Homecoming: Clearing a Path for the Repatriation of Taonga to Aotearoa

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Indigenous cultural property from communities all over the world fill the museum exhibitions of the former colonial powers, and attract millions of visitors every year. Taonga are no exception, having ended up overseas via trade, theft, or in the name of science. However, as the decolonisation of Aotearoa progresses, the call for taonga to be returned has grown stronger. Māori have worked for decades on solutions to bring more taonga back to Aotearoa, but international repatriation is a political process, intended by international instruments to take place between nation states. Māori are therefore limited in their ability to initiate the repatriation process without Crown support. However, the Crown also relies on Māori, to provide oral histories and cultural expertise and care. As such, this article argues that domestic reform is necessary to streamline the repatriation process for Māori and enable greater authority in developing repatriation policy. A new framework can be developed by adapting the Taonga Māori Protection Bill, broadening the scope of the Karanga Aotearoa programme, and integrating complementary tools like digitisation and a taonga registry. These efforts will require collaboration with the Crown, due to its obligations under Te Tiriti, and the partnership envisioned by the Waitangi Tribunal in Wai 262.

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1. INTRODUCTION

History is subjective; while the past cannot be changed, it can mean different things to different people.[1] As indigenous cultural property, taonga are not exempt from this subjectivity, but are sites of conflict where non-Māori and Māori views clash.[2] It is this tension regarding accessibility and how indigenous cultural property should be valued that has interfered with the development of a comprehensive international legal framework in the issue of repatriation. As a result, the international law processes of repatriation available to Māori seeking the return of their taonga have been limited to political negotiations and reliance on goodwill gestures.[3]

Since European contact, taonga have been taken overseas, treated as commodities and trophies. Comparatively, taonga returned to Māori are often either taken out of the public eye, or loaned to local museums for care and display.[4] They are welcomed home ceremoniously, because moveable taonga like korowai and whakairo are considered to be physical manifestations of ancestors and culture.[5] As such, the return of taonga is deeply related to decolonisation, a literal taking back of what was lost.[6]

While the decolonisation process has only recently emerged in mainstream politics, Māori have sought repatriation for decades, and enjoyed success in some areas. In 2003, the government and the Museum of New Zealand Te Papa Tongarewa (Te Papa) established the Karanga Aotearoa Repatriation Programme, to return kōiwi tangata (Māori skeletal remains) and kōimi tangata (Moriori skeletal remains) from other jurisdictions.[7] The programme has

1 Bjorn Wansink, Sanne Akkerman and Theo Wubbels "Topic variability and criteria in interpretational history teaching" (2017) 49 Journal of Curriculum Studies 640 at 643.

2 Deidre Brown and George Nicholas "Protecting indigenous cultural property in the age of digital democracy: Institutional and communal response to Canadian First Nations and Māori Heritage concerns" (2012) 17 Journal of Material Culture 307 at 309.

3 "Te Papa praises overseas museums" *Radio New Zealand* (online ed, New Zealand, 9 October 2012).

4 Te Aniwa Hurihanganui "Taonga of Captain Cook's ship to return home" *Radio New Zealand* (online ed, New Zealand, 27 August 2019).

5 Julia Czerwonatis "Taonga return to Northland after being kept in Auckland for a century" *Northern Advocate* (online ed, Northland, 10 October 2019); and Charlotte Jones "Taonga returns home ahead of Rua Kēnana symposium" *Radio New Zealand* (online ed, Auckland, 30 March 2021).

6 Ashleigh Breske "Politics of Repatriation: Formalizing Indigenous Repatriation Policy" (2018) 25 International Journal of Cultural Property 347 at 347.

7 "The Karanga Aotearoa Repatriation Programme: Te Kaupapa Whakahokinga mai a Karanga Aotearoa" Museum of New Zealand Te Papa Tongarewa <www.tepapa.govt.nz>.

repatriated over 400 ancestral remains in the last two decades.[8] However, a similar programme for other physical taonga has not been established, despite there being an estimated 16,000 taonga held in foreign institutions.[9] These other taonga fall outside the scope of Te Papa's programme, so there is currently no equivalent government programme focused on their return.[10]

This article identifies and explains some of the roadblocks in international law preventing the return of moveable taonga. It will argue that the repatriation of moveable taonga would be better facilitated by domestic reforms creating a direct pathway for Māori to repatriate taonga, rather than relying on the reformation of international mechanisms. These recommendations rely on support from the Crown, as the repatriation process is inherently political, involving foreign governments and public institutions like universities and museums. The Crown must also undertake a meaningful role as a Treaty partner.

Broadly, the first half of the article will introduce the status quo, made up of the relevant international law instruments and the existing framework in New Zealand. Part 2 will introduce three instruments New Zealand is a party to, and discuss how the historical context of their development shapes their effectiveness in the repatriation sphere and evaluate their suitability for Māori claims. Part 3 will introduce the tension between the different ways Māori and non-Māori view and value taonga, which is another reason why reform should occur at the domestic level: to ensure Māori can be at the core of change. Part 4 will discuss the Protected Objects Act 1975 as the current domestic law regulating the movement of taonga within New Zealand. This legislation ratifies New Zealand's international obligations in this field.

The second half of the article will discuss why the status quo should be reformed, and how. Part 5 sets out why domestic reformation within the existing international framework is the better option, as international law is ill-suited to the specific issue of repatriating taonga. Part 6 will argue that it is the responsibility of the Crown to collaborate on this process with Māori, due to the resources necessary to facilitate repatriation from overseas institutions, the political nature of repatriation, and its obligations under Te Tiriti. Part 7 will discuss the Taonga Māori Protection Bill, and its relevance to creating a modern repatriation framework. Lastly, part 8 will propose ways the Crown can change its involvement in the domestic framework, including the broadening of Te Papa's existing programme.

8 Museum of New Zealand Te Papa Tongarewa, above n 7.

9 "Virtual Repatriation: A database of Māori taonga in overseas museums" Ngā Pae o te Māramatanga New Zealand's Māori Centre of Research Excellence <www.maramatanga.co.nz>.

10 Museum of New Zealand Te Papa Tongarewa, above n 7.

2. THE INTERNATIONAL FRAMEWORK

In this context, repatriation describes the process of returning indigenous cultural property to the communities they are sacred to. There are three relevant international instruments: the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 (UNESCO Convention); the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995 (UNIDRIOT Convention); and the United Nations Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP). The three instruments emerged during different decades, and reflect the values of their respective time periods. Because their influence is dependent on inter-state cooperation, the instruments are ill-suited to facilitate taonga repatriation by Māori.

2.1 Overview of Mechanisms

The UNESCO Convention had been developed in response to a growing black market in pillaged cultural property.[11] After World War II, victors sought items to use as trophies and bargaining chips, profiting from destruction and damage to cultural heritage.[12] To address this, transfers of cultural property are declared illicit if they do not follow the UNESCO Convention provisions. For example, States Parties are required by art 7 to form their own national services to protect cultural property. However, the resulting flexible arrangement does not impose real obligations on signatories.[13]

To address the shortfalls of such a system, the UNIDROIT Convention was designed to be a complementary instrument to its predecessor.[14] It sets out a minimum floor of legal rules to protect cultural objects from illicit trade, and facilitate the return of objects to their countries of origin.[15] Notably, states are able to bring requests to the court of another State Party to have a cultural object returned.[16] Impacted purchasers are also only eligible for compensation if the transaction was made in good faith.[17] This stricter approach is beneficial for source countries seeking the return of cultural property, but not market states

11 "Illicit Trafficking" UNESCO <https://en.unesco.org>.
12 Zsuzsanna Veres "The Fight Against Illicit Trafficking of Cultural Property: The 1970 UNESCO Convention and the 1995 UNIDROIT Convention" (2014) 12 Santa Clara Journal of International Law 91 at 94–97.
13 At 98.
14 Patrick O'Keefe "Developments in Cultural Heritage Law: What is Australia's Role?" (1996) Australian International Law Journal 36 at 38.
15 "Legal Texts on illicit trafficking" UNESCO <https://en.unesco.org>.
16 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995 (signed 24 June 1995, entered into force 1 July 1998), art 5.
17 Veres, above n 12, at 105.

seeking to purchase. The relative inflexibility of UNIDROIT may explain why only 48 states are signatories of the Convention.[18]

UNDRIP is the third key instrument, as it can be used in conjunction with the first two conventions to inform repatriation policy. The right to self-determination is the central premise of the Declaration, defined in art 3 as freely determining political status and free pursuit of economic, social and cultural development. To exercise self-determination, art 4 gives indigenous peoples the right to autonomy and self-governance in matters relating to their international and local affairs, and financing their autonomous functions. Further, art 5 affirms the right for indigenous peoples to engage and fully participate with the state if they so choose. Therefore, there are at least two facets to self-determination: recognition of autonomy, and ability to participate.[19] However, indigenous peoples are compelled by art 46 to exercise their self-determination within the bounds of the imported legal system.[20] Despite such constraints, states worry about how proper recognition of indigenous autonomy and self-determination could impact its own sovereignty.[21] Thus, UNDRIP struggled to gain recognition in some states.[22]

UNDRIP protects many aspects of indigenous cultural heritage, with art 11 creating an obligation on governments to provide redress for property taken without consent.[23] Adopted by majority vote in 2007, the settler states of New Zealand, Australia, Canada and the United States were the only states to dissent.[24] While they have since reversed this position and become signatories to the Declaration, the original position of these countries demonstrated a general reluctance to accept some of the core provisions. This reluctance has been a notable roadblock in the development of this area of law; it took almost three decades to produce the Declaration because of concerns regarding the right to self-determination, and control over natural resources on indigenous lands.[25] UNDRIP is the only instrument out of the three that was conceptualised with

18 At 100.

19 Dorothée Cambou "The UNDRIP and the legal significance of the right of indigenous peoples to self-determination: a human rights approach with a multi-dimensional perspective" (2019) 23 International Journal of Human Rights 34 at 38.

20 At 36.

21 At 40.

22 Breske, above n 6, at 365.

23 Rebecca Tsosie "International trade in indigenous cultural heritage: an argument for indigenous governance of cultural property" in Christoph Beat Graber, Karolina Kuprecht and Jessica Christine Lai (eds) *International Trade in Indigenous Cultural Heritage: Legal and Policy Issues* (Edward Elgar Publishing Ltd, United Kingdom, 2012) 221 at 226.

24 At 224.

25 United Nations Department of Economic and Social Affairs: Indigenous Peoples "United Nations Declaration on the Rights of Indigenous Peoples" <www.un.org>.

indigenous interests in mind. However, it does not focus on cultural property specifically, meaning its suitability for Māori claims to taonga is limited.

2.2 Suitability for Māori Claims

As seen above, the mere existence of international law mechanisms cannot necessarily slow or prevent the illicit trade of cultural property, because the law's influence is reliant on cooperation between states. The instruments also do not create a clear pathway for indigenous repatriation, as states are often reluctant to interfere with the domestic affairs of foreign jurisdictions out of respect of that state's sovereignty.[26] Even within their own borders, states are hesitant to allow their indigenous populations to fully exercise self-determination.[27] Despite the intentional design of UNIDROIT and UNESCO to be used together, and the official recommendation of UNESCO to give effect to both conventions, not all signatories have done so, again limiting their combined impact.[28]

The conventions were also not designed with indigenous engagement in mind. One purpose of the UNESCO and UNIDROIT conventions was to foster cooperation and a sense of solidarity between Member States.[29] However, this approach creates a difficult repatriation process for indigenous communities like Māori to engage in directly. The values the conventions were founded on are better suited for inter-state, rather than state to individual, repatriation.[30] Māori simply do not have the mandate or resourcing to follow the conventions, such as bringing a repatriation claim to a foreign court. Therefore, changes at the domestic level will better facilitate the return of taonga to their respective iwi, rather than amendment to the international instruments. These changes will be informed by how taonga are valued and intended to be used.

26 Elizabeth A Klesmith "Nigeria and Mali: The Case for Repatriation and Protection of Cultural Heritage in Post-Colonial Africa" (2013) 4 Notre Dame Journal of International and Comparative Law 45 at 51.

27 Federico Lenzerini "Implementation of the UNDRIP around the world: achievements and future perspectives. The outcome of the work of the ILA Committee on the Implementation of the Rights of Indigenous Peoples" (2019) 23 International Journal of Human Rights 51 at 58–59.

28 Piers Davies and Paul Myburgh "The Protected Objects Act in New Zealand: Too Little, Too Late?" (2008) 15 International Journal of Cultural Property 321 at 327.

29 "The 1970 Convention" UNESCO <https://en.unesco.org>.

30 Emily Hsu "Repatriation as Restitution: Toward Procedural Rights for Indigenous Claims to Moveable Cultural Property" (2020) 52 George Washington International Law Review 501 at 517.

3. LIMITING USE AND PUBLIC ACCESS TO TAONGA

Iwi generally intend on "using" taonga in a different way to museums and other Western institutions, because of fundamentally different beliefs in what purpose taonga serve and the values they represent. While taonga are desirable to iwi and museum curators for vastly different reasons, both groups view possession as integral to the recognition and preservation of history and culture.[31] Where indigenous and non-indigenous people differ is the importance placed on accessibility, and accessibility for whom.

3.1 The Value of Public Accessibility

Public accessibility can be an important factor underpinning Western art and culture. For example, Italy has placed limits on artwork ownership rights to protect public accessibility to the country's cultural heritage.[32] Museums have historically utilised this reasoning in order to reject repatriation efforts, not just of indigenous cultural property, but ancient artefacts more generally.[33] Comparatively, it is becoming standard practice in Australian media and museums to suppress the name and image of a deceased indigenous Australian during a period of mourning.[34] Though colonial photos of Māori are being sold as art, and it is likely a market for similar photos of indigenous Australians would exist, preventing the circulation of images and details of the deceased is in accordance with cultural protocol.[35] For many indigenous communities, cultural property can, and sometimes is expected to, be removed from the public gaze. For Māori, taonga are connected to a history that is very personal and alive, and limiting public access can be a sign of respect. This demonstrates that taonga are an integral part of the iwi seeking their return, rather than a relic or artefact of distant history.[36]

31 Though Māori do not perceive taonga as capable of being owned within the Western sense of the word, possession is being used here as Māori are seeking the ability to exercise authority over the use of, and access to, their taonga.

32 Evelien Campfens "Whose Cultural Objects? Introducing Heritage Title for Cross-Border Cultural Property Claims" (2020) 67 Netherlands International Law Review 257 at 265.

33 Breske, above n 6, at 348.

34 "Indigenous cultural protocols: what the media needs to do when depicting deceased persons" *National Indigenous Television* (online ed, Australia, 27 July 2017).

35 Charlotte Muru-Lanning "How much would you pay for a photo of our ancestors?" *The Spinoff* (online ed, Auckland, 29 November 2020).

36 Haidy Geismar "Alternative Market Values? Interventions into Auctions in Aotearoa/New Zealand" (2008) 20 The Contemporary Pacific 291 at 303.

Public accessibility for the benefit of humanity is a core principle of cultural internationalism.[37] From this point of view, cultural objects represent a collective past that should not be limited by state borders. As many people as possible should have access to, and learn from, the artefact to foster a shared human identity.[38] This is a major reason why cultural property internationalists like John Henry Merryman argue for continued possession by museums.[39] A core function of modern museums is to be a place of learning.[40] Though they initially acted as collectors, museums are becoming cultural preservers.[41] Influential institutions like the British Museum, which attracts six million visitors every year, subscribe to the logic of cultural internationalism.[42] When considering a request from Te Papa to repatriate seven toi moko (tattooed preserved heads), the Museum Trustees weighed "the importance of the remains to an original community" against the "importance of the remains as sources of information about human history".[43] Determining access appears to be a balancing act.

For Aotearoa, the argument that everyone should learn the country's shared history is valid. Not only would it help foster greater cross-cultural understanding between Māori and non-Māori, but it may be necessary as part of reversing the impacts colonisation has had on Māoridom. However, the principal flaw of cultural internationalism is that it prioritises access for the general public at the expense of the people of that culture. A shared identity approach endorsed by cultural internationalism is premised on Māori values and preferences being ignored. While there may be wider understanding of the value of taonga for Māori, cultural property internationalism entrenches museums and the existing power systems as a central aspect of preservation, rather than creating space and resourcing for indigenous communities to preserve their own culture.[44] Therefore, taonga may only be prioritised if the museum or non-Māori majority considers them deserving of preservation. Though learning about other cultures is undoubtedly a positive, it should not be prioritised over people connecting with their own culture.

37 John Henry Merryman "Two Ways of Thinking About Cultural Property" (1986) 80 The American Journal of International Law 831 at 837.
38 Campfens, above n 32, at 266.
39 Breske, above n 6, at 348.
40 Haidy Geismar "Cultural Property, Museums, and the Pacific: Reframing the Debates" (2008) 15 International Journal of Cultural Property 109 at 112.
41 Brown and Nicholas, above n 2, at 310.
42 "British Museum tops UK visitor attractions list" *BBC News* (online ed, London, 7 March 2016).
43 "Request for repatriation of human remains to New Zealand" (April 2008) The British Museum <www.britishmuseum.org>.
44 Campfens, above n 32, at 267.

3.2 Public Accessibility in an International Framework

As the international conventions follow the rationale of cultural property internationalism, they are largely unfit to protect moveable cultural property because of a difference in beliefs.[45] Under this approach, the repatriation of taonga is dependent on whether it is considered part of New Zealand's shared heritage, rather than the value it holds for Māori. Taonga are not inherently worthy of protection, so their importance is measured against a subjective, non-Māori standard. This is a harder standard to meet for some taonga, such as a whakapapa album of Ngāti Tūwharetoa tūpuna that was for sale on Trade Me in 2019.[46] A non-Māori seller listed the album and received 58 bids, withdrawing the auction after several complaints. The anonymous seller maintained he had "no concern in displaying of Māori names as from a western culture perspective, it does not matter".[47] This controversy demonstrates the difficulty in viewing Māori taonga through a non-Māori lens, as only some taonga are understood to be of significance from a Western viewpoint. This limits the effectiveness of legislation like the Protected Objects Act 1975, which regulates the sale and purchase of taonga and is discussed further at part 4.

Conflating the rights of indigenous peoples with the rights of nation states means indigenous cultural property must be recognised as part of the wider national heritage to receive international protection.[48] The assumption of international law is that the rights of the nation state absorb the rights of its indigenous population, rather than being distinct and equal. Māori must buy into the Crown's definition of a national identity or their taonga fall out of scope. Thus a shared heritage approach to the protection of taonga is ineffective, and Māori must be supported in making their own repatriation claims, without having to justify why something is a taonga.

4. SETTING OUT THE DOMESTIC FRAMEWORK

This part will focus on two aspects of New Zealand's domestic framework: the Protected Objects Act 1975 (POA) and the Karanga Aotearoa Repatriation Programme administered by Te Papa. These two aspects demonstrate that the current approach to repatriation is both legislative and political. The POA ratifies New Zealand's commitment to international convention, and empowers and regulates the Nationally Significant Objects Register. Its roots are in

45 Tsosie, above n 23, at 232.

46 Taroi Black "Tūwharetoa dispute 'whakapapa' albums' TradeMe sale" *Te Ao Māori News* (online ed, New Zealand, 7 July 2019).

47 Black, above n 46.

48 Tsosie, above n 23, at 236.

international politics, as the POA is based on a model Bill developed by the Commonwealth states. The Karanga Aotearoa programme is also inherently political, as there is no legislation regulating its application. As main actors in the repatriation process, museums are political institutions, and how and why exhibits are displayed is influenced by the museum's socio-political context. The impact this has on the success of repatriation claims is illustrated by a case study from the British Museum.

4.1 The Protected Objects Act 1975

The POA is the domestic legislation relevant to this discussion, because its focus is on protecting moveable cultural heritage and giving effect to both the UNESCO and UNIDROIT conventions.[49] Key sections of the conventions were paraphrased and inserted via amendment in 2006.[50] The 2006 Amendment also introduced the category of ngā taonga tūturu, replacing the definition of Māori artefacts.[51] Ngā taonga tūturu are defined in s 2 as objects that relate to Māori culture, history or society. They must be over 50 years old, and have been manufactured or modified in New Zealand by Māori, brought to New Zealand by Māori, or used by Māori.[52] Ngā taonga tūturu are automatically protected under sch 4 of the POA. The POA also established the Nationally Significant Objects Register, to keep track of taonga within New Zealand. However, the register's voluntary nature and vague registration guidelines means it is not particularly helpful for repatriation.

4.1.1 The Nationally Significant Objects Register

Per s 7F, the Ministry for Culture and Heritage (MCH) is required to maintain a register of nationally significant objects, including taonga tūturu, that is not available to the public for inspection. Once registered, the object cannot be permanently exported from New Zealand.[53] The Act only requires registration of objects the MCH has refused to grant permission for export, but may also list objects voluntarily submitted for inclusion by the owner.[54] It is unclear how else an object may otherwise come to the attention of MCH for registration. Since it only covers artefacts found and/or currently in New Zealand, it is also

49 Paul Myburgh "New Zealand/Aotearoa" in Toshiyuki Kono (ed) *The Impact of Uniform Laws on the Protection of Cultural Heritage and the Preservation of Cultural Heritage in the 21st Century* (Brill, Leiden, 2010) 640 at 644 and 652.
50 Davies and Myburgh, above n 28, at 326.
51 Protected Objects Act 1975, s 2.
52 Section 2.
53 Section 7G.
54 Myburgh, above n 49, at 653.

unhelpful in keeping track of protected objects already exported overseas. For example, when Lady June Hillary, widow of Sir Edmund Hillary, sent five of her husband's Rolex watches to a Swiss auction house, the MCH only became aware after an external tip-off.[55] The MCH then proceeded to pay a penalty to the auction house for withdrawing the items, and returned them to New Zealand. Lady June had not been aware of her obligations under the POA to seek permission for export, because she did not consider the watches to fit the definition of protected objects. The managing director of the Swiss auction house also found the request for return on the basis that it was cultural heritage bizarre. This example shows that the definition of a protected object is not accessible to the general public, or even someone working in the art and heritage sector. While a taonga register could be a helpful resource for Māori seeking repatriation, the scope of the Nationally Significant Objects Register is too vague to be effective.

4.1.2 Scheme and Model Bill for the Protection of Cultural Heritage within the Commonwealth

The Scheme and Model Bill for the Protection of Cultural Heritage within the Commonwealth (the Scheme) was collectively written by the Commonwealth of Nations (the Commonwealth). It was a model Bill that ratified the UNESCO and UNIDROIT conventions, and a scheme that was complementary to the conventions.[56] Development of the Scheme began in 1983, in recognition of the need to better protect moveable cultural heritage.[57] Having a ready-to-ratify Bill would make it easier for the Commonwealth jurisdictions to meet their obligations domestically, but also streamline exports and imports between the member jurisdictions.[58] Member States are not required to implement it, but it is recommended.[59] New Zealand chose to implement the Scheme, in the form of the POA.

The Scheme is ill-suited to facilitating international repatriation of taonga for Māori because its functions are only conceived within the context of inter-country communication.[60] Requests can be made by governments wishing to

55 Adam Dudding "National treasures protected by arcane law" *The Dominion Post* (online ed, Auckland, 3 June 2012).

56 The Commonwealth *Scheme and Model Bill for the Protection of Cultural Heritage Within the Commonwealth* (Commonwealth Secretariat, 2017) at 22.

57 O'Keefe, above n 14, at 44.

58 The Commonwealth, above n 56.

59 Patrick J O'Keefe "Protection of the Material Cultural Heritage: The Commonwealth Scheme" (1995) 44 The International and Comparative Law Quarterly 147 at 148.

60 At 149.

repatriate protected items.[61] These are classified as items of cultural heritage due to their close association with the country's history, or the spiritual or emotional relationship of the item with any community within the country.[62] Taonga fit well within these categories, but the Scheme does not allow indigenous groups to make requests independent of their government. This adds a domestic political dimension to the return of cultural property; cooperation is needed between the indigenous population and their government. In the context of Aotearoa, if iwi are having to politick for requests to be made on their behalf, it may encourage them to forgo other claims. This goes against the spirit of the Treaty and the Treaty claims, as it relies on an inequal power balance between Māori and the Crown in order to pressure Māori to compromise, rather than respecting the partnership envisioned.[63] In creating the Scheme and model Bill, the Commonwealth essentially produced a blueprint on the regulation of indigenous cultural property, without proper input from indigenous communities.

4.2 The Karanga Aotearoa Repatriation Programme and Te Papa

The Karanga Aotearoa Repatriation Programme is administered by Te Papa, and is the mandated authority able to negotiate the return of kōiwi tangata and kōimi tangata from overseas. This negotiation is done on behalf of the government and the respective iwi. Established through the Cabinet Office in 2003, the programme receives funding to cover research, repatriation travel, freight and crating, and other associated expenses.[64] Upon arrival in Aotearoa, the remains are held by Te Papa on an interim basis until their return to their iwi, as Te Papa policy prohibits their exhibition.[65] The team is made up of two researchers determining the provenance of the remains and preparing repatriation claims, one manager negotiating and implementing the return, and one coordinator providing research and logistical support.[66] The team is

61 At 153–154.
62 At 151.
63 Evelyn Stokes "The Treaty of Waitangi and the Waitangi Tribunal: Māori claims in New Zealand" (1992) 12 Applied Geography 176 at 184–189.
64 Cabinet Policy Committee Minute of Decision "Repatriation of Koiwi Tangata Māori: Programme for 2003/04, 2004/05, 2005/06" (18 June 2003) POL Min (03) 14/1 (Obtained under Official Information Act 1982 Request to the Ministry of Culture and Heritage).
65 Veres, above n 12.
66 "Repatriation Team" Museum of New Zealand Te Papa Tongarewa <www.tepapa.govt.nz>.

supported by a Repatriation Advisory Panel made up of iwi representatives with expert cultural knowledge.[67]

Because of the inherent sensitivities involved in the repatriation of kōiwi tangata and kōimi tangata, Te Papa was unable to release specific details and information regarding the repatriation process into the public domain — this responsibility is held by the relevant iwi or imi.[68] Broadly, repatriation through the Karanga Aotearoa programme follows some or all of the following steps.[69] Te Papa approaches a foreign museum with ancestral remains in its catalogue. If the foreign museum agrees to engage, arrangements are made for repatriation to Te Papa. Upon arrival, a pōwhiri is hosted by the museum and local Māori, and the remains are quarantined and assessed. Through research and verification, Te Papa determines the relevant iwi or imi and facilitates the return. While the relevant descendants are being identified, Te Papa is able to hold the remains in storage indefinitely, but it is looking to develop a final resting place for unclaimed or unidentifiable kōiwi tangata and kōimi tangata.

The main actors normally involved in the Karanga Aotearoa programme are museums, rather than governments or government agencies. As such, they are not accountable to a constituency, and can enjoy relatively more freedom in their decision-making and policies. Te Papa has used this freedom to employ a bicultural approach in partnership with Māori, but the same cannot be said of all museums.[70]

4.2.1 Museums as political institutions

Museums are not passive actors within the repatriation conversation, as they can dismiss repatriation requests from foreign jurisdictions. The political climate and history of a state can also manifest in the museum's policies. For example, Te Papa uses the concept of mana taonga to give iwi and communities the right to define how taonga held by Te Papa should be cared for and managed, in a tikanga, or custom-appropriate, way.[71] Tikanga is the customs and traditional rules for conducting life and culture.[72] It is established over time through

67 "Repatriation Advisory Panel: Te Rōpū Tohutohu" Museum of New Zealand Te Papa Tongarewa <www.tepapa.govt.nz>.

68 Email from Te Herekiekie Herewini (Kaiwhakahaere Kaupapa Pūtere Kōiwi, Manager Repatriation) to the author regarding the Karanga Aotearoa Repatriation Programme (1 February 2021).

69 Museum of New Zealand Te Papa Tongarewa, above n 7.

70 Geismar, above n 40, at 114.

71 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) vol 1 at 194.

72 At 254.

precedent, and therefore is subject to change over generations.[73] Developed by Dr Apirana Mahuika in 1990, mana taonga recognises that the relationship Māori have with their cultural property should afford them the right to access the collections, be involved in their care and management, and participate in external roles like exhibitions and public programmes.[74] This ensures that tikanga is respected and upheld in interactions with taonga. As suggested by the name, this policy is applicable to all taonga held by Te Papa, not just those repatriated via the Karanga Aotearoa programme. Through mana taonga, the Māori community becomes a participant within the museum — this has allowed exhibitions to be even more political as a space for radical ideas.[75]

Because of the objects they house, museums can be and are political. In the same way Te Papa consciously chooses to engage and collaborate with Māori, other museums may actively choose a different path. This is evident in Te Papa's dealings with the British Museum.

4.2.2 Case study: repatriation from the British Museum

While no complete case studies are available to the public, the British Museum published correspondence from 2004–2008 between itself and Te Papa.[76] The documents provide an overview of what is required to make a formal request from an institution, and how long these discussions can take. Te Papa requested the repatriation of seven toi moko and nine human bone fragments. As quoted in part 3, in making their decision the Trustees of the British Museum weighed the importance of the toi moko to Māori against the public benefit of accessibility, ultimately concluding accessibility as more important. They engaged in the same balancing exercise for the bone fragments, but in that instance decided to agree to their repatriation.

After the initial meeting of the two museums in 2004, it took approximately 18 months for a formal request of repatriation to be made. During this delay, a change in the United Kingdom legislation allowed the British Museum to develop a policy regarding the repatriation of human remains, and invite Te Papa to begin the process. The invitation was accepted, and the request included evidence of the remains being less than 300 years old, reiteration of

73 Paul Kuruk "The Role of Customary Law under Sui Generis Frameworks of Intellectual Property Rights in Traditional and Indigenous Knowledge" (2007) 17 Indiana International and Comparative Law Review 67 at 81–82.

74 Conal McCarthy, Eric Dorfman, Arapata Hakiwai and Āwhina Twomey "Mana Taonga: Connecting Communities with New Zealand Museums through Ancestral Māori Culture" (2015) 65 Museum International 5 at 8.

75 At 10.

76 The British Museum, above n 43.

Te Papa's mandate from the government to repatriate taonga, and the connection of the kōiwi tangata to Māori today, as required by the policy.

The British Museum case study demonstrates that international repatriation is a long process requiring resourcing that is simply not available to iwi without support from the Crown. The initial step taken by Te Papa to approach the British Museum required an in-person meeting with their team in London. Te Papa provided expert reports for the British Museum's consideration, and hosted a representative of the Museum in Wellington to give them the opportunity to review Te Papa's work in person. Arrangements like hosting a visiting expert would not be possible unless the claimant was a museum, which suggests that repatriation claims are weakened if a non-museum entity initiates the process. These requests from the British Museum stem from Museum policy, and therefore cannot be changed by the New Zealand Crown.

The first half of this article set out the relevant instruments and processes currently available under international and domestic law. While the policies of foreign museums and institutions can be regulated by international instrument, domestic reformation would be more effective in aiding Māori in their repatriation claims. Therefore, the second half of the article will make the case for domestic reform, why the Crown needs to support Māori, and what steps can be taken at the domestic level to strengthen the taonga repatriation process.

5. THE STRENGTHS OF DOMESTIC REFORM

To aid the repatriation of indigenous cultural property, creating a new convention to be used in addition to UNESCO, UNIDROIT and UNDRIP has been suggested.[77] However, for the specific issue of facilitating the return of taonga to Māori, it is more effective to amend the domestic process within the existing international framework rather than relying on changes in international conventions. This is for three reasons: global perceptions of indigenous rights to artefacts have not substantially changed; domestic change for Māori being more attainable; and the variation in indigenous customs preventing an international one-size-fits-all framework.

5.1 Global Perceptions of Indigenous Rights to Artefacts have not Substantially Changed

First, creating a new convention is the approach that has been taken since the 1950s, when the issue of repatriation first came to international attention.

77 Hsu, above n 30, at 504–505.

Advancements in indigenous rights are being made, but the progress is slow.[78] Despite UNESCO and UNIDROIT being introduced 25 years apart, it has proven difficult both times for the instruments to gain traction.[79] There has not been significant developments within this area of law, or shifts in general perception that suggest a new convention 26 years after UNIDROIT will be any more effective in preventing illicit trade.

Furthermore, the UNDRIP already covers indigenous rights broadly. Considering the contents of all three instruments combined, a new instrument would majorly overlap in scope. UNDRIP is rightfully significant for indigenous communities around the world, but declarations lack the legal sway of a convention because they are not legally binding.[80] While they can be indicative of political and societal attitudes, a declaration on its own does not create any obligations. Though a new convention containing or expanding on the rights set out in UNDRIP could be created, it took the New Zealand government three years to give its support to a non-binding declaration.[81] In 2019, plans to implement the Declaration were under way, 11 years after signing.[82] This shows that the recognition of indigenous rights has previously been slow on an international scale and in New Zealand. Therefore, it is unrealistic to rely on a new convention to facilitate the return of taonga in the current political climate.

5.2 Potential for Domestic Change

Secondly, New Zealand does not need international conventions to prompt domestic change. The existing conventions only set out a minimum floor of rights, meaning New Zealand is able to go beyond the provided guidelines to give more rights to iwi. The existing pathway for repatriation of kōiwi tangata and kōimi tangata facilitated by Te Papa is already renowned within this sphere, suggesting that New Zealand is a world leader in this specific area of indigenous rights.[83] With plans already in development for the implementation of UNDRIP, the current state of New Zealand's political landscape could be amenable to a concentrated repatriation effort. As discussed in part 2, the current international regime requires indigenous communities to work with the

78 At 513.
79 Veres, above n 12, at 102.
80 Breske, above n 6, at 367–368.
81 Beehive "National Govt to support UN rights declaration" (press release, 20 April 2010).
82 Lucy Bennett "Work gets under way on plan for implementation of UN Declaration on the Rights of Indigenous People" *The New Zealand Herald* (online ed, Auckland, 8 April 2019).
83 Federico Lenzerini "Cultural Identity, Human Rights, and Repatriation of Cultural Heritage of Indigenous Peoples" (2016) 23 The Brown Journal of World Affairs 127 at 134.

state to repatriate their cultural property. While this article is premised on the issue that the repatriation pathways available to Māori are inadequate, there are existing avenues for direct Māori–Crown engagement in general. This includes the Waitangi Tribunal, which allows Māori grievances with the Crown to be acknowledged publicly.[84] Some countries may have better indigenous representation than New Zealand, such as the Nordic Sámi Parliaments, but other indigenous communities may not, such as Aboriginal Australians and Torres Strait Islanders. Therefore, changes at a domestic level could be more attainable for Māori compared to other indigenous groups, who look to the Karanga Aotearoa programme as an aspirational goal.

Ratification is also necessary regardless of whether these new rights would be sourced from international convention or produced from domestic politics. The international instruments that have been discussed took several years to develop because of the conflicting opinions and priorities of the different contributors. Knowing how reluctant other nation states have been in signing up to previous conventions, waiting for international law to develop creates unnecessary delay for Māori. If there is political appetite in Aotearoa for a domestic taonga repatriation programme, then Aotearoa can act unilaterally.

5.3 Variation in Indigenous Custom

Thirdly, indigenous custom and the correct way of doing things will not only vary between indigenous groups, but even between iwi.[85] Each community will have its own system and beliefs on the best way to protect its cultural property. Because of this, sui generis laws have been seen as the solution in protecting intangible indigenous works.[86] The top-down approach of international law would struggle to accommodate the nuances of different indigenous cultures, which is another reason why a domestic approach would be a more effective solution for Māori repatriation of taonga.

6. CROWN INVOLVEMENT IN REPATRIATION

At present, Māori need support from the Crown to repatriate taonga from overseas, as it is a political process that requires significant resourcing. As

84 Janine Hayward "Treaty of Waitangi settlements: Successful symbolic reparation" in Joannah Luetjens, Michael Mintrom and Paul 't Hart (eds) *Successful Public Policy: Lessons from Australia and New Zealand* (ANU Press, Canberra, 2019) 399 at 400.

85 Kuruk, above n 73, at 81.

86 Angela R Riley "Straight Stealing: Towards an Indigenous System of Cultural Property Protection" (2005) 80 Washington Law Review 69 at 74.

discussed in parts 3 and 4, overseas repatriation requires navigating international politics and relying on moral reasoning to convince other jurisdictions to engage.[87] International repatriation also requires significant resourcing for research, travel and storage of taonga, which is generally unattainable for most Māori. But while Māori may presently need support from the Crown, the growth of the Māori economy means in future Māori could independently resource their own repatriation claims. Despite this, the Crown is not absolved of its responsibility to support Māori repatriation claims, due to its obligations as a Treaty partner.

6.1 The Crown's Obligations to Provide Resources for Repatriation

As taonga come in all shapes, sizes and conditions, there can be considerable costs associated with repatriation.[88] However, many Māori do not currently have the resources necessary to independently engage in an international repatriation process because of colonisation. As a result of war, land alienation and cultural repression, and the establishment of Eurocentric institutions and systems, there is a wealth gap between Māori and Pākehā in Aotearoa.[89] As of 2018, the median individual net worth for Pākehā is $138,000 — for Māori, it is $29,000.[90]

This is of course a generalisation, as some Māori do hold significant resources. One example from Auckland is Ngāti Whātua Ōrākei, which holds assets worth approximately $1.3 billion, spread over several investments.[91] Using this economic base, the hapū is able to provide its members with wide-ranging services which can go beyond what is publicly available from the government, like antenatal wānanga (classes), employment support, and free health insurance.[92] Another example is Ngāi Tahu, a South Island iwi with an asset base of $1.5 billion.[93] As the era of Treaty settlements progresses, and the Māori economy continues to grow, Māori can begin engaging in the repatriation

87 Tsosie, above n 23, at 231.

88 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) vol 2 at 507.

89 Evan Te Ahu Poata-Smith "Inequality and Māori" in Max Rashbrooke (ed) *Inequality: A New Zealand Crisis* (Bridget Williams Books, Wellington, 2013) 153 at 153–155.

90 "Household net worth statistics: Year ended June 2018" (14 December 2018) Stats NZ <www.stats.govt.nz>.

91 "Te Pūrongo ā Tau 2019/20" Ngāti Whātua Ōrākei <www.ngatiwhatuaorakei.com> at 34.

92 "Whānau" Ngāti Whātua Ōrākei <www.ngatiwhatuaorakei.com>.

93 "Summary Group Financial Statements for the year ended 30 June 2020" Te Rūnanga o Ngāi Tahu <https://ngaitahu.iwi.nz> at 4.

process independently. However, the Crown's responsibility to collaborate with Māori in repatriation goes beyond providing resources, due to the Crown's obligations to Māori as Treaty partners.

6.2 The Crown's Treaty Obligations and Wai 262

Wai 262 was a landmark Waitangi Tribunal claim lodged in October 1991 by six claimants, on behalf of themselves and their iwi.[94] It initially arose out of concerns over the use and commercialisation of indigenous flora and fauna, and the lack of Māori consultation and consent in this area.[95] The claim was then broadened to argue that the Crown failed to allow Māori to exercise tino rangatiratanga (self-determination) over mātauranga Māori (Māori knowledge) and taonga, including flora and fauna.[96] The Tribunal concluded in Wai 262 that the Crown had a responsibility to support Māori leadership in the preservation and transmission of mātauranga Māori, because Māori cannot succeed without state support.[97] In regard to taonga held by overseas museums, the Tribunal supported repatriation.[98] It recognised the kaitiakitanga (guardianship) interest of Māori where taonga had been willingly transferred to others, and the rangatiratanga (sovereignty) interest for taonga that had been stolen.[99] However, the Tribunal was pragmatic in its stance and cautioned the Crown against exerting too much pressure on institutions for other taonga, because doing so could jeopardise the return of kōiwi tangata.[100] It is from this standpoint the Tribunal recommended the Crown policy for repatriation be developed through "significant consultation with Māori".[101]

The Wai 262 report was significant because it considered what the Treaty relationship would look like in future, beyond the settlement era.[102] The Tribunal called on Māori and the Crown to embrace partnership.[103] But consultation in developing repatriation policy is not partnership. Limiting Māori involvement to consultation falls short of true partnership because the decision-making

94 Waitangi Tribunal, above n 71, at 2.
95 At 2.
96 "Ko Aotearoa Tēnei: Report on the Wai 262 Claim Released" Waitangi Tribunal <https://waitangitribunal.govt.nz>.
97 Waitangi Tribunal, above n 71, at 188.
98 Waitangi Tribunal, above n 88, at 510–511.
99 At 504–505.
100 At 507–511.
101 At 513.
102 Waitangi Tribunal, above n 88.
103 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuatahi* (Wai 262, 2011) at 16–17.

authority is still held solely by the Crown. Instead, the authority should be shared, because the Tribunal recognised there was a Treaty interest in taonga tūturu, and that Māori have a high-priority interest in the taonga held in museums.[104]

According to James Tully, an academic who wrote on the Canadian Crown's relationship with the First Nations of Canada, the first step to true partnership is for mutual recognition between the parties as equal, co-existing and self-governing.[105] Where there is mutual recognition, there can then be intercultural dialogue, mutual respect, sharing and mutual responsibility to allow the relationship to develop.[106] Tully does not suggest that partnership requires a rigid equal splitting of authority between the two parties, but an ongoing relationship that is constantly evolving.[107] Applying this principle allows Māori and the Crown to contribute according to their strengths. In repatriation, Māori should have the dominant authority in determining which taonga should be prioritised for repatriation and lead engagement with foreign institutions, but the Crown can offer resourcing and political support. Without Māori, there would be a lack of cultural knowledge and oral histories that can establish provenance and ensure a taonga is cared for in accordance with tikanga. But the Crown also has an interest in taonga as artefacts of New Zealand's history, and in Māori culture more generally as a central aspect of wider New Zealand culture.[108] Both parties value taonga beyond money and politics, and collaborating to ensure Māori can actively participate in the developing repatriation policy would be closer to mutual recognition and partnership.

6.3 Challenges to Crown Involvement

Beyond the question of what Treaty obligations the Crown may have in supporting taonga repatriation, there are two major considerations preventing significant Crown involvement in this sphere: the hypocrisy in seeking repatriation of Māori taonga when New Zealand institutions hold significant amounts of Oceanic indigenous property; and the perception of special treatment for Māori.

First, there is an apparent hypocrisy in the Crown seeking repatriation of Māori taonga, when New Zealand museums and institutions possess the

104 Waitangi Tribunal, above n 88, at 504.
105 James Tully "The negotiation of reconciliation" in *Public Philosophy in a New Key — Volume 1: Democracy and Civil Freedom* (Cambridge University Press, Cambridge, 2008) 223 at 229.
106 At 225, 232.
107 At 244.
108 Waitangi Tribunal, above n 71, at 188.

indigenous cultural property of other peoples, mostly Oceanic nations.[109] The arguments regarding decolonisation and indigenous reclamation of culture are applicable to New Zealand returning other cultural property. Aotearoa played the role of colonising power over many of the neighbouring island nations. In Sāmoa, New Zealand established and maintained a colonial administration for over 40 years, until Sāmoa's independence in 1942.[110] Similarly, the Cook Islands, Niue and Tokelau are part of the Realm of New Zealand, and have varying levels of independence.[111] During this time, New Zealand has acquired its own collections sourced from Oceania. The Auckland War Memorial Museum alone houses over 1,800 artefacts sourced from the Pacific, most of which were obtained in the early 19th century.[112] These artefacts contribute significantly to the attraction of New Zealand museums, and to return them would be a great loss to these institutions. But as the Oceanic countries progress further into their own decolonisation, these questions will inevitably arise and place New Zealand in a difficult position. To create a framework supporting repatriation for Māori, but then refusing to cooperate with source states wanting their moveable cultural property returned, is a political decision, and one that is likely to be unpopular.[113]

Secondly, the Crown may hesitate in becoming heavily involved in repatriation because of the perception of special treatment of Māori, a concern which is not unique to issues of repatriation.[114] Indigenous repatriation is already a politically fraught topic, due to fundamental differences in understanding of ownership, property and taonga. "Forcing" bona fide purchasers to return indigenous cultural property impinges on private property rights, which greatly impacts public perceptions of Treaty settlements involving land and results in outcry.[115] As Māori activists have become more vocal about asserting their

109 Davies and Myburgh, above n 28, at 335. See Epeli Hau'ofa "Our Sea of Islands" (1994) 6 The Contemporary Pacific 148. I have opted to use the term Oceania, as conceptualised by Epeli Hau'ofa, instead of alternatives like Pacific and Polynesia, to recognise the precolonial relationships between the islands which are facilitated by the Pacific Ocean.

110 "New Zealand in Samoa: Colonial administration" (28 July 2014) NZ History <www.nzhistory.govt.nz>.

111 "Pacific Islands and New Zealand: Cook Islands, Niue, Tokelau and Nauru" (20 June 2012) Te Ara — the Encyclopaedia of New Zealand <www.teara.govt.nz>.

112 "Pacific Lifeways" Auckland Museum <www.aucklandmuseum.com>; and "Pacific Masterpieces" Auckland Museum <www.aucklandmuseum.com>.

113 Myburgh, above n 49, at 656–657.

114 Hsu, above n 30, at 517.

115 Angela Moewaka Barnes, Belinda Borell, Ken Taiapa, Jenny Rankine, Ray Nairn and Tim McCreanor "Anti-Maori themes in New Zealand journalism — toward alternative practice" (2012) 18 Pacific Journalism Review 195 at 200–211.

rights to stolen taonga like land, the conflicts play out in the media.[116] The return of some taonga are likely to be more politicised in the media, and therefore generate more responses and engagement.

Moveable cultural property are seen as objects, able to be commodified and therefore traded and sold.[117] This is especially true for taonga which can be considered art, like 19th-century photographs of marae and tūpuna, or a hei-tiki also from the same era.[118] Auctions selling antiquities and artefacts are still socially acceptable and mainstream — as of writing, there is a forthcoming auction titled "Oceanic and Indigenous Artefacts" advertised on the Webb's Auction House website for 17 May 2021.[119] The inclusion of such taonga in so-called "tribal collections" often price them out of the reach of its iwi, easily fetching into the hundreds or thousands of dollars.[120] These auctions perpetuate the idea that taonga can be owned and only hold monetary value. One of the strict limitations placed on the Karanga Aotearoa programme is that it cannot make payments to overseas institutions for taonga.[121] If the option of purchasing taonga is unavailable, that means other, non-financial pathways must be explored.

7. ADAPTING THE TAONGA MĀORI PROTECTION BILL

Discussions about how to repatriate and protect taonga have been ongoing for decades. An example of a past initiative is the Taonga Māori Protection Bill, a private member's Bill by MP for Northern Māori Tau Henare, introduced in 1996.[122] The Bill acknowledged Māori as arriving before Europeans, the importance of Māori culture and heritage to Māori and the wider community, and Māori as rightful owners of their heritage and responsible for its future, control and management.[123] It also recognised the need to preserve Māori cultural property and the importance of according the appropriate status to

116 At 201–202.
117 Will Harvie "Flashback: How a New Zealand museum traded taonga for Chinese antiquities" *Stuff NZ* (online ed, Auckland, 3 August 2019).
118 Muru-Lanning, above n 35; and Michael Neilson "'Ongoing colonisation': Māori hei-tiki pendant sells for $50,000 at Christie's auction in Paris" *The New Zealand Herald* (online ed, Auckland, 1 July 2020).
119 "Forthcoming Auctions — Oceanic & Indigenous Artefacts" Webb's Auction Portal <www.webbs.co.nz>.
120 Ella Stewart "Authenticity and ownership of Hongi Hika's musket questioned" *Radio New Zealand* (online ed, Auckland, 13 May 2021).
121 Museum of New Zealand Te Papa Tongarewa, above n 7.
122 Geismar, above n 36, at 300.
123 Taonga Māori Protection Bill 1996 (166-1), subs (a)–(c).

Māori to enable them to protect their culture and heritage.[124] The Bill passed its first two readings, before the order of the day for dismissal was discharged in 2004.[125] This part will discuss how the ideas presented in the Bill could inform a new framework today.

There were three key aspects to the Bill. First, Te Puni Kōkiri was given a monitoring and auditing function to ensure the commitment of government agencies and private corporations to the protection of taonga. Secondly, the Bill established a "Taonga Māori Register", to record the location of taonga overseas. Thirdly, a "Taonga Māori Trust" would assist with the administration of the register. Members of Parliament across the political spectrum supported the principles underpinning the Bill, but it was ultimately dropped.[126] It was criticised as lacking research and clarity, and was a popular topic of contention for talkback shows and opinion pieces.[127] Though it was not enacted, the values and ideas of the Taonga Māori Protection Bill continue to be relevant today. A new framework could take inspiration from the Bill to improve the repatriation process for Māori. There have been several developments in this area of law since its dismissal in 2004, which a new approach would need to consider and incorporate.

7.1 The Monitoring and Auditing Function of Te Puni Kōkiri

The first re-evaluation could be of the monitoring and auditing function originally designated to Te Puni Kōkiri (TPK), the Ministry of Māori Development, and whether this role could be shifted to Te Arawhiti, the Office for Māori Crown Relations. TPK and Te Arawhiti fulfil complementary roles, and work in areas of common interest like improving outcomes for Māori, enhancing Māori–Crown relationships, and monitoring the performance of the system for Māori.[128]

TPK should continue to hold the monitoring and auditing function in the new framework. According to Hansard, the Bill envisioned that TPK would act as a watchdog, overseeing government departments, Crown entities and state

124 Taonga Māori Protection Bill, subs (d)–(e).

125 "Taonga Māori Protection Bill" New Zealand Parliament Pāremata Aotearoa <www.parliament.nz>.

126 (1 May 1996) 554 NZPD 653–667.

127 Paul Tapsell "When the living forget the dead: The cross-cultural complexity of implementing the return of museum-held ancestral remains" in Cressida Fforde, C Timothy McKeown and Honor Keeler (eds) *The Routledge Companion to Indigenous Repatriation: Return, Reconcile, Renew* (Routledge, London, 2020) 259 at 261.

128 Cabinet Māori Crown Relations — Te Arawhiti Committee Minute of Decision "Roles and Responsibilities of Te Puni Kokiri and Te Arawhiti" (4 November 2019) MCR-19-MIN-0031 at [20].

enterprises to ensure their commitment to the ongoing protection of taonga.[129] This appears to be aligned with the role TPK fulfils today. When Te Arawhiti was established, the government released a report outlining how it would work alongside TPK.[130] TPK's work programme indicated a focus on monitoring services to ensure their effectiveness for Māori, which was reiterated in the strategic framework presented in TPK's 2020–2024 He Takunetanga Rautaki Strategic Intentions report.[131] A key focus area for TPK is also leading the government's work between the Crown and Māori to give effect to Wai 262.[132] From the work programme, it appears the introduction of Te Arawhiti has not substantially changed how TPK is operating in terms of monitoring and auditing. TPK's workplan also suggests that Te Arawhiti is not designed to take on this watchdog function, or the role would have moved to Te Arawhiti after it was established, rather than remaining with TPK. Therefore it is not necessary to shift the role of monitoring and auditing to Te Arawhiti.

7.2 Establishing a Taonga Māori Register with Te Papa

The second amendment to the Bill could be establishing a Taonga Māori Register in conjunction with Te Papa, rather than to be run by a trust. The establishment of a register is a popular recommendation as iwi cannot request the return of taonga if they do not know what is missing. Therefore, the suggestion of a register is still relevant. The register proposed by the Bill was intended to be a comprehensive record of taonga held in New Zealand and overseas, recording their whereabouts and condition.[133] This was to maximise Māori involvement with taonga, including having input in taonga maintenance if repatriation was not possible.

If designed to be used in conjunction with the Karanga Repatriation programme, Māori will be well placed for independent involvement in the repatriation process. Keeping up to date when taonga resurface overseas can be difficult, as it requires continuous observation of auction houses and private collections, and collecting information from museums and art galleries. This is a large undertaking for a private party, especially as institutions may not want to share information with the general public regarding how a taonga was acquired, or enable access to document it. Museums may be more willing to engage with a peer, on the basis of information-sharing between New Zealand and foreign institutions, or an agreement between governments. This appears

129 NZPD, above n 126, at 652.
130 Te Arawhiti Committee Minute of Decision, above n 128, at [2].
131 *2020–2024 He Takunetanga Rautaki Strategic Intentions* (Te Puni Kōkiri, February 2021) at 6.
132 At 22–23.
133 NZPD, above n 126, at 651.

to be the norm, as Te Papa has been able to arrange curatorial and exchange opportunities while negotiating repatriation through the Karanga Aotearoa programme.[134]

A register minimises the resources required by the wider Māori population to become involved in repatriation, therefore making this sphere more accessible. Resourcing a register will give iwi an opportunity to decide and develop the repatriation requests they bring to Te Papa, because the formal, specialised research can be completed by the museum. Iwi would then be able to contribute their own specialist knowledge derived from their oral history.

Different attempts at a register already exist, such as the Nationally Significant Objects Register discussed in part 4. However, a new register could operate separately from the existing MCH register, because they monitor different taonga. The taonga in the MCH database are already in New Zealand, and the information it holds is voluntarily offered. Comparatively, a register following taonga overseas could utilise publicly available information, and knowledge gathered by Te Papa and Māori.

However, taonga registers invoke concerns regarding privacy and respect for the mana of taonga, and therefore need to have the support of Māori to be effective. Māori should not feel pressured to contribute their knowledge to the register, as they may feel that publication is inappropriate or disrespectful. To circumvent these issues, the register could be public, but only provide written descriptions of taonga, similar to how taonga tūturu are listed on MCH's website. Alternatively, account registration could be required to track who is accessing the information, and only allow photograph access from these accounts. Because the most sensitive information held by the register would not be anonymously accessible, these options could minimise unnecessary exposure.

7.3 Building a Relationship between Te Arawhiti and Te Papa

The third change to the Bill could be for Te Arawhiti to build a relationship with Te Papa, to ensure Te Papa meets its Treaty obligations. While Te Arawhiti should not be auditing or monitoring the commitment of agencies to protecting taonga, it is intended to build closer partnerships with Māori.[135] To accomplish this, Te Arawhiti could act as a liaison between Te Papa and Māori. This could include raising awareness of the register, and developing accessibility for Māori who wish to use the register to inform their own repatriation requests. This supports the Treaty relationship by ensuring Māori are aware of the resources

134 *Karanga Aotearoa Repatriation Programme Background Document: Unprovenanced Kōiwi Tangata Options re: Final Resting Place* (Te Papa, Wellington, 2011) at 5.

135 "Building Closer Partnerships with Māori" Te Arawhiti <www.tearawhiti.govt.nz>.

available to them, and that these resources are effective for their intended purpose. Te Arawhiti should collaborate with Te Papa because Te Papa is significantly involved with New Zealand's repatriation process, and it is the only museum in New Zealand that is a Crown entity.[136] Te Papa is run by a board in accordance with the Crown Entities Act 2004, and therefore has commitments under the Treaty.[137]

8. BRINGING TAONGA HOME

Because taonga can come in many forms, a repatriation programme must be able to adapt to several situations. As such, many tools should be used to make up a kit, rather than relying on one programme or form of repatriation. In this part, the option of broadening Te Papa's Karanga Aotearoa programme to include more taonga within its scope will be explored. Digital repatriation will also be discussed as a complementary tool, for taonga that cannot be physically returned to Aotearoa. Utilising modern solutions like digitisation also demonstrates that tikanga and Māoridom are not stagnant, and have a place in a 21st-century society and beyond.

8.1 Broadening the Karanga Aotearoa Repatriation Programme

Broadening Te Papa's Karanga Aotearoa programme to include other types of moveable taonga could streamline the international repatriation process for Māori. A request under the Official Information Act 1982 shows the initial funds allocated from 2003–2006 were just over $500,000 annually.[138] During the same period, the operating balance ranged between $3.8–5.7 billion.[139] Considering the success of the programme, there is a strong argument for increasing funding and widening the scope of taonga able to be repatriated. A staggered approach could be taken to gradually include specific taonga types, such as taonga made with endangered materials, or created during a specific time period.

Broadening the scope would require additional funding and resourcing, and exploring ways of integrating further mechanisms for Māori to bring their repatriation claims. As part of the programme, Te Papa already holds hui ā-rohe (regional meetings) and wānanga (forums and workshops) with the wider Māori public. These are used as opportunities to discuss the appropriate final resting

136 Waitangi Tribunal, above n 88, at 493.
137 At 493, 501.
138 Cabinet Policy Committee Minute, above n 64, at [8].
139 Budget 2003 "Executive Summary" (15 May 2003) at 1; Budget 2004 "Executive Summary" (27 May 2004) at 1.

place of kōiwi tangata with unclear provenance, raising awareness about the programme, and updates on recent activity.[140] Having this interface with the public allows Te Papa to hear iwi suggestions on which taonga to repatriate. By creating a complementary register as suggested in part 7 to be used in conjunction with the programme, Māori will have a direct pathway to request repatriations.

Currently, Te Papa is only mandated to repatriate unmodified human remains. A particular hurdle to expanding New Zealand's repatriation programme is the issue of precedence, and how New Zealand's efforts to repatriate could encourage other states to do the same. There is virtually no overlap between the countries New Zealand is looking to repatriate from, and the countries whose cultural property is held by New Zealand, preventing an exchange of cultural property. To date, all but one of the repatriated ancestral remains in the Karanga Aotearoa programme have been returned from Europe, the United States, Canada, or Australia.[141] While there is no definitive data on where overseas taonga are held, it is reasonable to expect these same countries also hold a significant amount of taonga that are not remains. In comparison, New Zealand's collection of cultural property from the surrounding Oceanic islands is extensive.[142] Should New Zealand take a strong stance on repatriation from overseas, it could see other countries apply the same pressures to institutions here.

8.2 The Potential of Digital Repatriation

Digital repatriation is another option that could be used for taonga too old or frail for physical repatriation, or if iwi have given their permission. It generally involves documenting a physical taonga in a digital medium like photographs or videos. As technology develops, digital options increase. For example, Toi Hauiti, a working group of the iwi Te Aitanga a Hauiti, have developed and implemented e-based initiatives like livestreaming a tangihanga.[143] Because taonga have been taken as early as the 1800s, it is likely that some taonga overseas are centuries old, and they may have been cared for

140 "Regional / Local Meetings: Hui ā-rohe: Regional meetings" Museum of New Zealand Te Papa Tongarewa <www.tepapa.govt.nz>.

141 "International repatriation Te whakahoki tūpuna mai i rāwāhi: Returning Māori ancestral remains to Aotearoa New Zealand" Museum of New Zealand Te Papa Tongarewa <www.tepapa.govt.nz>.

142 Te Papa alone holds about 13,000 items in their "Pacific Collection". "Pacific Cultures at Te Papa" Museum of New Zealand Te Papa Tongarewa <www.tepapa.govt.nz>. There is an estimated 52,000 Pacific artefacts held in New Zealand. Jim Specht and Lissant Bolton "Pacific Islands' artefact collections: The UNESCO inventory project" (2005) 17 Pacific Ethnography, Politics and Museums 58 at 62.

143 Wayne Ngata, Hera Ngata-Gibson and Amiria Salmond "Te Ataakura: Digital

or stored incorrectly. For situations where it would be best for the taonga to remain overseas, and permission has been given, digital repatriation could be appropriate.

Digitisation is attractive for being lower in cost and effort.[144] High-quality images and videos of taonga can be produced relatively easily and at a lower price point than physical repatriation.[145] In future it could include holograms or 3D printed replicas. For some Māori, digital taonga could be appreciated in the same way photos and videos of loved ones who have passed are treasured. Associated costs of digital repatriation, like travel, storage, security and maintenance, could also be cheaper than physical repatriation. This can make the taonga more accessible to their iwi in the interim as other modes of repatriation are developed or implemented.

Despite being cheaper and more accessible, digital repatriation could be used to infringe Māori autonomy in making decisions about taonga. There is a risk that digitisation will become the default to save money, but the process of physical repatriation will not become more accessible for Māori who choose that pathway. There is already a tendency for the non-Māori majority to view Māori as a monolithic group who hold the same opinions, but digitisation is contentious in the community.[146] To act as partners in this area, Māori must be able to determine themselves if and when digital repatriation is appropriate. If non-Māori do not understand the cultural and spiritual value of taonga, then digital repatriation may be mistaken as the best option because it has some Māori support. However, digitisation is not intended to be a complete substitute for physical repatriation in every situation, but a tool to be considered for use.

Digitisation is also not as simple as capturing taonga in an electronic format. How taonga should be digitalised, and opinions on what protocols and tikanga need to be established when dealing with digitised taonga, will vary amongst Māori, depending on how they conceptualise taonga. For example, Toi Hauiti considers digital taonga to be defined by relationships, meaning one person's taonga is another person's artefact.[147] Therefore, protocols may not be necessary when digitising all taonga, as it would depend on the person or group's connection with the cultural property. This then raises questions about use and reproduction of the taonga, as digital mediums are much easier to copy

taonga and cultural innovation" (2012) 17 Journal of Material Culture 229 at 232 and 237.

144 Deidre Brown "'Ko to ringa ki nga rakau a te Pakeha' — Virtual Taonga Māori and Museums" (2008) 24 Visual Resources 59 at 66.

145 Ngata, Ngata-Gibson and Salmond, above n 143, at 232.

146 Rosemary Rangitauira "Some taonga best left overseas — artist" *Radio New Zealand* (online ed, Auckland, 31 March 2015).

147 Amiria Salmond "Digital Subjects, Cultural Objects: Special Issue introduction" (2012) 17 Journal of Material Culture 211 at 215–216.

and distribute, and who the kaitiaki (guardian) of the digitised taonga would be. It is unclear whether the protocols that apply to original taonga, such as not eating or drinking near the taonga, would also apply to the digital version.[148] While Toi Hauiti's approach appears to minimise the tikanga concerns regarding digitisation, academic Deidre Brown argues that new technologies must be located within Māori custom to be accepted as culturally appropriate.[149] She compares digital technologies to ceramics, which was introduced to Māori by Pākehā. Māori ceramicists retrospectively created a whakapapa for the art form, by recognising Papatūānuku, mother earth, and Rūamoko, the god of volcanoes, as the providers of the clay and fire used.[150] In doing so, it imbued the art form with mana. This example shows that Māori have adapted their own cultural understandings to developments in technology, and that it is possible to do so with digitisation as well.

9. CONCLUSION

Decolonisation is a long and complex process, and the repatriation of indigenous cultural property from overseas is only one part of it. Because indigenous cultural property is valued in different ways, there is disagreement regarding its possession and use. Some believe it is in the best interests of humanity to maximise accessibility to such artefacts, but others, including indigenous peoples, wish to limit public access. Western institutions have generally taken the former approach, prioritising the majority. As the states hold the authority under international law to participate in repatriation processes, indigenous peoples are not empowered to initiate the return of their cultural property. This is because the UNESCO and UNIDROIT conventions are designed for inter-state negotiations, not private parties, and while self-determination is promised to indigenous peoples under UNDRIP, states are reluctant for this to be fully realised. In Aotearoa, this has made it difficult for Māori to seek the return of their taonga.

At the domestic level, the Crown has obligations as a Treaty partner to support Māori in repatriation. Māori and the Crown must also work together as each partner has its own strengths to contribute. Māori development in repatriation has been ongoing for several decades, reflecting the importance of this work. The Crown has also proven it can provide an effective path to repatriation through Te Papa's Karanga Aotearoa Repatriation Programme, which could be broadened to include more taonga within its scope. In

148 Brown, above n 144, at 71.
149 At 62.
150 At 62.

building on past attempts to better protect taonga, there may be a place for a framework that utilises Te Puni Kōkiri, Te Arawhiti and Te Papa to facilitate a more streamlined repatriation process for Māori. This framework could include complementary tools like a taonga register and digitisation, to create a tool kit for repatriation. The aim is to develop and execute the process as a collaboration, which goes beyond mere consultation, and is closer to the partnership envisioned by the Waitangi Tribunal in Wai 262.