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Overseas-Born Māori and New Zealand Citizenship

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'MISSING MEN' BACKGROUND PAPER

May 2011

Institute of policy studies

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Waitangi Tribunal
16 Sep 15
Ministry of Justice
WELLINGTON

‘MISSING MEN’ BACKGROUND PAPER

MONTH/YEAR May, 2011

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ACKNOWLEDGEMENTS I would like to thank Colin James, David Pearson, Paul Callister and Paul Hamer for their insightful comments on early drafts of this paper. I would also like to acknowledge the assistance from Hayden Kerr who facilitated my use of a Department of Internal Affairs internal working paper. In addition, I would like to thank both the Foundation for Research, Science and Technology and Victoria University's summer scholarship programme for their funding support.

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Overseas-Born Māori and New Zealand Citizenship

Abstract

New Zealanders have been identified living in over 150 countries. Of particular note are the large numbers of Māori living in Australia. While most Māori living in Australia have automatic rights to live in New Zealand, some people with Māori ancestry living outside New Zealand do not have automatic rights to become New Zealand citizens or reside permanently in New Zealand. This paper explores whether Māori born overseas should have an automatic right to gain New Zealand citizenship.

Key words: diaspora, citizenship, Māori

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Introduction

Whether an individual is a visitor, temporary migrant, permanent resident or citizen of a country profoundly affects that individual's rights. Not only does an individual's nationality status affect their rights, it can also have a deep effect on their identity and sense of belonging (Pearson, 2005).

Many people have some form of connection to New Zealand. For some people living in New Zealand the connection is through being an international student studying at a New Zealand university, for some it is through being a citizen whose family has been here for five generations, and for yet others it is through being Māori and having an even longer ancestral connection with New Zealand.

Many people with a connection to New Zealand live overseas, including individuals who do not have automatic rights to become New Zealand citizens or to reside permanently in New Zealand.

Gamlen (2007) notes the problems of determining the number of New Zealanders, or potential New Zealanders, living overseas. He points to estimates from just over 400,000 to over 850,000 (Bryant and Law, 2004; DRC, 2007; Bedford, 2001; Hugo et al, 2003). In part, the difference in estimates relates to whether individuals or family units are counted. When family units are counted a significant number of individuals who were not born in New Zealand or are not New Zealand citizens are counted (Kea, 2006). A further complicating factor in counting is that a significant number of New Zealand citizens living overseas have dual citizenship and so might be part of more than one diaspora.[1] However, it is clear that New Zealand's diaspora is relatively large compared with that from other industrialised countries, although this does depend on which estimate is used. Between about a tenth and a fifth of the total New Zealand population, possibly up to a quarter of its tertiary-qualified workforce, live overseas at any one time (Gamlen, 2007).

1 While acknowledging a debate over meaning, Gamlen (2011: 5) suggests 'the essential features of a diaspora group are dispersion to two or more locations, ongoing orientation towards a "homeland", and the maintenance of a group identity over time." Gamlen adds that 'understood in this way, a diaspora can be succinctly defined as "an imagined community living away from a professed place of origin".'

New Zealanders have been identified living in over 150 countries (Kea, 2006), but the main location is Australia where about 530,000 New Zealanders live (Ansley, 2011). However, a significant number of New Zealand citizens live in the United Kingdom, Canada, and the United States (Bryant and Law, 2004). Of particular note are the large numbers of Māori living in Australia. Hamer (2008) estimated one in six Māori lived in Australia in 2006. While most Māori living in Australia have automatic rights to live in New Zealand, some people with Māori ancestry living outside New Zealand do not have automatic rights to become New Zealand citizens or reside permanently in New Zealand.

The Identity and General Policy Team of the Department of Internal Affairs (DIA, 2006) considered citizenship issues.[2] The unpublished internal paper analysed the current citizenship law and its development, focusing on the implications for Māori born outside New Zealand. Citizenship for those born overseas was focussed on again in early 2011 when the Honourable Sir Doug Kidd argued that the ability to pass on citizenship rights should be expanded (Kidd, 2011).

In this paper we begin by outlining the current law and commenting on the arguments in the paper by the Identity and General Policy Team (DIA, 2006). We then use four hypothetical examples to illustrate challenges in relation to New Zealand citizenship that those born outside New Zealand could face. We then explore whether the right to citizenship should be a right all Māori have regardless of whether they are born in or outside New Zealand. We discuss this issue in the context of the Treaty of Waitangi and the United Nations Declaration on the Rights of Indigenous Peoples (DRIP).

2 The Department of Internal Affairs (2006) paper is an internal document. The views, opinions, findings, and conclusions expressed in the paper were those of the authors and do not reflect the views of the department or the government.

Citizenship law

On New Year's Day 1949, the British Nationality and New Zealand Citizenship Act 1948 came into force. This Act created the legal status of a 'New Zealand citizen' and enabled 'New Zealand British subjects' (including Māori) to become New Zealand citizens.

Types of citizenship in New Zealand

The Citizenship Act 1977 is the governing legislation in relation to citizenship in New Zealand.

Citizen by birth

Before its amendment in 2006, the Citizenship Act 1977 provided that an individual is a New Zealand citizen if they are born in New Zealand, Niue, Tokelau, or the Cook Islands. Any individual born in those countries before 1 January 2006 is considered a New Zealand *citizen by birth*.[3]

The 2006 amendment to the Citizenship Act changed the law, so that merely being born in New Zealand, Niue, Tokelau, or the Cook Islands is no longer sufficient to guarantee New Zealand citizenship. In addition to being born in New Zealand, Niue, Tokelau, or the Cook Islands, an individual born on or after 1 January 2006 must also have at least one parent who is a New Zealand citizen or who is entitled to indefinitely reside in New Zealand, Niue, Tokelau, or the Cook Islands.[4]

An individual is a citizen by birth if they are born in the Independent State of Samoa and, but for reasons of medical necessity requiring the mother to travel from Tokelau to the Independent State of Samoa to give birth.[5]

In addition, an individual is likely to be a citizen otherwise than by descent if they were adopted in New Zealand on or after 1 January 1949 by a parent who is a New Zealand citizen.

Finally, four exceptions to the above requirements are in section 6 of the Citizenship Act.[6]

3 Citizenship Act 1977, section 6(1)(a).
4 Citizenship Act 1977,, section 6(1)(b).
5 Citizenship Act 1977, section 6(5).

Citizens otherwise than by descent

The expression ‘citizens otherwise than by descent’ can be used generally to describe all citizens who are not citizens by birth, but can also be used to mean a specific category of citizens who are not technically citizens by birth or grant. In this section, we use ‘citizen otherwise than by descent’ to refer to the latter group.

An individual born outside New Zealand is a New Zealand citizen otherwise than by descent, if the individual’s father or mother is a New Zealand citizen or a New Zealand citizen by descent under the Citizenship Act 1977 and is a head of mission or head of post within the meaning of the Foreign Affairs Act 1988; an employee in any part of the state services; a member of the Armed Forces on service overseas; working overseas for the public service of Niue, Tokelau, or the Cook Islands; or an officer or employee of New Zealand Trade and Enterprise or the New Zealand Tourism Board on service overseas.[7]

If an individual was born outside New Zealand on or before 1 January 1978 and one parent was overseas on service, it is likely the individual will be considered a citizen otherwise than by descent.

An individual is likely to be a citizen otherwise than by descent if they were a British subject born on or before 1 January 1949 who was ordinarily resident in New Zealand throughout 1948, naturalised in New Zealand before 1949, born in Samoa before 1949, or married to a man who automatically became a New Zealand citizen on 1 January 1949.

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6 Firstly, if a child born in New Zealand on or after 1 January 1978 would be otherwise stateless, they are deemed a citizen by birth. Secondly, a child is deemed to be a New Zealand citizen by birth, if the child, having recently been born, is found abandoned in New Zealand or if investigations fail to establish the identity of at least one parent. Thirdly, an individual born in New Zealand is not a New Zealand citizen, if their father or mother was a person upon whom any immunity from jurisdiction was conferred by or under the Diplomatic Privileges and Immunities Act 1968 or Consular Privileges and Immunities Act 1971 or in any other way, and neither parent was a New Zealand citizen. Finally, an individual is not a citizen by birth, if the individual’s father and mother were enemy aliens and the birth occurred in a place then under occupation by the enemy.

7 Citizenship Act 1977, section 6.

Citizen by descent – the jus sanguinis and jus soli *principles*

An individual may be a New Zealand citizenship by descent if they were born outside New Zealand on or after 1 January 1978 and, at the time of birth, one parent was a New Zealand citizen otherwise than by descent.

Jus sanguinis translates to 'right of blood' and is the principle that underpins the law in relation to citizenship by descent in New Zealand. New Zealand's citizenship by descent laws focus on blood connections rather than place of birth or place of residence (DIA, 2006). However, an individual who has been adopted by a New Zealand citizen may also be a citizen by descent.

In contrast to the *jus sanguinis* principle, the *jus soli* principle focuses on place of birth. If New Zealand's citizenship laws were underpinned by the *jus soli* principle, citizenship by descent would not feature.

Citizenship by grant

An individual may apply to be granted New Zealand citizenship.[8] To be eligible for a grant of citizenship an individual must have been physically present in New Zealand for a minimum of 1,350 days during the 5 years immediately preceding the date of the application and for at least 240 days in each of those 5 years, and, if granted citizenship, must intend to continue to reside in New Zealand. The days in which the individual resided in New Zealand must have been days in which the applicant was entitled, in terms of the Immigration Act 1987, to be in New Zealand indefinitely. However, the Minister may reduce this period in certain circumstances or waive the requirement completely.

Furthermore, to be granted New Zealand citizenship under section 8 an individual must also meet English language and character requirements and understand the responsibilities and privileges associated with New Zealand citizenship.

Samoan nationals may apply under the Citizenship (Western Samoa) Act 1982 for a grant of citizenship. The requirements for citizenship under this Act differ from those discussed above.

8 Citizenship Act 1977, section 8.

Analysis of citizenship in New Zealand

For the most part, the rights and responsibilities that come with citizenship are the same despite the different ways in which citizenship may come about. There is, however, one important difference between citizens by descent and other New Zealand citizens. This difference is the basis of this paper. Citizens by descent, unlike citizens by birth and citizens by grant, cannot automatically pass on citizenship to their children if their children are born outside New Zealand.

However, under section 9(1)(b) of the Act the Minister of Internal Affairs may grant citizenship to an individual who has a parent who was a New Zealand citizen when the individual was born.[9] This ministerial discretion is rarely used. There have been only nine grants from 2001 to 2006 out of about 130,000 applications (DIA, 2006). These statistics suggest that the Act may be insufficient to overcome the challenges in relation to multi-generational citizenship. The Act could be amended so that the minister could take into account whether an applicant can show a 'significant ongoing association with New Zealand' when considering whether to grant citizenship (DIA, 2006).

To be able to pass on citizenship, an individual who is a citizen by descent must first apply for and be granted citizenship. If the individual receives a grant of citizenship, then they are no longer a citizen by descent and can pass on New Zealand citizenship to any of their children who are born outside New Zealand. However, an individual who is a citizen by descent and seeking to become a citizen by grant must meet all the requirements for a citizen by grant and pay a fee. An individual must know that this option is available as well as the consequences of being a citizen by descent who was born overseas.

Knowledge of this process is unlikely to be widespread because the consequences of being a citizen by descent compared with being a citizen by grant are not widely publicised. It is also unlikely to be widely known (because relevant information is not readily available) that an individual who is a New Zealand citizen by descent can become a New Zealand citizen by grant[10] .

9 Citizenship Act 1977, section 9(1)(b).
10 Citizenship Act 1977, section 8.

In relation to New Zealand's diaspora and citizenship laws, Gamlen (2007, p 13) states that:

> the New Zealand diaspora is unlikely to become a 'first-order' policy issue. However, it deserves higher priority attention than it currently receives, and this attention could be more coherent, holistic and long-term.

Gamlen (2007, p 13) goes on to argue that:

> ...the country's geographical borders do not necessarily delimit its national population …
>
> This point cuts deep into New Zealand's relatively 'new and fractured' … national identity. Consider, for example, that being Māori abroad involves a different formal relationship with 'home' than being a New Zealander abroad. New Zealand citizenship is 'earned' through a mixture of ancestral, birth and residence criteria, whereas formal membership in Māori society is inherited through *whakapapa* (genealogy)[11] Some groups might argue that current national identity legislation neither reflects nor affects who is and who is not Māori, and that all Māori in diaspora should be able to return to Aotearoa, their *turangawaewae* (home ground), even if they are not New Zealand citizens. Without necessarily advocating this view, one can discern both legal and normative arguments which might sustain it. [Emphasis in original]

The Department of Internal Affairs internal paper asks whether the current restrictive approach to citizenship by descent fails to recognise multi-generational cultural and spiritual attachments to New Zealand for people who are distinctly 'New Zealand' in origin (DIA, 2006). This in turn raises the question of whether people who can make a claim to be the indigenous people of a land should have an automatic right to be citizens of that country no matter where they were born. To answer this question, we first need to understand what it means to be indigenous.

Defining indigeneity

Before focusing on indigeneity, it is worth discussing the public policy definitions of Māori. We then discuss views of indigeneity from Martinez Cobo, Benedict Kingsbury, and Jeremy Waldron.

Public policy definitions of Māori

Before focusing specifically on indigeneity, it is worth noting that in public policy there are two main definitions of Māori. One definition is a measure of ethnicity, the

11 In footnote 4 of Gamlen's article he states 'Proving that some Māori ancestry is a necessary and sufficient condition for being recognised as Māori'.

other is a measure of descent or ancestry. In all official data collections, ethnicity is a self-determined concept that requires no 'proof'.

The current official definition is that ethnicity is the ethnic group or groups that people identify with or feel they belong to. Ethnicity in this sense is a measure of cultural affiliation rather than race, ancestry, nationality, or citizenship. Ethnicity is self-perceived, and people can belong to more than one ethnic group.

In a background paper to the 2001/2002 Review of Ethnicity Statistics by Statistics New Zealand, Allan (2001, pp 5–6) lists factors that may influence the construction of an individual's ethnicity. Many of these factors are interrelated. In particular, the differences between ancestry and race are somewhat clouded. Allan's factors are:

- **ancestry:** ancestors are described as people from whom a person is descended; a forefather; a person regarded as the forerunner of another …
- **culture:** broadly speaking, a person's way of life, which may include music, literature, dance, sport, cuisine, style of clothing, values and beliefs, patterns of work, marriage customs, family life, religious ceremonies, celebration days/events which have particular cultural significance, eg Chinese New Year …
- **where a person lives and the social context:** are they rural, village dwellers, landowners or city inhabitants?
- **race:** defined as 'the descendants of a common ancestor especially those who inherit a common set of characteristics; such [as a] set of descendants, narrower than a species; a breed; ancestry; lineage, stock; a class or group, defined otherwise than by descent' … This often 'refers to physical characteristics such as skin colour, treated by members of a community as ethnically significant. ... There are no clear-cut characteristics by means of which human beings can be allocated to different races' …
- **country of birth and nationality:** nationality can be defined as membership of, or the fact or state of belonging to, a particular nation; a group or set having the character of a nation … [12]
- **citizenship:** the status of being a citizen and the membership of a community, or having the rights and duties of a citizen …
- **religion and language:** religion can be a key element of an ethnic group, for example Jews. Language is also commonly a marker of an ethnic group.

Statistics New Zealand (2003, p 4) notes that while any of these factors can influence the construction of a person's ethnicity, 'they do not necessarily determine a person's ethnicity'. However, this list suggests that for many, or perhaps most, of those in

12 A distinction needs to be made between a legal–political definition of country of birth and nationality and a sociological definition of the latter.

non-Māori ethnic groups, ancestry and place will have some influence on their ethnic affiliations.

Some official data collections, notably the five-yearly Census of Population and Dwellings, also have a measure of descent specifically in relation to Māori. While there is a relatively close alignment between descent and ethnicity for Māori, based on 2006 census data a significant number of respondents noted Māori ancestry but did not also claim Māori ethnicity as well as a small group who did not record Māori ancestry but claimed Māori ethnicity.

As Morning and Sabbagh (2005, p 70) note, in ethnic public policy an ongoing tension exists between 'the *politics of distribution* and the *politics of recognition*' (emphasis in the original). In the politics of recognition, claiming a particular identity does not lead to any special rights. But under the 'politics of distribution', rights and resources are at stake. In New Zealand in areas such as applying for ethnic-based scholarships ancestry rather than ethnicity is always used. Gaining citizenship clearly comes under the politics of distribution and emphasises definitions that are clear and have some external measures of proof. It is against this background that indigeneity is discussed.

Martinez Cobo – indigenous communities exist when colonial contact occurs

Much controversy surrounds the concept of indigeneity, and the legal and political significance of indigeneity is vigorously debated. Although the United Nations Declaration on the Rights of Indigenous Peoples is discussed later in this paper, the United Nations has no definition of 'indigenous peoples'.

In saying that, the United Nations Special Rapporteur Martinez Cobo provided a working definition of indigenous peoples in his 1986 report *Study of the Problem of Discrimination against Indigenous Populations.* The United Nations has used this definition as a guide. Cobo (1986) argues that:

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis for their continued existence

> as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

Put simply, the indigenous communities are 'in place' at the time of colonial contact. This approach avoids the vexed question of how long the occupation must have been, as this differs greatly among indigenous groups. Māori have occupied the land for centuries, but their Australian and Canadian counterparts have occupied their lands for millennia.

Cobo (1986) goes on to provide further clarity by setting out what constitutes historical continuity:

> This historical continuity may consist of the continuation, for an extended period reaching into the present, of one or more of the following factors:
>
> (a) Occupation of ancestral lands, or at least parts of them;
>
> (b) Common ancestry with the original occupants of the land;
>
> (c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, life styles, etc.);
>
> (d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);
>
> (e) Residence in certain parts of the country, or in certain regions of the world;
>
> (f) Other relevant factors.

Cobo's (1986) definition of indigeneity requires that only one of the above factors be satisfied to show that a group of people has a historical continuity with pre-colonial society. Therefore, Māori would be able to satisfy this part of Cobo's definition. There would also be much variation among individual Māori as to how many of the factors are relevant (Kukutai, 2010). Perhaps at one end of a broad spectrum, there would be those Māori who, for generations, have lived in their traditional tribal areas, are fluent in te reo Māori (language), and uphold traditional Māori customs. At the other end of the spectrum would be those with Māori ancestry who have lived outside their traditional areas, in another New Zealand location or overseas, do not speak te reo Māori, and do not uphold traditional customs. As a result of ethnic intermarriage, there would also be those with Māori ancestry who do not consider themselves ethnically Māori.

Benedict Kingsbury – indigeneity requires self-dentification but also regard by the ambient population

Benedict Kingsbury's (1998) definition of indigeneity includes essential requirements and relevant indicia. Kingsbury (p 455) states that the essential requirements are:

(a) Self identification as a distinct ethnic group;
(b) Historical experience of, or contingent vulnerability to, severe disruption, dislocation or exploitation;
(c) A long connection with the region;
(d) The wish to retain a distinct identity.

The relevant indicia are divided into two categories, 'strong indicia' and 'other relevant indicia' (Kingsbury, 1998). Kingsbury (p 455) states that the strong indicia include:

(a) Non-dominance in the national (or regional) society (ordinarily required); and
(b) Close cultural affinity with a particular area of land or territories (ordinarily required)

Finally, Kingsbury (1998, p 455) states that the other relevant indicia include:

(a) Socio-economic and socio-cultural differences from the ambient population;
(b) Distinct objective characteristics such as language, race, and material or spiritual culture;
(c) Regarded as indigenous by the ambient population or treated as such in legal and administrative arrangements.

Kingsbury's (1998) definition of indigeneity is the most flexible definition of the three presented. Consequently, it is vague in places, so raises questions. Does the need for the indigenous population to be regarded as such by the ambient population[13] mean that the state is becoming the arbiter of indigeneity rather than the indigenous population?

The requirement that the indigenous population has a long connection with a region is vague as 'long' is not defined. Are we to take 'long' at face value or are we to take a comparative approach and look at the length of time other groups have been connected to the region in which they are considered indigenous? If we are to take the latter approach, it is possible that Māori may not be considered to be the

[13] The ambient population takes into account movements of individuals through a given area.

indigenous people of New Zealand as it is estimated their connection with New Zealand spans just over a 1,000 years whereas the indigenous people of Australia and Canada have a connection that has lasted millennia.

The reference to 'ethnic group' in the first essential criteria begs the question, are indigenous groups just a special sort of ethnic group?

Jeremy Waldron – indigeneity is relative and requires a special relationship with the land

According to Jeremy Waldron (2003) the term indigeneity is a relative term because 'people may be described as indigenous in relation to a certain land or territory, meaning they are the original inhabitants'. This definition is referred to as the 'first occupancy' definition. Waldron (2003, p 62) argues that the term indigeneity is a 'doubly relative' term because a group may be indigenous in 'relation to some other people, who arrived in the land at a time subsequent to the people now called indigenous'. This definition is referred to as the 'prior occupancy' definition. The second of these definitions is referring to the descendants of peoples 'who lived in the territory before the entrance of a colonizing population' (Waldron, 2003, p 62).

Given these definitions, it can be said that Māori are the indigenous people of New Zealand because they were the first human group to inhabit New Zealand or because, relative to the Europeans, they were the indigenous inhabitants of New Zealand (Waldron, 2003).

After examining the surrounding literature and case law, Waldron (2003) concluded that a special relationship with the land is key to an indigeneity claim. In the New Zealand context, this means that to bring a claim for citizenship on the basis on indigeneity an individual would need to show a connection with the land that was special and different to the connection that others have with New Zealand.

The major criticism of Waldron's (2003) first occupancy definition is that it does not permit enquiry into the justice of an indigeneity claim, because simply being 'prior' is enough to satisfy the criteria.

Comparison of Cobo, Kingsbury, and Waldron's definitions of 'indigeneity'

The definitions of 'indigeneity' discussed above raise questions:

- Can indigeneity be retained forever simply through ancestry or does there need to be some wider connection to land and cultural practices?
- Who should define indigeneity? For example, for some iwi (tribal) leaders it may be that people who can link their whakapapa back to the particular iwi, no matter where they live or their citizenship, are always considered indigenous. Other leaders might consider the dilution of iwi resources across a wider membership base and put in place definitions of indigeneity that reward those with closer place and cultural connections. If the Crown is defining indigeneity, the definition may be more legalistically than culturally driven.
- Can new indigenous groups emerge within a locality given that length of residence and geographic boundaries are frequently integral to the definition?

In relation to the third question, Pryor et al (1992) argue, in a Canadian context, that as colonial societies mature and evolve, there is an increasing tendency for the settler populations to see themselves as 'indigenous' to the society in which they live. This includes Canadians starting to view the response 'Canadian' in official surveys as an evolving indigenous ethnic category.

In New Zealand, historian Michael King put forward a similar idea (Butcher, 2003).

> Maori came to New Zealand from Eastern Polynesia. We don't know how long it took to actually turn their backs on their culture of origin and decide they were Maori, but it was probably only three or four generations. The point at which it happened was when they stopped looking over their shoulder to the home culture and just got on with being the people they were in a new country. My view is that Pakeha have been here long enough now to have done the same thing and are 'a second indigenous culture'. And I don't think that's a particularly provocative thing to say. Like most Pakeha, I've been to Europe and felt that sense of affinity – but I am not European.

King has not been the only person to question who is part of the indigenous group. For example, Royal has suggested 'the concept of "tangata whenua" should no longer be exclusive to Māori but be part of a new language to include all those who share and are committed to a spiritual relationship with the natural environment' (Gurunathan, 2003, p 1).[14]

14 The idea that allowing settlers to identify with the country in which they live will automatically undermine indigenous rights is challenged in an article based on the Australian experience. Moran (2002, p 1,013) explores the idea that 'indigenizing settler nationalism' may support rather than resist the extension of indigenous rights and claims.

A Minister in the then Labour government, Trevor Mallard (2004), also claimed to be an indigenous New Zealander. Looking to the future political journalist and analyst Colin James (2008) has also noted:

> But look out 25 years. There will be Māori whose whakapapa is only one two hundred and fifty-sixth, even less, of their bloodline. Will they be accepted as tangata whenua and some seventh-generation English-descended New Zealander not be accepted as indigenous?

If indigeneity can be lost (at least officially) can it then be regained perhaps by allowing a person who has Māori ancestry but who has no automatic rights to live in New Zealand, become a citizen and, through this, potentially regain links with land and culture? What if those wanting to gain citizenship are doing so simply to gain a second passport and do not want to live in New Zealand or to reconnect with their culture and land?

As has been well documented, Māori experienced severe disruption, dislocation, and exploitation from colonialism; their lands were confiscated, and many Māori were forced to move from their tribal and ancestral lands. It could be argued that the subsequent deprivation by many Māori has encouraged migration outside of New Zealand, notably to Australia. However, some migration out of traditional areas will have been due to 'pull' factors, such as employment and wages, rather than simply 'push' ones.

Special migration treatment for Māori descendants

When the restriction on citizenship by descent was being considered in 1977 there was no consideration of the effect on Māori. Māori and Pakeha were viewed as equal at law, so it was believed that one ethnic group should not enjoy special consideration or rights compared with another. Indigeneity was not recognised or accorded any special or different treatment'

Not only does this restriction fail to recognise the strong cultural and spiritual relationship that Māori may have with New Zealand, but it also goes against tikanga (Māori customary practices). According to tikanga, Māori who migrate from their district of origin still have rights in relation to that district and can pass such rights on. In other words, the restrictive law on citizenship conflicts with tikanga because it focuses on place of birth whereas tikanga focuses on whakapapa.

The current law means that some Māori (and non-Māori) born outside New Zealand who are not New Zealand citizens are denied access to New Zealand.[15] Despite being born overseas or residing outside New Zealand, people, both Māori and non-Māori may still have deep family and 'home' connections to New Zealand that span generations. Arguably, the law fails to acknowledge and foster these connections because Māori and those who consider themselves socially and culturally New Zealanders but who are not New Zealand or Australian citizens must be granted permission from the New Zealand Department of Labour to migrate to New Zealand. At law, foreign-born Māori and other New Zealanders who do not have New Zealand citizenship are considered temporary migrants with the same rights as all other temporary migrants to New Zealand.

Although the central issue at hand is the issue of citizenship, it is interesting to note that the need to be granted permission from the Department of Labour to visit New Zealand means an individual could be denied permission to reside in New Zealand. This in turn means the person could be denied access to their ancestral marae and lands even though the individual is an indigenous person of New Zealand and possesses a whakapapa link with the country (DIA, 2006).

An individual may apply to be granted New Zealand citizenship under section 8 of the Citizenship Act 1977. This approach, if made widely known, might solve some of the identified issues, but it is unhelpful to those who are descendents of individuals who are citizens by descent. In sum, section 8 relies on the citizen by descent to change their citizenship status; descendants of the citizen by descent do not have any control over section 8 applications. However, it must be remembered that these individuals can apply for a grant of citizenship under section 9(1)(b).

We next use four examples to illustrate the circumstances in which citizenship issues may arise for Māori.

Example 1: Grandchild of a Māori soldier raised overseas

The first example involves an individual who is the grandchild of a Māori soldier who served in Vietnam. This individual was raised by their mother in Vietnam and

15 'Access to New Zealand for non-citizens' is an immigration issue, rather than a citizenship issue, so the Immigration Act 2009 applies rather than the Citizenship Act 1977.

eventually discovered they had a Māori grandfather. Based on these ancestral ties, the individual sees an opportunity to migrate to New Zealand and become a New Zealand citizen. This individual does not speak English and does not have a skill set that would gain them entry as a permanent migrant.

Example 2: Child descendant of a Norwegian whaler and his Māori wife

The second example involves a descendant of a Norwegian whaler and a Māori woman. The whaler returned to Norway 120 years ago with his Māori wife. Subsequent generations have retained connections with New Zealand. Some are registered members of an iwi. One of these descendents wants to migrate to New Zealand and become a citizen. This descendent does not speak English and does not have a skill set that would enable them to enter New Zealand as a permanent migrant.

Example 3: Child born in England to a British father and Māori mother

The third example involves a child born in England to a British father and New Zealand mother who has Māori ancestry. The child is a New Zealand citizen by descent. The family return to New Zealand and reside in New Zealand for 20 years. The child who is a New Zealand citizen by descent migrates temporarily to England for work on a fixed contract and gives birth to a child while there. Because she is a citizen by descent herself, she cannot pass on New Zealand citizenship to her child despite only having memories of life in New Zealand, calling New Zealand home, and living in New Zealand for more than 20 out of 22 years.

Example 4: Grandchild of missionaries who maintain links with New Zealand

A group of Ngāti Porou move to Hawaii to serve as Mormon missionaries. They stay there for two generations but maintain Māori links, run the local kapa haka club for the small Māori community, and inherit a significant shareholding of land in Māori title on the East Coast of New Zealand. The grandchildren return to live in New Zealand but do not meet the criteria for citizenship so can stay for only a short period.

Possible legislative reform

Migration is often driven by a need or desire to seek better opportunities. Thus, migration often involves moving from a poor country to a wealthier one. However, in most of the four examples this is not the case; the individual seeking New Zealand citizenship is migrating from a country that is in a better economic position than New Zealand. In example 1, the only connection to New Zealand is through ancestry. In example 2, there is a strong connection through registration to an iwi. Therefore, should the Citizenship Act be amended so that special migration treatment for all Māori descendants is allowed. Could there be a special route to citizenship with some test of ongoing links to New Zealand? Having a special route to citizenship or at least some rights of return for Māori would not be unique (for example, Israel's nationality law includes a right of return for Jewish diaspora).

Example 1 raises political questions: does a somewhat distant descent link trump other test criteria? Should a particular ethnic connection trump other test criteria only in relation to Māori?

The Department of Internal Affairs internal paper put forward various options (DIA, 2006). One was to amend the Citizenship Act to provide for multi-generational citizenship by descent. This amendment would acknowledge Māori as the indigenous people of New Zealand as well as acknowledge tikanga Māori at a legal level. However, this reform would not be without risks and problems.

Reforming the law in the this manner would permit some people to permanently reside in New Zealand and have rights to social welfare, education, health care, and the like. It is likely the numbers would be relatively small but they may not be insignificant.[16] While this approach would solve the potential problem around multi-generational citizenship it could bring about a great deal of debate and controversy because it would grant citizenship, and thus rights, to a group of people based on their ancestral links alone. After the historic move away from an ethnic- or country-based pattern of migration, sometimes described as a 'white-only' policy, such a move would revive ethnic-based policies. However, it is possible to argue that

16 However, the Department of Internal Affairs internal paper did highlight a risk of large numbers of people many generations removed from New Zealand arriving in New Zealand en masse should an economic, political, or environmental disruption occur overseas (DIA, 2006).

‘indigenous’ is a special and different category to ‘ethnic’, so this revival might not occur. This issue is politically contentious.

There is also some danger that such a move would prompt the Australian Government to re-examine its agreement with New Zealand that allows New Zealanders to permanently reside in Australia without a visa (DIA, 2006). This is because those who have been granted multi-generational citizenship would also have the right to immediately reside in Australia permanently, and it might be seen as another form of ‘back-door’ migration (DIA, 2006).

It could be argued that if Māori are acknowledged as the indigenous people of New Zealand, even if born overseas, then Māori have a link to New Zealand. Therefore, any problem of granting citizenship to individuals with no practical link to New Zealand would not arise. However, incorporating an ethnic- or race-specific component to the law may breach international legal obligations such as the International Covenant on Civil and Political Rights and breach the New Zealand Bill of Rights Act 1990.

Another option to allow overseas-born Māori to become New Zealand citizens would be to amend section 9 of the Citizenship Act 1977 (DIA, 2006). In its current form, section 9 requires the Minister, when considering an application, to be satisfied that the applicant meets various requirements, such as periods of residency. However, section 9 also enables the minister to waive any of the standard requirements (in section 8) for applicants under section 9. For example, people applying under section 9(1)(2) need only to meet convictions requirements[17] and a good character requirement as all other requirements are waived if the applicant has a ‘demonstrable ongoing link with New Zealand’. These requirements may be hard for an individual to meet and unwarranted given the individual’s connection with New Zealand.

Section 9 could be reformed so that citizenship could be granted if the applicant is of good character and has a demonstrable, ongoing link with New Zealand. An applicant could demonstrate an ongoing link with New Zealand by demonstrating whakapapa ties to New Zealand, having a period of residence in New Zealand, or having family members who are citizens residing in New Zealand (DIA, 2006). Given the possible problems that have been identified in relation to the option to

[17] Citizenship Act 1977, section 9A.

reform the law so that multi-generational citizenship can be granted to Māori, this option is preferable. However, the argument could be made that an individual with a *significant* connection to New Zealand and who identifies themselves as Māori should not have to apply for citizenship on principle. They should already be acknowledged as full members of New Zealand society because of Māori status as the indigenous people of the land.

If section 9 were to be amended in the aforementioned way, who would determine whether a demonstrable and ongoing link with New Zealand existed. One option would be to establish an advisory committee within the Department of Internal Affairs to advise the minister on the claimed link with New Zealand and whether citizenship should be granted accordingly.

The Treaty of Waitangi

Does the Treaty of Waitangi guarantee citizenship rights to Māori no matter where they were born? The Treaty of Waitangi, signed in 1840, was the first constitutional document relating to citizenship (DIA, 2006). The English version of article three of the Treaty emphasises equality and states that the Queen of England 'extends to the Natives of New Zealand Her royal protection and imparts to them all the rights and privileges of British *Subjects*'. According to the Waitangi Tribunal, the consequence of this article in relation to citizenship is that the protections of subjecthood apply equally to Māori and non-Māori. Therefore, Māori are not entitled to privileges above other subjects. However, this is merely an interpretation of the Treaty; arguably, the Crown promised Māori full citizenship in article three of the Treaty, so it should not matter whether a person with Māori ancestry was born inside or outside New Zealand.

Gamlen (2007, p 13) states that:

> A legal argument for non-citizen Māori return could begin from articles two and three of the Treaty of Waitangi. Article the second 'guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession'. This clause might be interpreted as a guarantee that Māori customs of kin-based membership and property rights will be protected in perpetuity by the state. Article the third of the Treaty grants Māori 'all the Rights and Privileges of *British Subjects*' (emphasis added), as opposed to the rights and privileges of *New Zealand citizens*. In 1840 when the Treaty was signed, the rights of British subjects included the right to come and go from New Zealand at will, and the legal category of New Zealand citizen did not exist. The latter was formed in the mid-twentieth century through decisions by the British and New Zealand governments, and confers more restricted mobility rights. It might be argued that these decisions did not honour the agreements in the Treaty, were not preceded by adequate consultation with Māori, and therefore do not legitimately limit the ability of non-citizen Māori to reside on their lands.
>
> This technical argument is far from clear cut, but draws emotive strength from norms about post-colonial reparative justice, which underpin broadly similar claims in New Zealand on a regular basis. A more explicit normative argument could begin from theories of multicultural citizenship … For example, … there are normative reasons why the state should provide minorities with 'external protection' from decisions made by the wider society which would otherwise restrict the liberty of minorities to maintain their cultural practices. Some people might argue that Māori residence on tribal land is a cultural practice that should be – or should have been – protected from external decisions to alter national identity legislation. What is particularly unsettling about this line of argument is that many liberal multiculturalists have campaigned vociferously against ethnic citizenship criteria (in receiving states), but here is a liberal multicultural argument *for* ethnic citizenship (in sending states). Perhaps this paradox illustrates that it is just as excessive to completely separate ethnicity and citizenship as it is to equate them.
>
> Through the special ministerial grant of citizenship, New Zealand identity legislation does provide a channel for recognising intergenerational ties … However, the 'rights' of non-citizen Māori still raise important questions. Must national identity legislation apply consistently to all cultural groups in increasingly diverse societies? Are expatriate Māori the only New Zealanders with significant intergenerational links to the country? Which models of belonging are appropriate for New Zealand: those that attach to territory, or those that attach to people? Is inherited national identity relevant in a globalising world? If so, should governments encourage citizenship by descent by emphasising the benefits of 'staying Kiwi'? What exactly are these benefits if one lives abroad, and are they

> consistent across ethnic groups? Systematically and cooperatively thinking through such questions in the context of a focused debate on state–diaspora relations would seem to fit squarely within the current government's strategic focus on national identity.

There is much confusion and debate about what was promised and what was ceded under the Treaty. For example, under the Māori version of the Treaty, governance was ceded, but under the English version, sovereignty was ceded. This confusion and debate has lead to the creation of 'Treaty principles'. One of these principles is that the Treaty confers on the Crown the duty of active protection. Justice Cooke in *New Zealand Māori Council v Attorney-General* stated that the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable'[18]. Arguably, by not legally recognising multi-generational citizenship, the Crown is failing to uphold this principle of the Treaty because not all Māori are being ensured access to their lands and waters. The possibility exists that some Māori, due to not being able to receive multi-generational citizenship, will be denied access to New Zealand or will have only limited access by way of a visitor's visa. To ensure active protection of Māori in the use of their lands and waters to the fullest extent, multi-generational citizenship could be made available.

According to the principles of the Treaty, Māori are to retain rangatiratanga over their resources and taonga and to have all the rights and privileges of citizenship. This principle guarantees *all Māori* the right to retain rangatiratanga. By not allowing multi-generational citizenship, some Māori will not be able to migrate to New Zealand where their resources are that they have been guaranteed rangatiratanga over. By including taonga in this Treaty principle it must have been anticipated that rangatiratanga over some items and lands would be passed down through generations. Therefore, it can be argued that it is contrary to this Treaty principle to not permit multi-generational citizenship and enable all Māori to hold citizenship and to freely migrate to New Zealand.

As was argued by Gamlen (2007), article two of the Treaty:

> guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties

18 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641.

> which they may collectively of individually possess so long as it is their wish and desire to retain the same in their possession.

Article two could be seen as guaranteeing that Māori customs of kin-based membership and property rights would be protected for eternity if Māori so desired (Gamlen, 2007). Based on this argument by Gamlen (2007) it could be argued that in accordance with article two, Māori should be able to return to New Zealand for any amount of time, regardless of whether they are New Zealand citizens (Gamlen, 2007).

Given the arguments that can be made, a claim to the Waitangi Tribunal may be made in the future in regards to multi-generational citizenship. It is difficult to know what the outcome of such a claim would be, but the Waitangi Tribunal is renowned for taking a pragmatic approach and has stated that the Treaty of Waitangi is a live document capable of adapting to the circumstances of the current day.

United Nations Declaration on the Rights of Indigenous People

The United Nations Declaration on the Rights of Indigenous Peoples is not a legally binding instrument, so its articles cannot be enforced in court. However, although not binding or enforceable, the declaration sets an important international standard for the treatment of indigenous people worldwide.

On 19 April 2010, Maori Affairs Minister Pita Sharples announced that New Zealand supports and endorses the United Nations Declaration on the Rights of Indigenous Peoples. Given that this announcement has very recently occurred, New Zealand may see some legislative changes in relation to Māori in the near future. Changes may include further legislative acknowledgement of the declaration, so the possible impact of the declaration will need to be discussed.

Based on various articles within the declaration it could be argued that in not permitting multi-generational citizenship for Māori the current New Zealand citizenship legislation is inconsistent with the declaration. For example, indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social, and cultural institutions while retaining their right to participate fully, if they so choose, in the political, economic, social, and cultural life of the state.[19]

19 United Nations Declaration on the Rights of Indigenous Peoples, article 5.

Because multi-generational citizenship is not available in New Zealand, Māori may not be able to migrate to New Zealand, so may not be able to fully participate in these various spheres of life in New Zealand. In New Zealand, an individual may not vote in a general election unless they are a New Zealand citizen or have been resident in New Zealand for at least 1 year. Consequently, Māori who were born outside New Zealand to parents who were only citizens by descent may not be able to vote. Thus, Māori may not be able to participate in a key part of New Zealand's democratic political system.

Right to a nationality

Under the declaration every individual has a right to a nationality.[20] Given that Māori, regardless of where they were born, may have a strong connection with New Zealand it can be argued that they should have the right to a nationality which reflects their connection with New Zealand and thus should be eligible for New Zealand citizenship on the basis of whakapapa.

Right to practise and revitalise cultural traditions and customs

The declaration states that indigenous peoples have the right to practise and revitalise their cultural traditions and customs.[21] This includes the right to maintain, protect, and develop the past, present, and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies, visual and performing arts, and literature.

It can be argued that citizenship by descent should not be limited in the way that it is, because to maintain and protect some historical sites such as pa sites and sacred lands, a presence in New Zealand is required for active management. A large number of Māori also have connections with a specific marae due to ancestry. Therefore, to protect and develop personal Māori culture and the Māori culture of an individual's family, access to an individual's marae may be required.

20 United Nations Declaration on the Rights of Indigenous Peoples, article 6.
21 United Nations Declaration on the Rights of Indigenous Peoples, article 11(1).

Right to lands and resources traditionally owned, occupied or used

Indigenous peoples have the right to the lands, territories and resources that they have traditionally owned, occupied, or otherwise used or acquired.[22] Therefore, Māori should have unrestricted access to New Zealand for migration.

Right to maintain and develop contacts and relations with own members and other peoples across borders

Article 36 of the declaration is particularly relevant to the issues surrounding multi generational citizenship. It states that indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic, and social purposes, with their own members as well as with other peoples across borders. By not granting multi-generational citizenship, the New Zealand Government may not be facilitating contact and relationships with family and whānau to the fullest extent it could or to the extent envisaged by the declaration.

Conclusion

As the Māori diaspora grows and iwi more fully recognise that their current and potential members are spread throughout the world, policy debate is likely about around whether Māori born overseas should have an automatic right to gain New Zealand citizenship. A case may surface in the Waitangi Tribunal with multi-generational citizenship at the forefront.

In any case, with the legal recognition of indigenous peoples' rights building momentum it is possible that changes in multi-generational citizenship legislation could occur nationally and internationally. In relation to the United Nations Declaration on the Rights of Indigenous Peoples, whether a claim would be successful would be easier to predict if the United Nations were to adopt or develop a definition of 'indigenous peoples'. At this stage, given the uncertainty surrounding indigeneity and the current legal status of the declaration. a multi-generational citizenship case reliant on the declaration might not be successful.

Given the uncertainties, risks, and problems that have been presented in this paper, a claim for a blanket set of rights for Māori is likely to be unworkable. Therefore, it is

22 United Nations Declaration on the Rights of Indigenous Peoples, article 26(1).

unlikely that automatic citizenship rights would be required by the Treaty of Waitangi. However, the examples provided above show that it is important that there is room for individual Māori, as well as other 'New Zealanders', to be granted citizenship on a case-by-case basis.

We acknowledge that a mechanism exists in the Citizenship Act 1977 to enable this case-by-case discretion to occur. However, to better enable citizenship to be granted on a case-by-case basis, the Act (specifically section 9) could be amended so that the Minister of Internal Affairs, after receiving advice from an advisory committee within the Department of Internal Affairs, could grant citizenship if an individual were able to demonstrate a 'significant ongoing association with New Zealand' (DIA, 2006).

Ultimately, multi-generational citizenship is a political issue but decisions would be usefully guided by legal and academic debate and analysis.

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