these values as they argued they are reflected in te Tiriti and upheld what their proposed constitutional changes represented.[136] Instead of providing a single proposal, the Working Group outlined six indicative models for constitutional change.[137] In their report, they made it clear that these were indicative models, and are subject to further consultation and change, but display the range of ways in which te Tiriti can be upheld.[138] All of these proposals were guided by the spheres of influence as discussed by the Waitangi Tribunal.[139] Of the Working Group's indicative models, four of the six models follow slightly different structures which each have a type of iwi/hapū assembly which makes up the rangatiratanga sphere, the Crown in Parliament, which makes up the kāwanatanga sphere and a joint deliberate body, which makes up the relational sphere.[140] One of the indicative models has iwi/hapū and the Crown making decisions together in a "constitutionally mandated assembly".[141] This model therefore only has a relational sphere. Their last indicative model is a bicameral model, comprised of an iwi/hapū assembly and the

[133] Charters et al.
[134] Charters et al, vi.
[135] Matike Mai Aotearoa, 'He Whakaaro Here Whakaumu Mō Aotearoa: The Report of Matike Mai Aotearoa - The Independent Working Group on Constitutional Transformation', 69.
[136] Matike Mai Aotearoa.
[137] Matike Mai Aotearoa.
[138] Matike Mai Aotearoa.
[139] Matike Mai Aotearoa; Waitangi Tribunal, 'He Whakaputanga Me Te Tiriti The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry'.
[140] Matike Mai Aotearoa, 'He Whakaaro Here Whakaumu Mō Aotearoa: The Report of Matike Mai Aotearoa - The Independent Working Group on Constitutional Transformation', 10.
[141] Matike Mai Aotearoa, 10.

Crown and Parliament.[142] This therefore has rangatiratanga and kāwanatanga spheres, but no relational sphere.

Ruru and Kohu-Morris explain that what is significant about each of Matike Mai's proposals is that each model allows for "enhanced decision-making for Māori."[143] Each of the Working Group's indicative models allows for the exercise of tino rangatiratanga, providing Māori absolute authority over their lands and people.[144] Further, these recognise and support individual iwi and hapū to exercise tino rangatiratanga. However, they ensure that te iwi Māori comes together within the rangatiratanga sphere. This, the Working Group explains, recognises "both the need for a united voice on issues and the shared goal of Mana Māori Motuhake."[145] Subsequently, these models attempt to reassert the "vibrant political order" which was present across Aotearoa before 1840.[146] While providing for tino rangatiratanga, this continues Crown governance in Parliament through the kāwanatanga sphere. However, the Working Group explains this is "constitutionally reconceptualised in a unique and new way."[147] Consequently, Willis argues that the findings of Matike Mai allow for the kāwanatanga-tino rangatiratanga relationship to "coexist in a meaningful way."[148] The report does not go into detail about the limits and powers of the spheres within the indicative models, as they provide that further dialogue is required to ascertain this. Although the Working Group provides that the government's kāwanatanga sphere would not be the indivisible and unchallengeable source of power that it currently is.[149] The Matike Mai report provides an example of how the kāwanatanga-tino rangatiratanga relationship can be constitutionally given effect within contemporary Aotearoa New Zealand. Ultimately, this shows the fundamental shift that our constitutional arrangements require if this relationship and thus te Tiriti is to be upheld.

[142] Matike Mai Aotearoa.
[143] Ruru and Kohu-Morris, '"Maranga Ake Ai" The Heroics of Constitutionalising Te Tiriti O Waitangi/The Treaty of Waitangi in Aotearoa New Zealand', 569.
[144] Matike Mai Aotearoa, 'He Whakaaro Here Whakaumu Mō Aotearoa: The Report of Matike Mai Aotearoa - The Independent Working Group on Constitutional Transformation'.
[145] Matike Mai Aotearoa, 12.
[146] Matike Mai Aotearoa, 100.
[147] Matike Mai Aotearoa, 112.
[148] Willis, 'The Treaty of Waitangi', 209.
[149] Matike Mai Aotearoa, 'He Whakaaro Here Whakaumu Mō Aotearoa: The Report of Matike Mai Aotearoa - The Independent Working Group on Constitutional Transformation'.

Palmer and Butler's critique of Matike Mai Aotearoa

Within *Towards Democratic Renewal,* Palmer and Butler provide a brief discussion of the findings of Matike Mai. In this, they state that those within the Working Group were opposed to their proposal, claiming that it had occurred before the requisite consultation and discussions had occurred.[150] However, Palmer and Butler argue that while their proposal does establish large changes to our constitutional arrangements, it retains the foundations of our Westminster system and government structures.[151] Consequently, they explain, their "proposals do not amount to a transformation in the sense that Matike Mai Aotearoa seems to advocate."[152]

Palmer and Butler point out that it remains difficult to see how the indicative models proposed in Matike Mai would operate. This is due to the extent of discussions that are yet to occur before the proposals are fully developed.[153] I agree with Palmer and Butler's statement to an extent, but it is likely that so do the Working Group. They have recognised in their report that if any of their indicative models are to be enacted, they require "substantial and substantive refinements."[154] The Working Group have pointed out that the result of these discussions may produce a completely different model.[155] While not providing specific details, the report does show how tino rangatiratanga may be constitutionally expressed. This, as I will discuss later in this essay, is something that Palmer and Butler's proposal fails to do. Notwithstanding, Palmer and Butler argue that it remains difficult to see how enough political will could be garnered to enact any of the Working Group's indicative models.[156] While Palmer and Butler may be correct, I do not wish to get into an argument over whether there is enough political will for either Matike Mai, or Constitution Aotearoa to be enacted. However, the Working Group provided an unequivocal response to Palmer and Butler's general concerns. They stated, "what some might see as an 'unrealistic' discourse was in fact seen as an expression of a deeply held understanding about what was promised in te Tiriti o Waitangi."[157]

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[150] Palmer and Butler, *Towards Democratic Renewal: Ideas for Constitutional Change in New Zealand*.
[151] Palmer and Butler.
[152] Palmer and Butler, 200.
[153] Palmer and Butler.
[154] Matike Mai Aotearoa, 'He Whakaaro Here Whakaumu Mō Aotearoa: The Report of Matike Mai Aotearoa - The Independent Working Group on Constitutional Transformation', 10.
[155] Matike Mai Aotearoa.
[156] Palmer and Butler, *Towards Democratic Renewal: Ideas for Constitutional Change in New Zealand*.
[157] Matike Mai Aotearoa, 'He Whakaaro Here Whakaumu Mō Aotearoa: The Report of Matike Mai Aotearoa - The Independent Working Group on Constitutional Transformation', 22.

Does Palmer and Butler's proposal give effect to the kāwanatanga-tino rangatiratanga relationship?

While their proposed constitution includes a section dedicated to the Treaty, it is my view that the proposal was not predicated on providing the Treaty with increased constitutional recognition. At the beginning of their book, Palmer and Butler reference eleven reasons why a written, codified constitution is necessary before mentioning the Treaty.[158] I believe the main purpose of the proposed constitution was to effectively establish the parameters of government and provide for an enforceable bill of rights. After achieving these objectives, it was viewed as a necessity to include the Treaty within the document to ensure its validity. While it has been included, it remains arguable whether whittling the Treaty into the framework of their proposal is the most effective avenue to provide the document with increased legal status and uphold the guarantees of the Crown in 1840.

The recognition of te Tiriti o Waitangi in Palmer and Butler's proposal centres around the provision where rights under te Tiriti are "recognised and affirmed."[159] This language is deliberately taken from the corresponding provisions of the Canadian Charter of Rights and Freedoms.[160] Edward Willis claims that this language was adopted "to reconcile indigenous rights with the sovereignty of the Crown."[161] This use of this language, therefore, upholds Crown sovereignty under te Tiriti, and thus does not recognise the Waitangi Tribunal's findings that Māori did not cede sovereignty to the Crown through te Tiriti.[162] Willis recognises that the analogous provision in the Canadian Charter of Rights and Freedoms has been used by the Courts to both restrict and expand the Crown's obligations to indigenous peoples in Canada.[163] However, this use has always reinforced Crown sovereignty. Consequently, Willis explains that this has "not provided a framework that can set those rights in alternative constitutional narratives."[164] This provision in Canada has not been an effective means of providing for

[158] Palmer and Butler, *Towards Democratic Renewal: Ideas for Constitutional Change in New Zealand*.
[159] Palmer and Butler, 308.
[160] Palmer and Butler.
[161] Willis, 'The Treaty of Waitangi', 211.
[162] Willis; Waitangi Tribunal, 'He Whakaputanga Me Te Tiriti The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry'.
[163] Willis, 'The Treaty of Waitangi'.
[164] Willis, 212.

indigenous self-determination. Therefore, this would likely provide limited scope for Māori to exercise tino rangatiratanga. Consequently, the predominant te Tiriti enforcing provision in Palmer and Butler's Constitution Aotearoa fails to give effect to the kāwanatanga-tino rangatiratanga relationship and thus does not give effect to the rights guaranteed in te Tiriti o Waitangi.

While the predominant te Tiriti provision within Constitution Aotearoa does not expressly provide for tino rangatiratanga, Palmer and Butler's proposal ensures that a process of consultation for defining what tino rangatiratanga means in Aotearoa New Zealand and what express provision should be added to the Constitution to provide for this.[165] Māmari Stephens points out that this consultation process remains important to ensure that Māori retain a level of agency over the application te Tiriti within our constitutional arrangements.[166] Further, she identifies that similar consultation is what the findings of Matike Mai are based upon.[167] However, while the results of this consultation are to be complied in a report, and presented to Parliament, it places no enforceable obligation on Parliament to enact their recommendations. Rather, it only requires Parliament to "consider it and determine the form and content of the required constitutional amendments (if any) that it considers are required".[168] This places a weak obligation on Parliament as the proposal does not ensure it expressly includes Māori's right to tino rangatiratanga.

Mason Durie argues that "New Zealand will favour a type of constitutional change where the transitions are progressive and not revolutionary."[169] This is what Palmer and Butler have done with their Treaty provisions in Constitution Aotearoa. Their proposal amounts to an incremental increase of recognition of te Tiriti, but this fails to recognise the core kāwanatanga-tino rangatiratanga relationship which te Tiriti aimed to establish. The main reason why this has failed is that it remains to uphold Crown sovereignty and our Westminster system of government.

[165] Palmer and Butler, *Towards Democratic Renewal: Ideas for Constitutional Change in New Zealand*.
[166] Stephens, '"He Rangi Tā Matawhāiti, He Rangi Tā Matawhānui"'.
[167] Stephens.
[168] Palmer and Butler, *Towards Democratic Renewal: Ideas for Constitutional Change in New Zealand*, 310.
[169] Durie, 'Tino Rangatiratanga', 15.

While they have attempted to provide for te Tiriti, and tino rangatiratanga, this process is reflective of the findings of Ani Mikaere. In her article, *The Treaty of Waitangi and Recognition of Tikanga Māori,* she explains that "any concessions that are made to Māori aspirations for tino rangatiratanga … are nevertheless envisaged as occurring within the framework of Crown sovereignty."[170] This remains problematic due to the findings of the Waitangi Tribunal that Māori did not cede sovereignty in 1840.[171] The models advocated for by Matike Mai may therefore reflect that irreconcilable difference between our Westminster system and the terms of te Tiriti. As the Working Group found, "the Westminster constitutional system as it has been implemented since 1840 does not, indeed cannot, adequately give effect to the terms of te Tiriti."[172] This is a system which Collier argues has repeatedly and systematically ignored and refused to uphold the text of te Tiriti.[173] It is not a system that allows for Māori autonomy over their lands, people and possessions. It is not a system that ensures a "just means for sharing power";[174] which Jones argues was established in te Tiriti. Moana Jackson explains the fundamental difference between constitutional change, as shown through Palmer and Butler's 'Constitution Aotearoa' and constitutional transformation, as advocated by Matike Mai. He claims that constitutional change affirms the status quo, while "tutu[ing] around the Westminster system" whereas constitutional transformation entirely reconfigures our governmental arrangements.[175] Ultimately, he argues, "we need constitutional transformation to restore te Tiriti."[176] This constitutional transformation, as advocated for by Jackson, is not what has been proposed by Palmer and Butler. Rather, while advocating for constitutional change, Palmer and Butler's proposal continues to 'tutu around the Westminster system.' As a result, their proposal fails to give effect to the rights guaranteed in te Tiriti o Waitangi.

Conclusion

[170] Mikaere, 'The Treaty of Waitangi and Recognition of Tikanga Māori', 330.
[171] Waitangi Tribunal, 'He Whakaputanga Me Te Tiriti The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry'.
[172] Matike Mai Aotearoa, 'He Whakaaro Here Whakaumu Mō Aotearoa: The Report of Matike Mai Aotearoa - The Independent Working Group on Constitutional Transformation', 25.
[173] Collier, 'A Kaupapa-Based Constitution'.
[174] Jones, *New Treaty New Tradition: Reconciling New Zealand and Māori Law*, 61.
[175] Jackson, 'Constitutional Transformation', 327.
[176] Jackson, 329.

In its entirety, Palmer and Butler's Constitution Aotearoa serves as an impressive attempt to advocate for and propose a written, codified constitution for Aotearoa New Zealand. However, regarding their te Tiriti provisions, these fall short in their attempt to give effect to the rights guaranteed in te Tiriti o Waitangi. This is not to say that they do not want to give effect to these rights, but they have attempted to fit these comfortably within our current Westminster system. It is my finding that the rights guaranteed within Te Tiriti cannot fit within this system. The concepts and parameters of the Treaty do not and cannot fit within either our current constitutional arrangements or Butler and Palmer's proposed constitution. For Te Tiriti to be upheld, it must allow for Māori to exercise tino rangatiratanga. Without this, any attempt at recognising or upholding te Tiriti does not provide for what was promised.

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