The Shift Aotearoa conference 2021 | a project of Community Housing Aotearoa and partners

WORKSTREAM: **CONSTITUTIONAL TRANSFORMATION**

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Foreword and acknowledgement on 'constitutional transformation' in Aotearoa

The idea of developing a focused programme of work came from the consistency with which issues which can properly be referred to as *constitutional* arise as inputs, barriers, issues, or enablers of the housing system. These include Te Tiriti o Waitangi, equal citizenship rights and outcomes, the place afforded in our political system to human rights, and system parameters that exist beyond policy and in interstitial areas of government – areas where there is no clear source of authority or action.

But we recognise both a wider and more specific constitutional transformation context exists in Aotearoa. Firstly we acknowledge that Māori have been calling attention to the need for such transformation in many ways for many decades, and that Māori have demonstrated an unmatched commitment to constitutional transformation and achieved unmatched success in instigating transformation, albeit an incomplete project.

While we realise that other specific projects have also occupied or continue to occupy this space, we acknowledge the place and reach of Matike Mai Aotearoa[1] in particular, the report, and the Iwi Chairs Forum for initiating that project.

Dr Moana Jackson was the convenor of Matike Mai Aotearoa and spoke at the Shift Aotearoa conference in 2019. In his keynote address he articulated the historical and constitutional underpinnings of our housing crisis with fresh clarity and precision built on a careful survey of the history of our housing system illustrated with instances of Māori experience at the hands of Crown decisions.

Our aspiration is to honour both the insights provided by Dr Jackson and the momentum it created to re-visit historical dimensions of housing and 'houselessness'[2]. We also want to honour and further develop the link he articulated with the Matike Mai Aotearoa kaupapa by creating space for future work to explore the inter-relationships and inter-dependencies between housing-related drivers of constitutional transformation and the recommendations of the Matike Mai report.

We note Matike Mai Aotearoa recommends the convening of a Māori Constitutional Convention in 2021[3] and offer the context and resource of our constitutional transformation workstream and our conference as a means to support that important outcome.

Why 'constitutional transformation' at a housing conference?

Our housing system is shaped by constitutional boundaries and features: constraints and parameters that exist far beyond the bounds of what might be thought of as housing policy.

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[1] He Whakaaro Here Whakaumu Mō Aotearoa. The report of Matike Mai Aotearoa - the independent working group on constitutional transformation, 2015. https://nwo.org.nz/wp-content/uploads/2018/06/MatikeMaiAotearoa25Jan16.pdf

[2] Dr Moana Jackson, The Shift Aotearoa conference 2019. Dr Jackson made the eloquent point that in his view Māori cannot be homeless in Aotearoa because Aotearoa is their home; he accepted however that Māori can certainly be *houseless.*

[3] Above n1.

It is inherent in our system of government that *policy* is a thing political parties tout, and governments implement and/or enact. There is at least a sense – generally – that we vote *on and for* policies presented by parties in election campaigns and as such there is a standing argument that we get what we vote for.

Policies are written, readable, comparable, and this is why advocacy often works at the policy level. We can say *your policy says X, and this is having Y impacts, etc,* and on this basis we can propose amendments.

But our housing system is clearly not controlled and shaped by policy alone. Our infamous neo-liberal tendencies toward market-reliance have for 30 years been political economic dogma, not policy.

Recent examples include the exchange arising between the Minister of Finance and the Reserve Bank, and in particular the impact of the Reserve Bank's changes to the LVR settings on our housing system during the COVID response.

Nor are these 'macro' settings legislative, or part of our Public Law, both of which again can be interrogated and understood in relatively concrete terms.

These settings are more akin to *a culture of government* than anything else, and this is of course super murky territory. That the culture of government in New Zealand is deeply Pākeha is axiomatic, but when we expand on that to add words like *colonial* [because cultures themselves operate over time and therefore have historic dimensions] and *capitalist* [partly because of that historical dimension, but also because Pākeha culture has powerful global and international constructs] it's perhaps more confronting.

The question is *how can we approach and modify the culture of government?* These factors remain elusive unless we try to find a frame within which they sit. Our unwritten constitution offers one opportunity, which is bolstered by important contemporary work seeking to interrogate and modify our constitutional structures.

While our constitution is itself elusive, there is no doubt that it supports the principles of democracy, and it follows that we should in fact have a say and have some capacity to influence these matters.

Our housing system has a significant historical dimension.

The housing system is not just a sudden immediate construct. While we make much of the need for new supply, our system is made up primarily of existing stock, and existing and historical experiences.

It might seem straight forward to ask: what is the role of Te Tiriti o Waitangi in our housing system, but this is a critical question *because our housing system has an important historical dimension in which government action and inaction has led directly to detrimental outcomes for Māori [see Jackson 2019, et al],* and it is undeniable that those poor outcomes and inequities are sustained in our contemporary housing system, and by the powers holding that control the system.

But this historic dimension is not just about Te Tiriti either. The mapping of our investment in Public Housing across a century offers some of the most important insights into the current operations of our housing system. At the same time, understanding the way in which international capital support for New Zealand's economy has been tied to a new wave of global financial tools and structures – for example, debt-based [and therefore financial profit-based] home ownership systems – also sheds light on how our system works and why. New Zealanders may have had a quarter acre dream, but owning it was at least partly a leap

> enabled by the extension of the global reach of debt systems to New Zealand's housing system.

And our housing system should also be thought of has having a significant future dimension.

> Constitutional law is clear that while Parliament has the power to make law that binds the government, it is not possible for Parliament to make law that prevents a future government from changing that law, or that is protected from future change.
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> In that environment, how do we achieve a sustained long term response to our housing crisis?
>
> How do we effectively and successfully plan to have a great housing system in 2040?

'Constitutional Transformation': what does it mean?

Transformation implies action and significant change, and in regard to the constitution there is really no chance for change unless it is significant. We are building a vision for a new housing system – one that is well-functioning and effectively ensures all New Zealanders have a home. This also implies and requires significant change – beyond policy. It requires an interrogation of some big structures within government, and there is no point undertaken such an interrogation if we are not committed to grabbing hold of significant change if the opportunity arises.

The Matike Mai Aotearoa report intentionally established its grounds for pursuing constitutional transformation. The point it expands on in the following passage is that when thinking about 'changing' outcomes deriving from New Zealand's constitution, it is absolutely necessary to delve into exploring the system of government imagined for government here [especially but not exclusively in relation to Māori interests], not just the myriad ways in which the constitution itself operates:

> *"The Terms of Reference did not ask the Working Group to consider such questions as "How might the Treaty fit within the current Westminster constitutional system" but rather required it to seek advice on a different type of constitutionalism that is based upon He Whakaputanga and Te Tiriti. For that reason this Report uses the term "constitutional transformation" rather than "constitutional change"*[4]

The report's recommendations, aligning with that idea of a broad and deep interrogation, envision a new constitutional model – something a long way beyond mere *change.* The report ensures readers are confronted with a key argument for revisiting the Westminster system itself, establishing the existence of a constitutional authority pre-existing Te Whakaputanga and the Treaty of Waitangi:

> *"… prior to 1840 Iwi and Hapū were vibrant and functional constitutional entities. That is, they had the right, capacity and authority to make politically binding decisions for the well-being of their people and their lands."*[5]

Matike Mai Aotearoa directly opens up a great deal of space for constitutional discussions. As part of those discussion our housing system, along with historical and contemporary wrongs and inequalities facing Māori which continue to arise within our housing system, could offer real life systemic and governmental activity as a backdrop.

Other 'Western', though perhaps not Pākeha or Westminster 'Western', dialogue is also really useful here as a call to arms to courageous constitutional revision. Joel Modiri from the University of Pretoria, for example, reviews the post-1994 South African constitution from the basis that a constitution is in fact – 'merely' I think he would say - "a textual representation of a particular political

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[4] Ibid.

[5] Ibid.

imaginary, and of a particular political moment".[6] In this way he removes *a priori* numerous layers of Western assumptions about the historical and contemporary authority of this thing called a constitution. The same quote ends by asserting that as such a constitution born in such circumstances was always bound to fail at producing a liberated society.

The proposition for constitutional transformation then becomes – at least if we followed this single insight - one that must avoid any transformation being simply a textual representation of a particular political imaginary. It must instead be a representation of a full range of political imaginaries. We are well-placed to also comprehend any transformation as serving more than one particular political moment: not only is this implicit in a Māori world view – looking both backwards and forwards, it would also be the natural result of respecting throughout the process the history of Māori protest in this area, and in the housing space the history of constitutional failings and the need for long-term future planning.

How will this approach help elevate, express or reinforce the Treaty of Waitangi?

Placing a constitutional lens over our vision of and for housing system helps centre Te Tiriti o Waitangi as the *new* bedrock of our constitution.

In the section below entitled 'What and where is our constitution, and who said so anyway?' I have collated a series of resources explaining the constitution of New Zealand. Interestingly, the resources produced by the Office of the Governor General, and that produced by the Ministry of Justice differ in how they view the role of Te Tiriti in the constitution.

The former says '[i]ncreasingly, New Zealand's constitution reflects the Treaty of Waitangi as a founding document of government in New Zealand'[7], a statement which alludes to the fact that as the constitution is unwritten it can be thought of as modifying over time in accordance with changing uses and expectations.

The latter source names the Treaty of Waitangi in a short list of 6 documents that form our constitution. Four of those documents are Acts of Parliament, one is the Standing Orders of the House of Representatives.[8]

Meanwhile we have developed the view that the general contemporary understanding of our constitution today is that it rests on the idea that Te Tiriti *is* the founding document of New Zealand. This thematically appears in commentary that critiques our legal system, constitutional arrangements, and government/public sector practices. One simple example is from Māori legal academic Claire Charters: "The Treaty of Waitangi is Aotearoa/New Zealand's founding constitutional document"[9].

Notwithstanding this is revealed in the same article as more of an aspirational assertion than a fact with other assertions about the nature and content of our constitution, it remains in many ways a simple truth that is only undermined by obscuring it under multiple layers of Westminster legal analysis – a process which of course stands as a *classical move* in the assertion of a hegemony in the relation between States and indigenous peoples.

And the interpretation and reach of the treaty's terms are increasingly extending across other sources of authority – in practice if not in Public Law as such.

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[6] Oxford Human Rights Hub · The Transformative Possibilities of a Constitution (with Joel Modiri and Gautam Bhatia)
[7] Office of the Governor-General website.
[8] Ministry of Justice website.
[9] Charters, Claire [2006]: An Imbalance of Powers: Māori Land Claims and an Unchecked Parliament in Cultural Survival Quarterly Magazine.

While this may be open to debate, the underlying point is that we live in a society in which constitutional transformation has consistently been part of our collective consciousness, and has proven a successful framework through which to agitate for meaningful change. We are also positioned to not simply accept but to test, push and stretch the bounds of our *unwritten* constitutional, in ways the citizens and institutions of other countries – those with written constitutions – cannot.

What and where is our constitution, and who said so anyway?

The intention of this section is to make the case that New Zealand's constitution is both contested and malleable, making it worth talking about. This is not simply to raise anyone's ire for no reason, but to show that there is good cause and good reason to embark on better and deeper constitutional conversations. And it is also relevant to the provision of housing for vulnerable families.

An unwritten constitution found in a series of written documents

This discussion all arises at least in part because our constitution is *unwritten* – that's the legal term for a constitution that is not contained in one document, but in a series of *written* documents and other sources.

This section sets out below a record of what the Office of the Governor-General and the Ministry of Justice say our constitution is. Apart from being different in minor ways, it is itself simply noteworthy that official government entities have been drawn – for whatever historic or legal reason – into recording and publishing their version of what's in our constitution.

What is shared between these two versions (and many others) is a Pākeha, legal, and Western constitutional imaginary.

Matike Mai Aotearoa – and some other records and documents – represents a different constitutional imaginary, with the shared thread being an uncomplicated view of what a constitution is: a formulation of how a nation will work in particular in terms of the relationship between the State and citizens. It is indigenous not Western, but it is more important to note that the Western legal constructs espoused by the OAG and Ministry of Justice are the terms which the OAG and Ministry of Justice consider give authority to the word 'constitution', a proposition entirely contested when the issue is approached from outside government and from outside Western cultural paradigm. Outside that paradigm it is simply not the case that our constitution needs to be built on what we already have, and especially not simply what is already considered within the legal order.

Matike Mai Aotearoa [full reading of this critical report is recommended, but it is also discussed further below] offers a very different series of views of the constitution - or what constitution is and means - than the Pākeha/Crown/State/Western imaginaries reproduced below. Those various views assume transformative change is possible.

Culture only changes in a landslide victory

Culture – and more precisely the constitutional culture of government, say, or the Public Service – may only really change in a landslide moment, but the pressure is building around constitutional matters relating to both Te Tiriti, and human rights. As noted above, this pressure is primarily due to the consistent impression made on government and the public service by Māori and advocates for better, fairer, and clearer expressions of State compliance with Te Tiriti, over many decades.

Office of the Governor-General:[10]

"New Zealand's Constitution

New Zealand's constitution is not found in one document. Instead, it has a number of sources, including crucial pieces of legislation, several legal documents, common law derived from court

[10] Office of the Governor-General website.

decisions as well as established constitutional practices known as conventions. Increasingly, New Zealand's constitution reflects the Treaty of Waitangi as a founding document of government in New Zealand.

The Constitution Act 1986 is a key formal statement of New Zealand's system of government, in particular the executive, legislature and the judiciary. The Act recognises the Queen as the Head of State of New Zealand and the Governor-General as her representative.

Other laws that outline the powers and functions of the three branches of government in more detail include the State Sector Act 1988, the Electoral Act 1993, the Judicature Act 1908 and the Senior Courts Act 2016 and the District Court Act 2016.

Other important legislation includes the Treaty of Waitangi Act 1975, Ombudsmen Act 1975, the Official Information Act 1982, the Public Finance Act 1989, the New Zealand Bill of Rights Act 1990, the Human Rights Act 1993.

Some British laws, such as parts of Magna Carta 1297 and The Bill of Rights 1688, and the Act of Settlement 1701 and the Royal Marriages Act 1772, have been incorporated into New Zealand law by the Imperial Laws Application Act 1988."

"The New Zealand constitution: Its main features

The New Zealand constitution is to be found in formal legal documents, in decisions of the courts, and in practices (some of which are described as conventions). It reflects and establishes that New Zealand is a constitutional monarchy, that it has a parliamentary system of government, and that it is a democracy. It increasingly reflects the fact that the Treaty of Waitangi is regarded as a founding document of government in New Zealand. The constitution must also be seen in its international context, because New Zealand governmental institutions must increasingly have regard to international obligations and standards."

Note that Te Tiriti is referred to a source that the constitution increasingly reflects, implying an iterative process but one that is somehow up to the constitution to reflect. Bearing in mind this is the OAG's description of the constitution, it is noteworthy that The Treaty of Waitangi Act is referred to as 'important', and the Magna Carta 1297 appears to perhaps have a more stable and recognised place in our constitutional form, than Te Tiriti, according to this rendition.

Ministry of Justice[11]

"The basis for all law

A constitution forms the basis for all law within a country and defines the principles on which the government, including the justice system, must operate. It sets up the most important institutions of government, states their principal powers and makes broad rules about how these powers can be used.

New Zealand's constitution

New Zealand's constitution is drawn from a number of important statutes (laws), judicial decisions, and customary rules (constitutional conventions). [Note, this list explicitly excludes Te Tiriti, but Te Tiriti is included in the immediately following paragraph].

Key parts of New Zealand's constitution

Key parts of New Zealand's constitution can be found in a number of documents. Together with New Zealand's constitutional conventions (generally legally accepted ways of doing things), the following documents form our constitution:

[11] Ministry of Justice website.

- The Constitution Act 1986(external link)
- The Electoral Act 1993(external link)
- The Human Rights Act 1993(external link)
- The New Zealand Bill Of Rights Act 1990
- The Standing Orders of the House of Representatives(external link)
- The Treaty of Waitangi

Other aspects of the constitution are also found in legislation in the United Kingdom and other New Zealand legislation, judgments of the courts and broad constitutional principles and conventions."

Rule of law

The rule of law also forms a significant part of the New Zealand constitution. The principles of the rule of law are not easily defined but encompass ideas such as:

- the powers exercised by parliamentarians and officials are based on legal authority;
- there are minimum standards of justice to which the law must conform, eg laws affecting individual liberty should be reasonably certain and clear;
- the law should have safeguards against the abuse of wide discretionary powers;
- unfair discrimination should not be allowed by the law;
- a person should not be deprived of his or her liberty, status or other substantial interest without the opportunity of a fair hearing before an impartial court or tribunal."

This description of the rule of law offers numerous grounds to reflect on the place of or absence of Te Tiriti. What safeguards exist or have existed to ensure wide discretionary powers have been used over time to ensure Māori prosperity, or to ensure Māori enjoyed equal citizenship? Were Māori deprived of a status protected by indigenous rights generally, or rights deriving from Te Tiriti without the opportunity of a fair hearing before an impartial court or tribunal"?

The Matike Mai Aotearoa constitutional imaginary

"Māori have never abandoned the treaty promise"[12]

"[T]his Report does not consider in any great detail the contrary views that the Crown has maintained since 1840, and especially its presumption that Iwi and Hapū ceded sovereignty in Te Tiriti. We simply note that they have always been at odds with Māori understandings."

The Matike Mai Aotearoa report resulted from 252 hui between 2012 and 2015. The Working Group was established with these Terms of Reference:

"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".

When we talk about Te Tiriti o Waitangi, it's always constitutional. That's not only because we might be trying to make point about the validity of Te Tiriti as a part of our constitution. It is also constitutional because for Māori the source of government authority remains Te Tiriti, and Te Tiriti remains and continues to be seen by Māori as a validation of pre-existing rangatiratanga.

The descriptions of New Zealand's constitution provided above from the OAG and Ministry of Justice basically extend to debating the place of Te Tiriti within the realm of our constitutional sources, and

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[12] Above n1, p12.

fall well short of looking past that to consider the constitutional nature of Māori authority. Structured Māori authority, with basic shared understandings across iwi and hapu providing a Māori constitutional form which was the very thing that made it possible and necessary for the Crown to enter into a Treaty.

The Matike Mai Aotearoa report notes:

> "… prior to 1840 Iwi and Hapū were vibrant and functional constitutional entities. That is, they had the right, capacity and authority to make politically binding decisions for the well-being of their people and the protection of their lands.
>
> The authority was exercised within the constructs and values of our own culture and according to the quite specific rights and responsibilities that the tīpuna assumed were implicit in any constitutional and political power. It was part of a unique constitutionalism that jealously guarded the independence of each polity while stressing the interdependence that is fundamental to whakapapa.
>
> It included all the usual attributes of constitutional independence including the obligation to maintain the peace or make war and the right to define what we would now call citizenship. It also included the authority to decide who could enter into our jurisdiction as immigrants, what tikanga would govern their presence, and what entitlements, if any, they might be granted.
>
> In spite of all that has happened in the last 170 years to the effective practice of that constitutionalism it is our firm view that the right to it remains intact. We take that as a given."[13]

The Matike Mai Aotearoa report recommends the convening of a national Māori constitutional convention in 2021.

If such a convention occurs, where will that leave Pākeha in considerations of New Zealand's constitutional foundations? The Crown, the public sector, and Pākeha more generally as independent actors within our State need to engage with this conversation too.

Pre-conference work programme | initial schedule of meetings

Our pre-conference work programme includes a series of engagement meetings on these matters. Please let us know if you would to be involved.

2021 work programme	Constitutional transformation*	Housing System Settings	Narrative Change	Development phase
Meeting agenda prepared 3 working days prior published via available channels				
Meeting minutes circulated 3 days after specifying agreed next steps/tasks published via available channels				
Meetings are open and inclusive – there is no membership or limit on attendance: feedback will consistently be sought				
This schedule offers a framework: there can and will be other meetings, 'offline' and otherwise				
Existing networks and sector networks will be kept up to date and consistently invited to feedback and participate				
Standard timing	-	1PM – 3PM	10AM-Midday	
January	TBC	26 Jan	26 Jan	Convene conversation with those interested in each workstream Draft forward work/discussion milestones to June 2021

[13] Ibid, p 30.

February	TBC	9 Feb	9 Feb	Agree vision for what could be achieved at conference, & to 2023 How? Develop ideas to get there
March	TBC	9 March	9 March	Agree vision for what could be achieved at conference, & to 2023 How? Develop ideas to get there
April	TBC	13 April	13 April	Conference presentations planned – key points agreed Issues paper or discussion papers agreed
April / May	Evolving work stream leadership engages with sector Wide net engagement on issues and discussion papers			
May	TBC	11 May	11 May	Feedback on issues and discussion papers circulated to inform presentations
May 12 - 31	Networking and engagement Conference presentations pre-recording			
Conference date:	9 June	10 June	11 June	Conference presentations focus on decision making and advocacy opportunities
Post conference initial review	TBC	29 June	29 June	Review conference proceedings and plan future work Establish forward meeting schedule
Conference 2021 outcomes include the development of a clear agreed future work programme				