*Ethics, Kawa, and the Constitution: Transformation of the System of Ethical Review in Aotearoa New Zealand* 

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New Zealand is a South Pacific nation with a history of British colonization since the 19th century. It has a population of over four million people and, like other indigenous societies such as in Australia and Canada, Māori are now a minority in their land, and their experience of colonization is that of being dominated by settlers to the detriment of their own systems of society.

Māori are high users of the health system, and, for a range of reasons, inequalities in health between Māori and other New Zealanders have unacceptably become the norm, and ethics committees are often considering issues that have direct or indirect impact on Māori communities.

Over the past three decades, consecutive New Zealand governments have introduced health policies to reorient and sensitize health services to the needs of Māori. The establishment of indigenous-led health services is among the range of ways that have been developed over time to maximize indigenous uptake of health services while effecting a reduction in health disparities. Health practice is an important element of any health system, and in New Zealand it can be said to refer to the activities of two main groups of health practitioners: the performance of services that fall within the legal description of a health profession<sup>1</sup> and the performance of services that are not legally defined, but the workforce makes a significant contribution to overall health objectives.<sup>2</sup>

The importance of Māori philosophy and Māori ethical standards to contemporary ethical review has begun to emerge in Māori postgraduate research.<sup>3</sup> Whether indigenous standards are required for ethical review does not appear to be the most pressing issue. Over the past two decades, there has been growing recognition among ethicists internationally that morals are human inventions that are culturally constructed, including indigenous culture. Culture plays a significant role in guiding moral judgment and behavior, and therefore attitudes, ideas, and decisions about health and well-being.<sup>4</sup> Thus an important challenge for ethical review in New Zealand is how indigenous ethical standards can be integrated into ethical review that provides assurances for the protection of the moral health of Māori, central to their overall well-being.

#### The Institutionalization of Ethics

The system for ethical review of health practice comprises a network of the law and recognition of international covenants, government policies, statutory structures, and conventions, and Figure 1 provides an overview of the system in New Zealand. Ethical review is primarily aimed at protecting those who

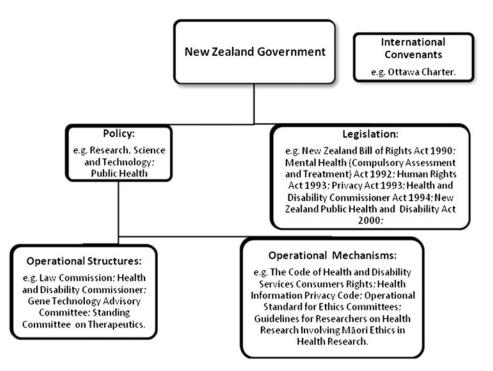


Figure 1. Overview of the system for ethical review of health practice.

receive health services or participate in health research. History requires New Zealand to have an ethical review system<sup>5</sup> that can straddle the divide between clinical health practice and health research, because much health research is conducted by health professionals. Major legislation like the New Zealand Public Health and Disability Act provides for all public hospitals and government-funded health services including the establishment of ethics committees. The Health Practitioners Competence Assurance Act provides for regulation of health professionals, and, in doing so, regulatory bodies are charged with the responsibility of prescribing curriculum for health professionals and standards of professional behavior including ethical codes of conduct. Another piece of legislation, the Health and Disability Commissioner Act, provides a practical mechanism for members of the public to convey their concerns about health services to a statutory body and to have confidence that their right to complain has legitimate and legal weight. The Code of Rights for Consumers of Health & Disability Services provides a guide for ethical practice for health practitioners by listing the kinds of legal rights consumers should expect as recipients of health services. Regardless of the legislation, Western conventions determine the law and give rise to Western ethical principles, and ethics committee members largely conduct review processes against Western ethical standards.6

There are three contexts in which ethics tends to have prominence in the New Zealand health sector. First, ethics is often attributed to funding applications

processes. Competitive funding is a characteristic of the health research environment, and research plays a major role in the health sector by informing and influencing practice. The notion of health, however, has grown significantly, albeit in the academic environment, because of greater acknowledgment of the two main intellectual systems in New Zealand. There is a comparative need to also analyze the notion of health ethics and the standards against which ethical practice is measured to ensure ethical review continues to achieve its primary purpose for all.

The second focus given to ethics by health practitioners is decisionmaking, and especially for informed consent. Health knowledge including ethical theory is firmly entrenched in Western academic discourse. The implication is that ethics committees use the same standards for ethical review that are familiar to health practitioners. As will be explained later, there are differences between Western and Māori philosophy in an ethical sense, and by only applying the standards of one tradition to ethical review processes, ethics committees may contribute to inequities in Māori health because they overlook issues of moral significance to Māori that might otherwise contribute to their moral well-being.

Third, ethics becomes important when health practice goes wrong. An error or omission can lead to devastating consequences for recipients of health services, for practitioners, and for institutions. Communication between the health workforce and recipients of health services is important to mitigate against ethical issues, but it is also one of the main reasons for complaints about health practice.<sup>7</sup> In perspective, New Zealand has relatively low levels of complaints and litigation against health practice compared to other countries, offset by a no-fault health system that the New Zealand government adopted in 1974.<sup>8</sup> For reasons that are not well understood, Māori often do not complain when the quality of health services or the manner in which they are provided is inappropriate (Personal communication, Tania Thomas, Deputy Health & Disability Commissioner, August 2, 2010). Ethics committees therefore have a critical role for Māori, and they are in an ideal position to identify potential ethical concerns and to mediate any concerns.

# The Constitutional Framework for Ethical Review

The system of ethical review in New Zealand is underpinned by the legal system that is set within the country's constitution. New Zealand's constitution is not fixed or contained in one written document like that of the United States. Instead, it is made up of different elements, consistent with the Westminster parliamentary system inherited from Britain.<sup>9</sup> Figure 2 shows the major elements of the constitution.

The legal system is a major contributor to the ethical system, and it is informed by two major sources, common law and statute law. Common law is a body of law built up from decisions made in the United Kingdom that began from recording local norms and practices seen as common in English society, "a compilation of the values of that society as shown in practice."<sup>10</sup> Developments of common law by New Zealand courts mean that it now differs from that of the United Kingdom in some aspects. Parliament (General Assembly) is the supreme law maker and dominant entity within the constitution, and there are no formal limits to Parliament's law-making power. The courts are further contributors to the constitutional framework, and the role of the courts is to "interpret and apply

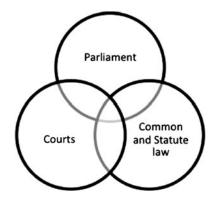


Figure 2. New Zealand constitutional elements.

statutes in accordance with Parliament's intent and to develop case law where there is no applicable statutory rule."<sup>11</sup> Statute law is passed by Parliament and is set out in written published statutes or legislation that may override the common law.<sup>12</sup> The law is a means of social control. Criminal law for example, seeks to control antisocial behavior according to the dominant interpretation of a lawabiding society. Commercial law provides a structure of rules for business transactions according to the notion of business according to the government that is expressed in the law. Constitutional law provides for and determines functions of various bodies of government according to the dominant view of how a society should be governed. As a whole, the law is intended to represent the value system of New Zealand society, determined by the beliefs and ideas that arise from the society or, more accurately, dominant society. Much law "presupposes a certain moral framework within which we conduct our lives."<sup>13</sup> Although prescribing moral or value-based behavior is purported not to be the function of the law, the law has the effect of being able to enforce widely held moral beliefs. Although it is disputed by legal texts that morality and law do not coincide, legislation is the primary instrument of coercive power of the government that symbolizes and articulates the government's will in exercising its power.<sup>14</sup> Fundamentally a Western legal system is the tradition in New Zealand that supports the colonial system of government that continues to prevail. The formulation of meaning of concepts of law in New Zealand privileges a Western legal system, and ethical review is underpinned by the moral standards embedded in the system.

## The Standard "Ethical" Approach

Ethics is a Western construct. New Zealand's system of ethical review has its roots in English philosophy and knowledge, and the influence of European philosophy upon English thought that were imposed on Māori society as a consequence of British colonization through the 19th and 20th centuries.

New Zealand followed international trends by applying ethical principles to health research under the guidance of the Medical Research Council set up in 1937 as a committee of the Health Department. Ethical guidelines were first formally adopted in 1968<sup>15</sup> although the ethical "duty" of doctors was already

inherent to medical practice that traces back to the Hippocratic Oath and Christian teachings.<sup>16</sup>

Autonomy, beneficence, nonmaleficence, and justice are key ethical principles.<sup>17</sup> Four major areas of Western ethical inquiry are recognized, meta-ethics, religious or social, descriptive, and normative.<sup>18</sup> Meta-ethics is the study of ethical concepts and thus questions about semantics like what the meaning of *good* in moral terms is. Religious ethics derives from a distinct body of doctrine such as Christian ethics. Descriptive or positive ethics refers to the study of morality of a particular group or society, whereas normative or rational ethical inquiry holds that people behave morally by conducting themselves according to a prescribed set of norms.<sup>19</sup>

Normative ethical inquiry, a broad area of ethical theory, includes various approaches that are relevant to New Zealand's health and sociopolitical context. For example, the basis of deontological ethical theories is that the motive or intent of an action is important and not the consequences of the action.<sup>20</sup> Kantian theory is deontological in nature, where an action possesses moral worth only if it is carried out with good will, and therefore a morally valid reason justifies the action.<sup>21</sup> A teleological approach sees the end as justifying the means. Utilitarianism is a teleological or consequence-based approach, and utilitarians share the conviction that the right act in any circumstance is the one that maximizes the overall result or the best outcomes for the most people.<sup>22</sup> New Zealand's political system operates according to utilitarian principles that have flow-on effects to health policies. Policies that are designed to meet the clinical health needs of the majority of New Zealanders do not automatically align to moral standards. Health practitioners may go to great lengths to make their services culturally appropriate, but unless those services are underpinned by the philosophy and moral standards of each culture, it is simply a Western health service with a different look.

Virtue ethics has the longest tenure of normative theory that can be traced back to intellectual heavyweights like Socrates, Aristotle, Plato, and the Italian theologian Thomas Aquinas. Socrates saw recognition of one's own ignorance as the first step toward the acquisition of knowledge. His prominent definition of knowledge is that of justified true belief. For something to count as knowledge, it must be true and believed. A belief on its own is insufficient because people can believe things that are proven to be untrue. Similarly, people cannot be said to know something just because they believe it and it subsequently turns out to be true. His view was later challenged by Edmund Gettier, who demonstrated that even a justified belief can prove to be untrue. Regardless, truth, belief, and justification have persisted as the three fundamental conditions of Western knowledge.<sup>23</sup>

Aristotle's philosophical system known as Scholasticism was fused and reconciled with Christian doctrine. An important feature of Scholasticism was the prevalence of learned disputes, which Aristotle applied to much of his work on a range of problems from biology and physics to morals and politics. Aristotle was disposed toward reasoned analysis. He sought a theory that would allow for moral values and scientific truths, and his most basic philosophical commitment was to common sense. Within his work, he identified ultimate realities or primary substances and secondary substances. Based on his theory, Socrates considered that concrete phenomena such as him, constitute ultimate realities, because without such realities nothing else would exist. Secondary substances, he proposed, refer to the characteristics of himself, such as being a man and pale

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in color, because such phenomena are reliant on other objects for their existence. Aristotle was therefore the first to deduce that every primary substance falls under a secondary substance, and, by using logic with science, he conceived of a class system of species, a system that he applied to the fields of science, knowledge, society, and politics.<sup>24</sup> Aristotle also saw political theory as continuous with ethics, and he described moral excellence as the acquired rational capacity to choose the mean between extremes.<sup>25</sup>

Thomas Aquinas drew on Aristotle's ideas about reason by advancing two principles underpinned by a relationship between faith and reason, according to his own philosophical Christian bias. First, Aquinas proposed that reason will never discover anything contrary to faith. Second, the position held by faith is beyond explanation by rational argument. For example, God's trinity (the father, the son, and the Holy Ghost) is a truth that cannot be explained by unaided human reason.<sup>26</sup> The prestige of natural science has played a key role in the development of Western knowledge because science provided unmistakable evidence that, by applying reason to nature and human beings, people could live progressively happier lives. Insanity, for example, no longer needed theological repression because it could be explained empirically.<sup>27</sup> Knowledge thus constitutes an ethical moral stance and Western knowledge has long been linked to Christian standards of behavior.<sup>28</sup>

The fundamental features of Western intellectual thought that originated from the earliest European philosophers permeate a range of subjects from preschool education to university study. Economics, medicine, nursing, teaching, marketing, business, law, philosophy, and education are learned by understanding information as parts of a whole. Learning about the human body is generally approached by an understanding of the systems of the body. Numeracy is taught by understanding different kinds of numbers—natural, rational, algebraic, real, and complex. Literacy comprises reading, writing, spelling, listening, and speaking. Accountancy is a branch of mathematical science, and statistics and probability are key subjects.

In summary, fundamental characteristics of Western philosophy are deduction logic, scientific reasoning, and Christian values.

## Māori Philosophy

Two assumptions of Māori philosophy consistent with philosophy of other indigenous peoples are that the world is viewed as a whole and all phenomena are explained by the natural world.<sup>29</sup> *Whakapapa*<sup>30</sup> is central to Māori philosophy. It embodies the past, the present, the future, tangible objects, intangible concepts, and all matter of substances. All phenomena interrelate with and rely upon the existence of the other, and in this way, expressed through *whakapapa*, all things are equal. A class or system as promulgated by Socrates and reinforced by Thomas Aquinas is antithetic to Māori philosophy.<sup>31</sup>

Sources of wisdom and knowledge are not generally attributed to an individual person's theorizing. Knowledge is not ascribed to a theory according to a particular individual. Instead, humans are a vehicle by which knowledge is expressed, and they draw their understanding of the world from watching, listening to, learning from, and interacting with their environment. For example, the phases of the moon, the configuration of stars, and seasonal weather patterns are frequent sources of learning and wisdom. Knowledge arises from human interaction with natural phenomena, and sometimes the knowledge is gained by way of reference to certain *atua* or ancestors, who are attributed with guardianship roles over natural elements. The Christian God does not feature in Māori intellectual traditions or Māori cosmology. Māori knowledge discourse might refer to *atua* (sometimes translated as *a god*), but they are not the same notion of a god as referred to by Christian teachings, although many Māori today might observe Christian beliefs in addition to their own cultural ideas.

*Hauora* is a Māori philosophical concept of health. The word *hauora* is actually the combination of two root words, *hau* (meaning breath) and *ora* (meaning life). Māori words and concepts typically have layered meanings and multiple interpretations. For example the word *hau* has other meanings—wind, illustrious, vitality, or project. The word *ora* also has different meanings—alive, safe, escape, recover, or a wedge for splitting wood.

*Hauora* manifests through interrelated factors including *tinana* (physical wellbeing), *wairua* (spiritual well-being), *whānau* (social well-being), and *hinengaro* (mental and emotional well-being). Metaphorically speaking, a human being is symbolic of the universe. How he or she interacts with the elements within his or her world determines how the universe reciprocates the relationship, and to achieve *hauora* requires a respect for the universe or a *holistic* worldview. People need to be cognizant of their conduct including their basic needs whether it is the air they breath, the water they drink, each person they come into contact with, their work ethic, and so on. Consequently, reality occurs at multiple levels and is determined by multiple phenomena that may happen simultaneously.

*Kawa*, another Māori concept, is the regulatory mechanism for maintaining wellbeing. It manifests as *tikanga*, which constitutes norms and practices out of which morality arises.<sup>32</sup> Every tribal group has particular *kawa* unique to its tribal area and, like ethics, it is a risk management convention that determines rules of behavior.

It is inconceivable that Māori society could exist without an ethical system, as this would imply the absence of a distinct moral and intellectual system.<sup>33</sup> Traditionally, Māori knowledge was preserved and transmitted by oral and creative traditions before the Western notion of literacy was introduced in New Zealand. There is sufficient contemporary academic literature by Māori and non-Māori that reinforces the existence of an ancient Māori intellectual system as old as Western civilization.<sup>34</sup>

In summary, there are fundamental features of Māori intellectual thought of moral significance. The features are holism, explanatory power lies with *whakapapa* and is contextually applicable, and all phenomena are equal.

## The Interface of Ethical Review

Figure 3 provides a simplistic description of the fundamental characteristics of Western and Māori philosophy.

The characteristics of each philosophical system have corresponding consequences for ethics committees that pose important challenges. For example, informed consent is an ethical standard expressed in the law. In New Zealand, the law is designed to deal with consent by an individual. Adults can give consent for themselves or for children for whom they are a legal parent or guardian. The notion of individual consent has two parts to it: the autonomy of

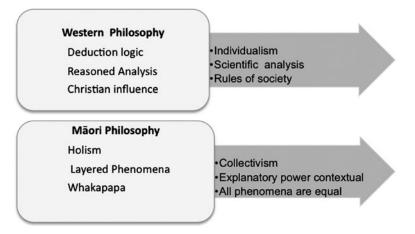


Figure 3. Implications for ethical review.

the individual to make decisions independently and that consent must be adequately informed to satisfy legal and ethical standards. In any case, individual consent draws on Western conventions.

From a Maori philosophical viewpoint, the legal and ethical system that supports a Western approach to consent, by design, places barriers on the ability of Māori to have a collective approach to consent. To be clear, collective informed consent might be different according to the context, but it is not simply about a collection of people in a room who all consent to something according to the Western notion of informed decisionmaking. Collectivity also can pertain to the ability for Māori to deliberate on information they have received in a culturally oriented way. They might deliberate in their own language, and they might collectively arrive at a group of questions they wish to ask health practitioners to inform their thinking that supports the overall decision of an individual or group for whom the decision process is intended. Research also suggests that collective decisionmaking from a Maori philosophical viewpoint refers to a conclusion on a range of possibilities, rather than the Western idea of decisionmaking that aims to choose a single solution from a range of options. The involvement of kin groups in decision processes has added social, political, cultural, and philosophical benefits for well-being.<sup>35</sup> However, ethics committees are unlikely to facilitate arrangements for collectivity if it is not part of their standard assessment procotol or accepted practice.

Another example of working at the interface of philosophical systems that can challenge ethics committees has to do with health research. The collective and communal nature of indigenous communities is emphasized in a Canadian review of aboriginal health research ethics literature.<sup>36</sup> One recommendation contained in the Canadian report is the need for steps to ameliorate inherent conflicts between research ethics board policies and indigenous ethical requirements, the primary example being barriers to decisionmaking about community research by community participants prior to formal approval for research from institutional research ethics boards. The same problem exists in New Zealand. Consultation with indigenous communities is a fairly standard requirement for ethics approval, and, as explained earlier, ethics approval is a prerequisite for research funding. But many ethics committees grant ethics approval for research

projects simply by trusting the research team, and there is generally no follow-up process put in place. The dilemma is that researchers often require guidance before consultation occurs, hence the benefit of prior ethics approval. But the meaning of consultation is open to interpretation, and indigenous communities can be quite vulnerable to the goodwill, or lack thereof, of researchers. If researchers do carry out some consultation before ethics approval (and in some cases that does occur), researchers carry the risk of the cost of consultation, and there is no guarantee their projects will be funded.

Another fundamental ethical challenge has to do with preparation of the health sector workforce and accountability to indigenous communities. Health practitioners, through their education, receive formal instruction on Western standards of ethical conduct. Regulatory frameworks and the law ensure health practitioners can be held to account according to ethical norms. The same cannot be said for Māori ethical standards. There is no consistent framework for indigenous standards built into health education programs and, worse, health practitioners cannot be held to account for their professional conduct even if it is a differential standard that is applied to a Māori person compared to a non-Māori. As a result, Māori are, again, vulnerable to the will of the health sector, and the same practitioners are left to interpret what they believe is required to be ethical with Māori. But it also means that a different, ad hoc consideration for *kawa* is the benchmark applied to Māori society that is not acceptable to dominant society.

## **Transforming Ethical Review**

Māori, as a minority society, desire the law to protect their rights as much as any New Zealand citizen. Indeed, any practitioner can facilitate ethical practice by incorporating Māori approaches, but currently it is dependent on goodwill. Hudson argues that the Western ethical principle of justice is determined by the dominant paradigm of what constitutes justice, based on notions of objectivity, equality, and impartiality.<sup>37</sup> Although the notion of justice is important to Māori members of society, his research found that it is rarely applied to ethical review in a way that represents Māori philosophy. Māori also have different experiences of being Māori that can be partly explained by the process of colonization, but it is relevant to ethical processes because the policy of appointing a Māori member onto an ethics committee places great expectations on one person to sufficiently identify ethical issues for all Maori.

There are common elements between Western and Māori philosophical traditions that are morally relevant, because the objectives of both are essentially the same. Figure 5 draws out the common objectives of ethics and *kawa*.

Figure 4 can and should be the starting place for transforming the framework for the important role of ethics committees. It can be a beginning point for considering new language for labeling ethics committees and the scope of their role. Change requires innovative and forward thinking and, above all, respect and a willingness to contribute to health and well-being for all people.

#### Treaty of Waitangi

The Treaty of Waitangi is sometimes referred to as the constitutional document of New Zealand that is foundational to the government's relationship with Māori.<sup>38</sup>



Figure 4. Common objectives of two traditions.

It takes its name from the place where it was first signed in 1840. As a document the Treaty is not a single large sheet of paper, but it is a group of nine documents that represent nine regions of the country that were traversed by British Crown officials to gather signatures from about 540 Maori chiefs. Collectively, the documents represent an agreement between the British Crown, iwi,<sup>39</sup> and hapu.<sup>40</sup> There are three parts or articles to the Treaty and two versions of the Treaty were signed, one in English and one in Maori. The different language texts are significant by symbolizing two different systems of a society, each with its own distinct intellectual tradition and associated political, ethical, judicial, social, educational, and economic systems. Translating the points of difference between the texts is problematic<sup>41</sup> and has been the cause of decades of dispute between Maori and the Crown. The Treaty superseded an earlier agreement the Crown signed with Maori in 1835, the Declaration of Independence. On the basis of concerns by a British diplomat, James Busby, the Declaration was intended to deal with two issues. First, Busby saw the need to address the lack of a formal justice system in New Zealand because of unruly behavior by his own comrades. An agreement with Maori was necessary to ensure their sanction to put a judicial system in place. Second, Busby was aware of France's interest in New Zealand and a growing probability that France would declare sovereignty over the land.<sup>42</sup> The Declaration proved to be insufficient or, rather, a barrier to the annexation of the country by Britain. William Hobson was thus instructed to pen another document, the Treaty of Waitangi, and the Declaration was revoked.<sup>43</sup> However, Maori interpreted the Treaty to enhance their rights further under the Declaration, and, contrary to popular belief, they did not cede sovereignty, nor did they see themselves as citizens of British society. Instead, they considered themselves as they always had, as an independent nation.<sup>44</sup> Following the signing of the Treaty, a series of legislation and policies led to alienation of Maori from much of their land, which had major implications for their economic and social well-being from the beginning of the 19th century. Land alienation is the main subject of historical claims by Maori of Treaty breaches by the Crown under the Treaty of Waitangi Act 1975. It is legislation that was established to enable Māori to file claims against the Crown and to have an independent body determine if their claims of Crown breaches are substantiated. The legislation provides for historical claims up to September 23, 1992, which marks the first Deed of Settlement between Maori and the Crown on fisheries claims. Although the Treaty is referred to in some legislation to give effect to recognition of Māori as the indigenous people, it is predominantly used as a term of reference on historical matters. The Treaty does not have the same weight as the other elements of the constitution, yet it is the only document that provides for a relationship between Māori and the Crown.<sup>45</sup> The implication is that policies and processes developed by ethics committees are determined on the assumption of being underpinned by the weight of law, and the strength of the law lies in its being relevant for all members of society. Regardless of whether Māori are substantially contributing to the development of the law, the functions that flow from the law, grounded in dominant moral standards, apply to Māori.<sup>46</sup> The place of the Treaty constitutionally in the future and as a framework for ongoing relationships remains unknown. Although it may be argued by some that the Treaty is a part of the constitution, the government refers to it at will and it is found inconsistently in legislation.

## Conclusion

Even by Western intellectual standards, it is illogical to apply ethical conventions of one philosophical approach to another philosophical tradition if the conventions were not designed to do so. The benefit of ethics for Māori cannot be completely dismissed, because it is naive to imply that Māori communities have not been influenced by Western ideas, and they do not favor some of the ideas that have been imposed on Māori society over the past century.<sup>47</sup> On the other hand, simply including Maori words in legislation or health policy while retaining the fundamental components of the status quo is simply window dressing.

The system for ethical review in New Zealand is prescriptive and monocultural and ineffective for addressing Māori moral standards inherent to Māori cultural identity. The survival of Māori society is imperative to ensure the preservation of New Zealand's unique national characteristics that set it apart from any other nation. Transformation at a constitutional level is a major undertaking. The New Zealand government conducted a Parliamentary review of New Zealand's constitutional arrangements from 2004, and the present government is committed to a cross-party review of the constitution over the next 3 years that will require either broad cross-party agreement or majority support at a referendum.<sup>48</sup> By drawing on the common features of two societies and the basic tenets of each other's knowledge systems and by acknowledging the limitations and commonalities of those systems and the relative moral positions represented by both, it is possible to establish a new approach to ethics that gives power to communities to influence health practice that is oriented to their overall health and prosperity. And long may that be.

#### Notes

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- 32. Royal TAC. *Te Ngakau: He Wananga i te Matauranga*. Porirua Mauriora-ki-te-Ao/Living Universe Ltd.; 2009.
- 33. See note 10, Durie 1999.
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- 37. See note 3, Hudson 2004.
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- 39. An *iwi* refers to a tribal collective.
- 40. A hapū refers to a collective kin group that is normally part of a larger tribal grouping.
- 41. See note 33, Ngata, Jones 2005.
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