

In Confidence

Office of the Minister of Crown Māori Relations

Office of the Minister of Māori Affairs

Office of the Minister of Foreign Affairs

Office of the Minister of Education

Purpose of Brief

1. The purpose of this briefing is to provide an overview of the doctrine of discovery, its application in Aotearoa and its relevance to the implementation of the Declaration on the Rights of Indigenous Peoples.

Relation to government priorities**2. He Puapua Report**

The doctrine of discovery has been described by Indigenous nations and in the United Nations as the driver of all Indigenous dispossession. It features in the preambular text of the Declaration on the Rights of Indigenous Peoples and has been central to a number of recommendations from the Permanent Forum for Indigenous Issues. It is a crucial concept to understand in the implementation of the Declaration on the Rights of Indigenous Peoples

3. Antiracism

Numerous government agencies are currently developing strategies for addressing institutionalised racism. The doctrine of discovery is understood by race theorists as both the progenitor of colonialism and modern racism. Understanding the role of the doctrine of discovery in the shaping and embedding of racism in modern institutions will enhance both the understanding of racism in general and the colonial racism which provides the underpinnings for how racism has manifested in Aotearoa.

4. National History Education Review

The government has committed to teaching Aotearoa New Zealand's histories in all schools and kura from 2022 onwards and is currently undergoing a review process. The doctrine of discovery is a vital aspect of our history that contextualises our own domestic colonial experience within a broader global phenomena of imperial expansion. This remains sorely misunderstood and under-taught, in spite of a 2012 United Nations recommendation that all member states incorporate the doctrine of discovery in their national curricula.

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Waitangi Tribunal

4 Dec 25Ministry of Justice
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Analysis

5. History of the doctrine of discovery

The doctrine of discovery is an international legal concept that stems from a series of papal laws issued by the Vatican from the 15th and 16th centuries.

6. While the doctrine of discovery is formed from a range of papal bulls, it is helpful to understand its impact through the provisions expressed within the papal bull *Romanus Pontifex*:

“to invade, search out, capture, vanquish, and subdue all Saracens and pagans whatsoever, and other enemies of Christ wheresoever placed, and the kingdoms, dukedoms, principalities, dominions, possessions, and all movable and immovable goods whatsoever held and possessed by them and to reduce their persons to perpetual slavery, and to apply and appropriate to himself and his successors the kingdoms, dukedoms, counties, principalities, dominions, possessions, and goods, and to convert them to his and their use and profit – by having secured the said faculty... justly and lawfully has acquired and possessed, and doth possess, these islands, lands, harbors, and seas”

7. It is important to note that although these papal laws are centuries old, they have never been rescinded. Collectively, these laws legitimised the expansion of European empires across the globe for four centuries in what became widely known as “The Age of Discovery”. Bound within these laws were certain permissions granted to facilitate the expansion of empires. These permissions included the violation of human rights of those who were not European, and not Christian (reference). While acts of dispossession and enslavement existed prior to the papal laws of the 15th century, it was these papal laws which provided the legal codification for dispossession and enslavement, based upon Eurocentric racial hierarchy. The doctrine of discovery ascribed a Eurocentric hierarchy of value to humans, which was shaped by skin color and place of origin, and was therefore also the progenitor of white supremacy and racism. Under the logic of the doctrine of discovery, non-European and non-Christian inhabitants of lands forfeited their rights of occupation (and other rights) to what was presumed to be superior European powers. Over successive centuries, the system of extraction, exploitation and dispossession that was enabled through the doctrine of discovery became foundationally embedded in the global geopolitical superstructure. Our modern international bodies of law, finance and governance are rooted within the history of the doctrine of discovery, and its enduring sociological, political and economic influence has been a matter of human rights discourse for decades.

8. The doctrine of discovery and the Declaration on the Rights of Indigenous Peoples

The Declaration on the Rights of Indigenous Peoples fourth preambular paragraph states:

“Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin

or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust.”

9. This applies directly to the doctrine of discovery, which is also known by other names as the Doctrine of Christian Discovery and the Doctrine of Domination.

10. The United Nations Permanent Forum on Indigenous Issues Recommendations

In its eighth session (2009), the UN Permanent Forum on Indigenous Issues appointed Special Rapporteur Ms Tonya Gonnella Frichner, a member of the Forum, to conduct a preliminary study on the impact of the international legal construct known as the doctrine of discovery on Indigenous Peoples that has served as the foundation of the violation of their human rights and to report thereon to the Forum at its ninth session, in 2010. The subsequent report importantly linked ecological degradation to the doctrine of discovery, stating:

“Once indigenous protection based on ecological knowledge and wisdom is removed, the biological and ecological integrity of the traditional territory of a particular Indigenous Nation is open to attack from the forces of... biosphere exploitation and destruction”

11. In 2012, the United Nations Permanent Forum on Indigenous Issues held a special session on the doctrine of discovery. It was led by a panel of expert speakers including Moana Jackson, who highlighted that the doctrine of discovery ascribed rights not only over lands but also over Indigenous Peoples. Three recommendations of the Permanent Forum of Indigenous Issues that followed from this session were:
 - a. The Permanent Forum calls upon States to repudiate racist doctrines such as the doctrine of discovery, or other doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences.
 - b. The Permanent Forum encourages the conduct of processes of reconciliation between States and indigenous peoples based on justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.
 - c. The Permanent Forum recommends that States include a discussion on the doctrine of discovery, and related aspects, in education curricula.

12. The following year, in its twelfth session (2013) the United Nations Permanent Forum on Indigenous Issues made the further recommendation:

The Forum strongly recommends that States, human rights bodies and judiciaries denounce the “doctrine of discovery” and discontinue its use and application.

13. To date, no member state has reported back on implementing any of the above recommendations.

14. The doctrine of discovery in Aotearoa

James Cook has often been heralded as “the last of the great explorers” of the aforementioned Age of Discovery that was set in train by the doctrine of discovery. Cook carried out proclamations of discovery on behalf of his monarch King George III in Tūranganui a Kiwa (Gisborne), Whitianga (Mercury Bay), Tai Tokerau (Northland) and Tōtaranui (Queen Charlotte Sound) (check and reference sites and dates). The entitlement to make these proclamations of discovery sits within the logic of the doctrine of discovery. It can be said that the entitlement of successive problematic settlers in the late 18th and early 19th centuries can also be traced to the sociological embedding of the racist logic of the doctrine of discovery throughout European society. Indeed, this enduring logic continues to underpin tensions between settler descendants and Māori to this day.

15. The doctrine of discovery was referenced by William Hobson in his proclamation of sovereignty “on the grounds of Discovery” over Te Wai Pounamu. While sovereignty over the North Island was said at the time to be expressed based upon cession to the Queen, it is now widely accepted that Te Tiriti o Waitangi was not a treaty of cession¹. As sovereignty was never ceded, the assertion of Crown sovereignty over Aotearoa cannot be said to be legitimised by Te Tiriti o Waitangi, and is thus, in its entirety, an expression of the doctrine of discovery. Hobson’s proclamation of sovereignty over New Zealand became the basis of the 1852 New Zealand Constitution Act which established the New Zealand government.

16. The doctrine of discovery was further embedded within New Zealand’s legal and economic framework when, in the 1877 case of *Wi Parata v Bishop of Wellington*, Chief Justice James Prendergast drew from a famous court case in the United States (*Johnson v M’Intosh*) that utilised the doctrine of discovery as the basis for the extinguishment of Indigenous title. In declaring the Treaty “a simple nullity” and drawing from the *Johnson v M’Intosh* as a precedent, the doctrine of discovery became an underpinning foundation of New Zealand law.

17. The doctrine of discovery and Te Tiriti o Waitangi

In the opening dialogues of the 9th session of the Permanent Forum on Indigenous Issues, the then Minister for Māori Affairs Hon. Pita Sharples, in affirming New Zealand’s support of the Declaration on the Rights of Indigenous Peoples, qualified that support within the constraints of its commitment to the Treaty of Waitangi as the primary instrument for managing the relationship between the Crown and Māori, and providing redress for colonial injustice.

18. This position was echoed during the aforementioned 12th session special meeting on the doctrine of discovery; Jane Fletcher, then Deputy Director of New Zealand Office

¹Waitangi Tribunal. (2014). *Te Paparahi o Te Raki: Northland inquiry part one*.

of Treaty Settlements stated the following on behalf of the then New Zealand government:

“We recognise that by denying indigenous title, the doctrine of discovery has created historic injustices, and has had a wholly negative impact on the relations between indigenous peoples and state governments. In New Zealand, however, our history is particular. The relationship between the indigenous people of New Zealand, Māori and the New Zealand Government has long been, and remains, based on a single Treaty, the Treaty of Waitangi, signed by some representatives of iwi Māori and the British crown on and after 6 February 1840. The Treaty remains of fundamental constitutional and historical importance for New Zealand.”

- 19.** The intervention then proceeds to outline the Treaty settlement process as the means through which the New Zealand government is providing redress for the impacts of colonisation and “settling the grievances of its Indigenous people”.
- 20.** Jane Fletcher’s statement belies a number of important facts. Firstly, that James Cook made numerous proclamations of discovery on behalf of the British Crown, which is an explicit application of the rights set out through the doctrine of discovery. These proclamations of discovery also set in train the events leading to British incursions upon Maori lands and set the context for the further application of the doctrine of discovery in spite of He Whakaputanga and Te Tiriti o Waitangi. Further, it ignores that William Hobson directly applied the doctrine of discovery when he claimed British sovereignty over Te Waipounamu by rights of Discovery. It is important to note that the crown appointed judiciary on Te Tiriti o Waitangi, the Waitangi Tribunal, has found that it was never a treaty of cession, however it was treated as such by the British Crown, and certainly by the New Zealand government (an approach which endures today). The presumption of ultimate authority without a treaty of cession can therefore be seen as an application of the doctrine of discovery.
- 21.** The presentation of the settlements process as a means for settling the grievances caused by violations of Te Tiriti o Waitangi holds deeper problematic suggestions. The Treaty of Waitangi Act, which has established the settlements process, is one that was established within parameters set by the Crown, who has in turn placed limitations upon both the scope and enforceability of the tribunal recommendations. For example, the tribunal cannot recommend the return of private land, even when that land has been proven to have been unjustly confiscated by the Crown in the first instance. Further, the settlement process has been described by many who have undergone it as a deeply harmful and traumatising process, largely because of the pressure placed upon the process by the Crown; the fact that the tribunal recommendations are not enforceable; and the limitations to full and appropriate redress applied by the Crown, even upon its own judicial body. The Crown’s self-appointment as the ultimate authority over claims of Crown malfeasance can be seen as an abuse of the powers acquired through the doctrine of discovery and rooted in the fiction of benevolent colonialism. This fusion of colonialism and good intentions inhibits the ability of Crown mechanisms to adequately identify or address colonial racism towards Maori. Accordingly, even

though the tribunal itself performs an important function as a truth forum for colonial injustice, the settlement process itself continues to protect the power and privilege ascribed through the doctrine of discovery and to limit state accountability to the rights violations carried out through its application.

- 22.** The consistent positioning of the Waitangi Tribunal and settlements process as a unique vehicle for Indigenous justice, even as they fail to meet the standards of justice outlined within Te Tiriti o Waitangi itself, continues the New Zealand myth of exceptionalism and colonial beneficence. At best it provides miniscule reparative measures, at worst it functions to entrench colonial fictions such as reconciliation, legitimate colonial authority, post-coloniality and the “wiping clean of the slate”. It is therefore inappropriate to present the tribunal and settlement process as a vehicle for Indigenous justice. Further, the reluctance to ratify and implement the Declaration of the Rights of Indigenous Peoples, the optionality of the Declaration, and the optionality of Waitangi Tribunal recommendations collectively speak to the treatment of Indigenous peoples as sub-human through the treatment of Indigenous human rights as non-essential.

23. The doctrine of discovery in contemporary times

The far reaching consequences of the doctrine of discovery across such a broad expanse of time means that it has become normalised to the point of being “baked into” the fabric of modern society. New Zealand land and natural resources legislation, foreign policy, social policies, economic, education, justice and corrections systems are all built upon a legacy rooted in the doctrine of discovery, and in the absence of any strong critical analysis about its role in contemporary policy and processes, its energy continues to endure.

24. Case law

As mentioned earlier, *Wi Parata v Bishop of Wellington* had far reaching consequences within New Zealand law, and has been subsequently invoked as precedent during claims brought for breaches of the Treaty, well into the twentieth century. It was not conclusively overruled until 2003.²

- 25.** However numerous subsequent cases served to not only rely upon the precedent set by Prendergast in *Wi Parata v Bishop of Wellington*, but also re-entrenched assumptions claimed through the framework of the doctrine of discovery.

- 26.** *Te Heuheu Tukino v Aotea District Maori Land Board [1941]*; *Re the Bed of the Wanganui River [1962]*; *Re Ninety Mile Beach [1963]* were all cases which operated upon an assumed right of the Crown to extinguish native title, and therefore operated within powers provided through the doctrine of discovery rather than Te Tiriti o Waitangi, aptly reflected by the following statement of North J in *Re Ninety Mile Beach*:

² Ruru et al

- a. *“...the rights of the Maoris to their tribal lands depended wholly on the grace and favour of Her Majesty Queen Victoria, who had an absolute right to disregard the Native title to any lands in New Zealand, whether above high-water mark or below high-water mark.”*

27. While there has been a concerted effort within Waitangi Tribunal, and more recently through the judiciary, to address the harms delivered through the application of the doctrine of discovery, it continues to be hindered by the Crown’s assumption of indisputable and ultimate parliamentary sovereignty, as evidenced by the Crown’s response to the Waitangi Tribunal findings and Court of Appeal findings in relation to *Ngati Apa v. Attorney-General & Others*, and the subsequent Foreshore and Seabed Act.

28. Legislation and Policy

As with Case law, the primary principle within which the contemporary application of the doctrine of discovery must be understood is that of the enduring presumption of parliamentary sovereignty. Questioning the role and propriety of the doctrine of discovery within the New Zealand government is undoubtedly hindered by the fact that it would entail questioning the very foundation of the government’s authority and jurisdiction.

- 29.** If we consider three of the core principles of the doctrine of discovery to be:
- a. The presumption of ultimate colonial authority and supremacy over Indigenous territories and peoples
 - b. The right of colonial authority to dispossess, appropriate and extract the moveable and immovable property of non-European peoples for its own purpose and profit
 - c. The right of colonial authority to subdue Indigenous Peoples (ie to bring under control by force)
- 30.** As noted by Sir Mason Durie³ the greatest impact of Māori-specific provisions in New Zealand legislation has been to limit or extinguish Māori interests. The list of historical legislation that has functioned to dispossess Maori land and ocean estate and resources is extensive, and well publicized. While many acts that function to directly alienate Maori land and ocean estate and resources have been repealed, many others remain in place (eg Public Works Act 1981) whilst others have developed out of acts which have alienated land, therefore maintaining the alienation of Maori land (eg lands alienated through the Scenery Preservation Act 1903 maintained through the Conservation Act 1987). Overarchingly it remains the case that all legislation developed through the Crown government which accords ultimate authority to the Crown, in relation to land, freshwater, and ocean estate and resources is an application of the doctrine of discovery.

³ Durie, Mason. *Nga Tini Whetu*. Huia (NZ) Ltd. Kindle Edition.

31. As noted by legal scholar Moana Jackson⁴ noted, the doctrine of discovery not only accorded a right to take control of another nation's land, but also a right to take over the lives and authority of the people to whom the land belonged. The exile, enslavement (through incarcerated labour) and incarceration of Maori has long existed in tandem with Crown processes of land alienation. Similar to environmental legislation, there is a long list of acts which have operated, and still operate upon the assumption of colonial authority over Maori persons, and has sought to subdue Maori by force. Arguably the most obvious of these are the acts which have facilitated the exile, enslavement and incarceration of Maori and the forced removal of Maori children. Of further consideration under these terms are Crown acts and policies which function to limit Maori cultural expression, for example the Tohunga Suppression Act 1907 which outlawed Maori schools of learning (wananga), limiting traditional means of transmitting matauranga Maori, and placing knowledge transmission for Maori largely within a colonially racist education system.

32. Foreign Policy

In light of the issues already outlined in this paper, it follows that the New Zealand government's assumption to represent the interests of Aotearoa stands as the primary expression of the doctrine of discovery in relation to foreign policy. Further, there are specific functions carried out through New Zealand's multilateral agreements that function to support both the domestic and international dominance of European imperialism, in addition to relying upon the doctrine of discovery principles and entitlements in order to develop and expand New Zealand imperialism throughout the Pacific region.

33. From its outset, the doctrine of discovery functioned to establish and reinforce systems of extraction for the economic benefit of European nations. Over time, it set the foundations for global economic infrastructure, which included the economic domination of the global north over the global south. New Zealand's imperialist underpinnings laid the groundwork for its neo-imperial foreign policies which continue to favour the rights of corporate and state empires over the rights of Indigenous peoples both domestically and internationally. This is exemplified by ISDS provisions within free trade agreements where the New Zealand government agrees for overseas corporations to acquire enforceable rights that Maori still do not have over their own territories, resources and intellectual property. Further, in understanding the global extractive economy as a contemporary derivation of the doctrine of discovery, there are numerous instances of the extraction from Indigenous territories and exploitation of Indigenous persons which occurs through multilateral trade agreements.

34. Strong links can be also drawn between the doctrine of discovery and New Zealand's early expansionist policies in the Pacific. New Zealand's empire-building within the Pacific region was driven both by the desire to gain territory and by the belief that

⁴ UNPFII 11session 2012

colonialists were the best suited to “civilize” Polynesians. The New Zealand government saw colonisation in the Pacific as the “continuation of a project they understood as benevolent rule.”⁵ This implies that the “project” began with Māori and would continue with other parts of the Pacific region. The idea of “benevolent rule” also links to the myth of innocence often propagated in other colonial states such as Australia, USA and Canada: that any and all evil acts committed in the processes of colonisation can be forgiven because the people being colonised are better off after colonisation than they were before. It further illustrates the enduring logic set in train through another facet of the doctrine of discovery, the debates of Valladolid.⁶

- 35.** New Zealand’s policies of extraction, both of land and people, have also held heavy consequences in the Pacific region. Banaba and Nauru are prime examples of places mined so extensively that entire lands were destroyed, and entire populations permanently displaced, in order to nourish New Zealand’s agricultural pastures (this persists today in New Zealand’s support of phosphate mining in Western Sahara). We also continue to see the enduring maltreatment of Pacific peoples as cheap and expendable labour, extracted from the Pacific region as a human resource for the benefit of the New Zealand economy. At a global level, the euro-imperialist perspective of the Pacific region as remote, uncivilized and sacrificeable, has contributed to its maltreatment by multiple nations as a dumping ground, extraction site, and military testing zone. New Zealand’s contribution in this space is significant, both as a diplomatic and economic coercive force which has placed significant pressure in trade, climate change and environmental forums, as well as participation in military endeavours such as RIMPAC, the world’s largest international naval training exercise with direct ties to the militarised arm of neo-application of the doctrine of discovery by New Zealand and New Zealand’s military allies.

Conclusion

- 36.** It is difficult to overstate the influence that the doctrine of discovery has had in the shaping of New Zealand and the modern world. International and domestic power structures have been influenced by this concept, and as a colonial state New Zealand is not an exception. The relevance of the doctrine of discovery to Aotearoa and our relationship to the world is poorly understood and, consequently, poorly responded to. As the driver of Indigenous dispossession and harm, its application in New Zealand, at first at the hands of the British empire, and subsequently at the hands of the Crown government, has had and continues to have immeasurable negative impacts upon Maori human rights. Whilst it is a difficult and disruptive history to confront, understanding

⁵ Mallon, S., Māhina-Tuai, K. U., & Salesa, D. I. (Eds.). (2012). *Tangata o le moana: New Zealand and the people of the Pacific*. Te Papa Press.

⁶ The Debates of Valladolid occurred in 1550, were a series of adjudicated debates ordered by King Charles V of Spain, and were between two franciscan monks, Bartolome De Las Casas and Juan De Sepulveda. The opposing positions of the debate were that Indigenous peoples were either not human (Sepulveda), or were lesser humans (De Las Casas), which therefore made it the duty of good Christians to “benevolently” civilise and convert them to the service of the Christian God. These debates are described by Jackson as setting the baseline for colonial law relating to Indigenous Peoples.

the implications of the doctrine of discovery for Aotearoa will be a crucial step in the implementation of the Declaration on the Rights of Indigenous Peoples, the addressing of institutionalised racism and the appropriate delivery of New Zealand history in schools. Moreover, acknowledging the enduring ethos of the Doctrine of Discovery within New Zealand's policy, legislative and justice systems is an important part of owning its own history and charting a pathway towards a more just future.

Recommendations

- 37.** Authorise commission of an in depth study on the implications of the doctrine of discovery in Aotearoa in order to contextualise its response to the He Puapua Report. The report must be publicly accessible, and should include:
 - a. A full account of the historical and enduring application of the doctrine of discovery in New Zealand.
 - i. This account should cover the economic, political, social, legislative, legal and policy dimensions of the application of the doctrine of discovery in New Zealand.
 - b. A full account of the historical and enduring application of the doctrine of discovery by New Zealand internationally.

- 38.** Agree to recommend incorporation of the doctrine of discovery into the national curriculum.
 - a. The New Zealand education system will require a competency review in order to ensure it is fit for purpose to deliver this education.

- 39.** Officially renunciate the doctrine of discovery
- 40.** Formal Crown acknowledgement of the Waitangi Tribunal findings that Maori did not cede sovereignty and that the current constitutional framework is therefore an expression of the doctrine of discovery.

- 41.** A commitment to constitutional transformation, centered upon Te Tiriti o Waitangi