Waikato Law Review

Taumauri

VOLUME 31, 2023–2024

THE UNIVERSITY OF WAIKATO
Te Whare Wānanga o Waikato

Harkness Henry
SPECIALIST LAWYERS

Cover Photograph: Te Matariki

The sculpture, Te Matariki, was commissioned by the Law School in 1994, using funds donated by Dame Catherine Tizard when the Law School was first established. The sculpture was designed and constructed by Brett Graham.

Te Matariki is star-shaped with seven points. It is based on Matariki (the Pleiades Group), a star cluster significant to Māori that appears on the flag of King Tūheitia, Pōtatau Te Wherowhero VII. Matariki was venerated by Māori; its arrival in June marked the start of the New Year. The seven points symbolise the seven stars in the group and also the seven attributes: he mana, he tika, he aroha, he mohio, he kaha, he pai and he oranga.

The Waikato Law Review cherishes the goal of biculturalism, which carries with it a commitment to advancing and encouraging the Māori dimension in the legal system. The Māori title of the Review, Taumauri, means “to think with care and caution, to deliberate on matters constructively and analytically”. This title both encapsulates and symbolises the values and goals of the Review.

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First published in 1993, *Taumauri* – the Waikato Law Review provides authoritative and critical analysis on a broad range of legal issues. The journal is hosted by *Te Piringa* Faculty of Law at the University of Waikato and reflects the Faculty's founding objectives of biculturalism, the study of law in context, and professionalism.

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Submissions
Articles, case notes, and book reviews should be emailed (as Microsoft Word attachments) to the Co-Editors in Chief by **March 30, 2026**.

Submissions should comply with either the New Zealand Law Style Guide (3rd Edition) or OSCOLA (4th Edition), and should conform with the general layout of articles, case notes, and book reviews published in previous issues of the Waikato Law Review. Articles should be within the range of 8,000 to 12,000 words (maximum) including footnotes, and other submissions should be within the range of 4,000 to 8,000 words.

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Contents

Editorial

In this edition, we bring together a collection of perspectives from judges, scholars and practitioners – and from some future leaders of the legal profession – that confront several of the most critical legal issues the country is facing. Readers will find the poignant critique of the failed Treaty Principles Bill by the Hon Sir David Baragwanath, with an appendix by the Rt Hon Sir Douglas Graham PC. This edition continues with two analyses of the role of tikanga Māori as the first law of Aotearoa's legal system and its interaction with the common law. Justice Whata, of the Court of Appeal, in his 2024 Norris Ward McKinnon lecture, directly engages with the concern of uncertainty that this role appears to create. In his view, this concern reflects a fundamental misunderstanding of tikanga. He then provides a multifaceted analysis of this role. Judge Warren, of the Māori Land Court, explores the interactions between tikanga and trust law, and identifies evidential and procedural issues that practitioners will have to deal with when engaging with tikanga-based claims.

Our founding dean and emeritus professor, the Hon Margaret Wilson, reflects on the role of the lawyer in law-making in New Zealand on the basis of her rich professional experience in government, politics and academia. Philip Morgan KC, in an edited version of his presentation to the Waikato Public Law and Policy Unit, discusses the practical challenges and legal limitations of using cultural background reports under s 27 of the Sentencing Act 2002 in New Zealand. This edition continues with Professor Trevor Daya-Winterbottom's professorial speech. It delves into the history of the English and New Zealand legal systems and shows how they have been able to respond to historical and contemporary developments, including the ongoing climate crisis.

Finn Gambrill argues in his contribution that climate change is hindered by being treated as a political issue, which leads to inconsistent policies with each change in government. The author contends that the debate must be depoliticised, with a shift towards bipartisan cooperation and greater public support. Ryan Young argues in his article that the current s 30 evidence balancing test of the Evidence Act 2006 should be removed from New Zealand's criminal procedure. Ultimately, the article aims to contribute to and energise the existing debate about abolishing the s 30 test.

This edition closes with two articles by future distinguished members of the legal profession. Nicole Cutler critically examines how Aotearoa New Zealand's public healthcare system continues to deliver inequitable outcomes for Māori, rooted in colonial history, systemic racism and socio-economic deprivation. She argues that these inequities breach Indigenous human rights and Te Tiriti o Waitangi obligations. Cullen White reviews the regulation of assisted reproductive technologies in the country. His article uses posthumous reproduction as an example to illustrate that attempts to reform policy, to keep pace with the progression of social views, may be undermined by procedural shortcomings.

This is the first online-only edition of the Waikato Law Review, and *Te Piringa* Faculty of Law is extremely grateful to the Waikato law firm Harkness Henry for sponsoring this edition. It is also the first under the new Co-Editors in Chief, and we would like to acknowledge the dedication of our predecessor, Professor Trevor Daya-Winterbottom, who steered the Waikato Law Review through the difficult days of the Covid-19 pandemic. We also would like to express our gratitude to our student editors, Isabel Xiao, Nikita Sue and Anish Patel, for their significant contribution in making this edition possible.

Dr Dara Dimitrov and Dr Alberto Alvarez-Jimenez
Co-Editors in Chief
Te Piringa Faculty of Law
University of Waikato

Pānui Ētita

I tēnei putanga, ko tā mātou he whakaemi i tētahi kohinga tirohanga mai i ngā kaiwhakawā, i ngā tauira me ngā tohunga – oti rā, i ētahi kaiārahi o āpōpō o te ngaio ture – kei te huaki i ētahi o ngā take ā-ture tino kaikini kei mua i te aroaro o te motu. Ka kitea e ngā kaipānui o te tuhinga arotakenga tino hāngai nei o te Treaty Principles Bill i hinga nā te Hōnore Tā David Baragwanath, me tētahi tāpiritanga nā te Tino Hōnore Tā Douglas Graham PC. Ka haere tonu tēnei putanga me ngā tātaringa e rua o te tūranga o te tikanga Māori hei ture tuatahi o te pūnaha ture o Aotearoa me tōna taukumekume ki te ture whānui. Hāngai tonu atu te aro o Pouwhakawā Whata, o te Court of Appeal, i tana kauhau Norris Ward McKinnon 2024, ki te āwangawanga o te rangirua ko te āhua nei e hua mai ana i tēnei tūranga. Ko tana titiro, e hua mai ana tēnei āwangawanga i te mutunga mai o te pōhēhē ki tēnei mea te tikanga. Kātahi ka whārikihia e ia he tātaritanga matatini o tēnei tūranga. Tūhura ana a Kaiwhakawā Warren o Te Kooti Whenua Māori, ko ngā taukumekume i waenga i te tikanga me te ture Kaitiaki, e tautohu ana i ngā take ā-taunakitanga, ā-tukanga hoki e kitea ai e ngā tohunga i te kōkiritanga o ngā kerēme e ahu mai ana i te tikanga.

Ko te mahi o tō mātou manutaki whakapūmau, ahorangi hoki o mua te Hōnore Margaret Wilson, he huritao i tōna tūranga hei poutoko ture i ngā mahi hanga-ture i Aotearoa i runga i te āhua o tōna wheako ngaio haumako i roto i te kāwanatanga, i te ao tōrangapū me te ao o te mātauranga. Kua matapakina e Philip Morgan KC, tētahi putanga i whakatikahia o tōna kauhau ki te Waikato Public Law and Policy Unit, ngā takinga whai kiko me ngā herenga ā-ture o te whakamahinga o ngā pūrongo whakamārama ahurea i raro i te wāhanga 27 o te Sentencing Act 2002 i Aotearoa. Ka haere tonu te kauhau ngaio o Ahorangi Trevor Daya-Winterbottom i tēnei putanga. He mea hōhonu te ruku ki roto i ngā pūnaha ture o Ingarangi, o Aotearoa hoki me te whakaatu atu i pēhea i taea ai te urupare ki ngā whanaketanga o neherā, o nāianei hoki, tae atu ki te tairaru āhuarangi e haere tonu nei.

Ko te tohe o Finn Gambrill i tana takoha mai kua raru te huringa āhuarangi nā te mea kua noho hei take tōrangapū, ko te hua o tēnā ka huri te kāwanatanga, ka huri te kaupapahere, ka mutu, he rerekē tēnā kāwanatanga kaupapahere, i tēnā kāwanatanga kaupapahere. E tohe ana te kaitito me whakakore te mahi tōrangapū mai i te kōrero mō te āhuarangi, me te tahuri ki te mahi ngātahi tētahi ki tētahi i runga hoki i te pikinga ake o te tautoko mai o te iwi whānui. E tautohe ana a Ryan Young i tōna tuhinga me tango te wāhanga 30 whakamātautau whakatautika taunakitanga o te Evidence Act 2006 i te tukanga taihara o Aotearoa. Matua rawa, ko te whāinga o te tuhinga ko te takoha ki, me te whakahihiko i te tautohetohe mō te whakakorenga o te whakamātautau wāhanga 30.

Hei whakakapi i tēnei putanga e rua ngā tuhinga nā ētahi mema tino rangatira o te ngaio ture. He kaikini te tirotiro o Nicole Cutler ki te āhua o te whakatutukinga a te pūnaha atawhai hauora tūmatanui o Aotearoa i ngā putanga tino tītaha mā te iwi Māori, te whakahāwea iwi a-pūnaha me te whakaeo ā-oha-pori. Ko tana tohenga ko ēnei ōritenga kore he mea takahi matatika Iwi Taketake, takahi hoki i ngā kawenga o Te Tiriti o Waitangi. Kua arotake a Cullen White i te whakaturetanga o ngā hangarau whakawhānau whai tautoko i tēnei motu. Kua whakamahi tōna tuhinga i te whakawhānau muri mate hei tauira ki te whakaahua i ngā mahi ki te whakahou kaupapahere kia hāngai tonu atu ki te kaunekehanga o ngā tirohanga pāpori, e whakapōrearea pea i ngā ngoikoretanga ā-tukanga.

Ko te putanga tuihono-anake o te Waikato Law Review tēnei, e kore hoki e mutu ngā mihi a *Te Piringa* Faculty of Law ki te pakihi ture o Waikato a Harkness Henry mō te tautoko ā-pūtea i

tēnei putanga. He tuatahitanga hoki tēnei i raro i ngā Ētita Ngātahi Matua hou, me rere anō hoki ngā mihi ki te kaingākau o tō mātou tautōhito tōmua, a te Ahorangi Trevor Daya-Winterbottom, nāna i noho hei kaiurungi o te Waikato Law Review i te taumahatanga o ngā rā o te mate urutā Kowheori-19. Mokori anō te rere o ngā mihi ki ā mātou ētita ākonga, a Isabel Xiao, a Nikita Sue me Anish Patel, ki te nui o tā rātou whakapeto ngoi kia hua mai ai tēnei putanga.

Tākuta Dara Dimitrov rāua ko Tākuta Alberto Alvarez-Jimenez
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The Principles of the Treaty of Waitangi Bill
Ngā Mātāpono o te Pire Tiriti o Waitangi

Hon Sir David Baragwanath KC
(with an appendix by Sir Douglas Graham)

The reasons that follow disagree with enactment of the Bill and enforcement of any statute purporting to give effect to it. They are followed by a succinct and powerful analysis by the former Minister of Treaty of Waitangi Negotiations, the Rt Hon Sir Douglas Graham PC, himself a major contributor to the modern application of the Treaty.

I. The History

Why do we have the Treaty of Waitangi? Ned Fletcher has emphasised the contributions of two visionary contributors.

(1) Its creation:[1]

> the principal source for drafting the Treaty was [the Secretary of State for the Colonies, the Marquis of] Normandy's instructions, as Trevor Williams and Donald Loveridge have concluded. The chief architect of the Treaty, therefore, was [Under-Secretary for the Colonies] James Stephen, since the instructions were his work.

Fletcher explains:[2]

> no one contributed more to settling the terms on which Britain intervened in New Zealand in 1840 than Stephen. That was the result of his dominance of the Colonial Office and the dependence of its political leaders on his judgment … drawing on what was by then his unparalleled experience of empire. The existence in New Zealand of a substantial indigenous population, under pressure from European encroachment, presented in a new setting what was to Stephen a familiar problem and one which he regarded with particular anxiety. As a result, the instructions to Hobson and Stephens' subsequent handling of British policy regarding New Zealand exhibit great care.

Appointed as legal counsel to the Colonial Office from 1813, in 1833 he was the drafter and fervent advocate of the United Kingdom's abolition of slavery legislation. Fletcher shows that Stephen described as "civilising" the change to human advantage of such settled practices:[3]

> Stephen recognized native populations as possessing political and property rights which were to be respected and which could be modified only by agreement. … Although Stephen believed in the benefits of western civilisation for native peoples, he took the view that they should be 'civilised' with their own consent.

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1 Ned Fletcher *The English Text of the Treaty of Waitangi* (Bridget Williams Books, Wellington, 2022) at 493. Fletcher observes at 103 "Trevor Williams was hardly exaggerating when he wrote that Normandy contributed only his signature to Hobson's instructions".

2 Ned Fletcher *The English Text of the Treaty of Waitangi* (Bridget Williams Books, Wellington, 2022) at103.

3 Ned Fletcher *The English Text of the Treaty of Waitangi* (Bridget Williams Books, Wellington, 2022) at 109.

…

> Stephen was sceptical about the role of government in 'civilisation'. … 'civilisation' had to be at the pace that suited native populations and with their consent …[4]

In 1840 Māori and Crown consented to the terms of the Treaty. From our standpoint Stephen would have contrasted, to the credit of Māori, their rapid appreciation of his Treaty's visionary ambitions, and the international behaviours that today challenge our second major treaty, the Charter of the United Nations.

Yet a hundred and eighty-four years later the proponents of the Bill seek, presumably under the very "pressure from European encroachment" Stephen had resisted, to repudiate a major element of his Treaty's policy and effect. The Bill would substitute for Māori agreement a referendum − by a majority of non- Māori and, in his words, failing to "recognize … [the] native population … as possessing political and property rights which were to be respected and which could be modified only by agreement …".

(2) As to modern identification of the Treaty's significance, for his first source of drafting the Treaty, Fletcher gave the historian Trevor Willams. In summarising Williams' New Zealand writings Wikipedia reports the conclusion of his doctoral thesis, which was later elaborated in books:

> that it was the Treaty of Waitangi that granted Britain sovereignty over New Zealand, and the land was not terra nullius.
>
> Today his argument is universally accepted.

He is now better known as Brigadier Sir Edgar (Bill) Williams, Montgomery's intelligence officer. At Alamein he suggested the change of tactics that broke the attack and began the defeat in North Africa of Rommel, who is famously attributed with "Give me a division of Maori and I will conquer the world." The recent death of Sir Robert Gillies, the last surviving member of the Māori Battalion which led the Eighth Army to victory, recalls on the Battalion's website unheralded benefits to our society's evolution:[5]

> Before the war most Māori had lived on the margins of New Zealand society. Their total population in 1938 was only about 87,000, and many lived in relatively isolated regions like Northland, Bay of Plenty/Rotorua and the East Coast. The war gave many Pākehā and Māori their first experience of living and working alongside each other. This helped promote racial equality and a sense of shared national identity.

Williams displayed in action Stephen's disapproval of compelling Māori to accept opposing European compulsion. So did Gillies and his companions.

4 Ned Fletcher *The English Text of the Treaty of Waitangi* (Bridget Williams Books, Wellington, 2022) at 110−111.

5 "After the War" 28th Māori Battalion <www.28maoribattalion.org.nz>.

II. The Faulty Major Provisions of the Bill

(emphasis added)

After cl 1 offering a title for a new Act:

> This Act is the Principles of the Treaty of Waitangi Act **2024**
>
> the Principles of the Treaty of Waitangi Bill proposes:
>
> **2 Commencement**
>
> (1) **If a majority of electors voting in a referendum respond to the question in subsection (2) supporting this Act coming into force, this Act comes into force** 6 months after the date on which the official result of that referendum is declared.
>
> (2) The wording of the question to be put to electors in a referendum for the purposes of subsection (1) is—
>
> "**Do you support the Principles of the Treaty of Waitangi Act 2024 coming into force?**"
>
> …
>
> **6 Principles of Treaty of Waitangi**
>
> The principles of the Treaty of Waitangi are as follows:
>
> Principle 1
>
> **The Executive Government of New Zealand has full power to govern, and the Parliament of New Zealand has full power to make laws,—**
>
> (a) **in the best interests of everyone; and**
>
> (b) **in accordance with the rule of law and the maintenance of a free and democratic society.**

But the Treaty is not confined to simple equality criteria. It concerns, as will be seen, the grant to the Crown of the sovereign status of the Māori chiefs who by the Treaty passed to it "sovereign authority over the whole or any part of those islands" and they and their people became subjects of the Crown. The Bill would deprive Māori of their entitlement, not simply to the same rights as the latest immigrant, but to decline alteration of their own Treaty rights without their agreement.

That entitlement would be infringed by Proposed Principle 2(1), which ignores the canon of construction the subject of footnote 11 below − that, as circumstances change, a treaty is not frozen in the past but alive and continues to speak relevantly to the changed circumstances.

It would also be infringed by the Proposed Principles 2(2) and 3 (by reducing Māori Treaty rights to whatever rights others may have), and by cl 7.

> Principle 2
>
> (1) **The Crown recognises, and will respect and protect, the rights that hapū and iwi Māori had under the Treaty of Waitangi/te Tiriti o Waitangi** at the time they signed it.
>
> (2) **However, if those rights differ from the rights of everyone, subclause (1) applies only if those rights are agreed in the settlement of a historical treaty claim under the Treaty of Waitangi Act 1975.**

Principle 3

(1) **Everyone is equal before the law.**

(2) **Everyone is entitled, without discrimination, to—**

(a) **the equal protection and equal benefit of the law; and**

(b) **the equal enjoyment of the same fundamental human rights.**

7 Principles of Treaty of Waitangi set out in section 6 must be used to interpret enactments

(1) The principles of the Treaty of Waitangi set out in section 6 must be used to interpret an enactment if principles of the Treaty of Waitangi are relevant to interpreting that enactment (whether by express reference or by implication).

(2) Principles of the Treaty of Waitangi other than those set out in section 6 must not be used to interpret an enactment.

Yet the Bill also and inconsistently proposes:

9 Treaty of Waitangi/te Tiriti o Waitangi not amended

Nothing in this Act amends the text of the Treaty of Waitangi/te Tiriti o Waitangi.

…

A. The Legislation Act

So what is wrong with the Bill, having begun with attempted infringement of the history, expression, and effect of Māori Treaty rights, continues with the conflict between cl 9 and its other provisions. The Legislation Act 2019 states:

10 How to ascertain meaning of legislation

(1) The meaning of legislation must be ascertained from its text and in the light of its purpose and its context.

(2) Subsection (1) applies whether or not the legislation's purpose is stated in the legislation.

(3) The text of legislation includes the indications provided in the legislation.

Clause 9 "**Nothing in this Act amends the text of the Treaty of Waitangi/te Tiriti o Waitangi**" is unambiguous.

Yet the purpose of the Bill can only be to change current interpretation of that text. That is contradicted by the language of cl 9.

III. The New Zealand Constitution

The Bill also seeks to infringe constitutional law.

Principle 1 proposes:

> **The Executive Government of New Zealand has full power to govern, and the Parliament of New Zealand has full power to make laws,—**
>
> **(a) in the best interests of everyone; and**
>
> **(b) in accordance with the rule of law and the maintenance of a free and democratic society.**

The constitutional expert Sir Stephen Sedley has drawn attention to two significant United Kingdom cases. In *Jackson v Her Majesty's Attorney General* Lord Steyn stated the English constitutional law which New Zealand constitutional law adopted:[6]

> The classic account given by Dicey[7] of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the *general* principle of our constitution. It is a construct of the common law. The judges created this principle. …

That particular case raised a question, which I had faced sitting in New Zealand – when if ever would the judges do other than apply the statute law stated by Parliament? Neither in that case nor in mine did the judges actually contemplate doing so. The nearest they have ever come was in *Oppenheimer v Cattermole* where according to Nazi law a Jewish citizen of the United Kingdom had had his previous German citizenship removed by outrageous legislation. Lord Cross responded:[8]

> [T]he 1941 decree did not deprive all émigrés of their status as German nationals. It only deprived Jewish émigrés of their citizenship. Further, as the later paragraphs of the decree show, this discriminatory withdrawal of their rights of citizenship was used as a peg upon which to hang a discriminatory confiscation of their property. … [W]hat we are concerned with here is legislation which takes away without compensation from a section of the citizen body singled out on racial grounds all their property on which the State passing the legislation can lay its hands and, in addition, deprives them of their citizenship. To my mind a law of this sort constitutes so grave an infringement of human rights that the Courts of this country ought to refuse to recognise it as a law at all.

So why should Parliament now be asked to demolish the common law principle that the supremacy of Parliament is a judge-made construct of the common law, and give it in statute form both without Māori agreement, and to a different limb of Government, to which it has never been denied?

The answer can only be that the Executive Government – elected for a three year term as Parliament – is being asked without Māori agreement to alter their Treaty rights by creating with support of a referendum including non-Māori, who are New Zealanders pursuant to the Treaty, yet lack a Māori lifetime's experience of such rights and their history, in what would be an unprecedented change to our constitutional balance.

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6 *Jackson v Her Majesty's Attorney General* [2005] UKHL 56, [2006] 1 AC 262.

7 AV Dicey, Stephens' nephew, described by Lord Bingham at [95] of *Jackson* as "our greatest constitutional lawyer".

8 *Oppenheimer v Cattermole* [1976] AC 249 (HL).

IV. The Bill Infringes the Terms of the Treaty

The long title of the English text of the Treaty records the invitation to the Native Chiefs and Tribes of New Zealand of Queen Victoria who:

> regarding [them] with Her Royal Favor … and [1] anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary [2] in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and [3] appoint a functionary properly authorized to treat with the Aborigines of New Zealand for the recognition of Her Majesty's sovereign authority over the whole or any part of those islands – [4] Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects [5] has been graciously pleased to empower and to authorize me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to Her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

[1] and [4] record the purpose and protection by law and institutions of Māori rights and property; [2] the creation of the new bicultural community; [3] and [5] Her Majesty's sovereignty over New Zealand.

The English text of Article the first effects the transfer of sovereignty from Māori to the Crown; Article the second promises the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess; the third guarantee of Her royal protection and imparting to them all the Rights and Privileges of British Subjects. Sir Hugh Kawharu translated the Māori text of Article three as to protect Māori "in the unqualified exercise of their chieftainship over their lands, villages and all their treasures."

The Crown's undertaking "to protect Māori in the unqualified exercise of their chieftainship", by establishment of "a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects", naturally extends to the Treaty itself. While including the generally expressed judge-made doctrine of the supremacy of Parliament, it did not extend to permit *Oppenheimer v Cattermole*'s "discriminatory withdrawal of their rights of citizenship … used as a peg upon which to hang a discriminatory confiscation of their property". Ever since *Calvin's Case*,[9] the subject's obligation of loyalty to the Crown, including the military service for which Māori are renowned, has had a reciprocal benefit − of the Crown's obligation to protect its subjects and their rights, of which the Treaty of Waitangi according it sovereignty to perform that obligation is the supreme example.

In an essay *The treaty and essential fresh water* it was explained that the Treaty made between two sovereigns – the Māori chiefs and the Crown, is now the subject of reciprocal obligations of the New Zealand Crown, treating all New Zealanders − Māori and non-Māori – as its subjects.[10] The Crown in its capacities as Executive, Parliament and judiciary is heir to the original Crown obligations to its Māori people. These do not permit diluting the Treaty without Māori consent.

9 *Calvin's Case* (1604) 7 Coke's Reports 1a, 77 ER 377.

10 D Baragwanath "The treaty and essential fresh water" (2024) NZLJ 5, 6 and 42–44.

Nor, viewed as a practical matter, would that be consistent with the treatment by international law of historic treaties in modern circumstances.[11]

Yet the Bill proposes treating a referendum as potentially conferring on

> **The Executive Government of New Zealand … full power to govern, and the Parliament of New Zealand … full power to make laws,—**
>
> **(a) in the best interests of everyone; and**
>
> **(b) in accordance with the rule of law and the maintenance of a free and democratic society**

that are both inconsistent with **rights that hapū and iwi Māori had under the Treaty of Waitangi/ te Tiriti o Waitangi** at the time they signed it and, in terms of Clause 9 of the Bill, are designed to **amend … the text of the Treaty of Waitangi/te Tiriti o Waitangi.**

V. A Prior Experience

It is apparent that the issues the Bill would raise are complex and vitally important, yet even less likely to result in a socially acceptable referendum result than the United Kingdom Brexit episode. What is more at risk is of an insufficiently informed conclusion formed by the large non- Māori population outweighing informed opinion.

That is supported by my own experience. My first case, which was before a single judge appellate court, was to represent the Crown as respondent to appeals by young Māori against conviction for taking shellfish from the Ninety Mile Beach without a permit. On a blinkered application of equality criteria, and what might have been argued as the proposed criteria of the Bill – that it was both:

> **in the best interests of everyone; and**
>
> **in accordance with the rule of law and the maintenance of a free and democratic society −**

according to European standards – it was argued superficially that the appeals be dismissed. Indeed, I found and cited a 1927 joint opinion of two judges supporting such result. The appeals were dismissed.

Twenty-five years later I received a call from the Hon Matiu Rata, the sage and distinguished Māori Minister of the Crown, asking me to represent the five tribes of the Far North before the Waitangi Tribunal to oppose a Governmental attempt to demolish Māori fishing rights.

Having conducted relevant research I discovered to my dismay that my former submissions for the Crown, like the two-judge decision I had cited, infringed not only the Fisheries Act 1908 providing "nothing in this Act shall affect Māori fishing rights" which prior judgments had unconstitutionally rejected as obsolete, but also the Treaty of Waitangi, and judgments of the United States Supreme Court and the United Kingdom Judicial Committee of the Privy Council, as well as the opinion of Francisco de Vitoria, the leading authority on indigenous rights in South America. Unsurprisingly, in *Te Rūnunga o Muriwhenua Inc v Attorney-General* the Court of Appeal led by

11 In particular art 31 of the Vienna Convention on the Law of Treaties 1969, the *Iron Rhine* award of the Permanent Court of Arbitration <www.pcacases.com/web/sendAttach/478>, and the judgment of the International Court of Justice in *Guyana v Venezuela Arbitral Award of 3 October 1899* ICJ Reports (2023) at 262, [87] considered in the fn 8 essay at 43.

Sir Robin Cooke reversed both the two-judge decision and what I had wrongly seen as a "win" in my first case.[12] But in the meantime the entitlement of Māori to exercise the fishing rights included in the Treaty promise had been lost for quarter of a century.

Later as a judge I departed from the convention not to criticise legislation I might be required to interpret, taking exception to the Foreshore and Seabed Act 2004. Applying contrary to my advice an approach recently struck down by the final court of South Africa as constitutionally unacceptable, it removed from Māori the beach property rights enjoyed by Pakeha New Zealanders. I was pleased to see the end of that legislation as next mentioned.

VI. Ultra Vires

High common law authority recognises the special status of "constitutional statutes", in particular their immunity from "implied repeal", which (in the words of Lord Justice Laws):[13]

> preserves the sovereignty of the legislature and the flexibility of our uncodified constitution. It accepts the relation between legislative supremacy and fundamental rights is not fixed or brittle: rather the courts (in interpreting statutes and, now, applying the Human Rights Act 1998) will pay more or less deference to the legislature, or other public decision-maker, according to the subject in hand.

In *Ngāti Apa v Attorney-General* the sanctity of the Treaty of Waitangi was classified by the then senior New Zealand resident court as within principles settled by the Privy Council and the final courts of Canada and Australia as entitling indigenous peoples to enforcement of fundamental rights.[14] The status of *Ngāti Apa*, challenged for a period, has been acknowledged by Parliament in rejecting the short-lived Foreshore and Seabed Act 2004 in favour of the Marine and Coastal Area (Takutai Moana) Act 2011, as is seen at para 84 of the judgment of the Supreme Court of New Zealand: *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui Takutai Moana O Ngā Whānau Me Ngā Hapū O Te Whakatōhea*.[15]

By substituting referendum for agreement by Māori, enactment of the Bill and giving it application would infringe New Zealand and international law so fundamental as to be beyond both convention and power of any institution.

VII. Conclusion

My six decades experience as a New Zealand lawyer has warned me to leave the Treaty alone, as ironically cl 9 says should be done. The law's task is not to suppress difference but to make good use of it. For New Zealanders that requires us to encourage members of our first nation to exercise their culture. As they did in warfare they must be able to do in peace.

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12 *Te Rūnunga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (CA) cited at [9] of the Supreme Court's *Whakatōhea* judgment of 2 December 2024 later mentioned.

13 *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151 at [63]−[64] approved in *Miller v Secretary of State for Exiting the European Union* [2018] AC 61 (SC) at [66].

14 *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643 (CA).

15 *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui Takutai Moana O Ngā Whānau Me Ngā Hapū O Te Whakatōhea* [2024] NZSC 164.

VIII. Appendix: Analysis of Rt Hon Sir Douglas Graham PC

The 2nd principle in its Treaty Principles Bill potentially extinguishes property rights of Māori without even prior discussion with the holder of those rights. This is said to be justified because those rights are not shared with non-Māori.

When English speaking migrants arrived in America, Canada, Australia and New Zealand and elsewhere, they brought with them the English common law which had been developed over the centuries by English courts. That common law held that indigenous people had customary rights under the rubric of Aboriginal Title and were entitled to follow customs relating to land, fishing and food gathering practices and other activities until they elected to abandon them or until they were specifically extinguished by Parliament.

The first nation people in the United States and Canada and the aboriginal people in Australia enjoy unique rights today and seem to manage well. The courts in those jurisdictions have developed law to deal with the different treaties entered into where they exist, and in other areas where they do not.

In New Zealand Māori therefore held customary rights to maintain their culture and way of life. In the main these rights were related to fishing and food gathering activities to sustain the local hapu. So, for example, the Ngai Tahu hapu living on Rakiura [Stewart Island] had exclusive rights to continue to gather mutton birds from the Crown Titi Islands which they had been doing for centuries. Other hapu throughout the country exercised similar food harvesting rights. The rights were not held by all Māori but by the hapu who exercised them and were confirmed, but not created, by the Treaty of Waitangi. Over the 180 odd years since the Treaty was signed, as many Māori moved to the cities, some customary rights were clearly abandoned. However they remained alive when those who remained exercised the rights. Some were varied by statute for conservation purposes. Some, such as the foreshore and seabed, have had a chequered history as attempts were made to clarify what proof of entitlement entailed. Some, such as Ngai Tahu's mutton bird rights, were included in their settlement and are included in the settlement legislation. The point is, however, that undoubtedly some customary rights are still in existence today. Act's Bill states that those customary rights will be respected but, if they are not shared by non-Māori, then only if the Crown has agreed to include reference to them in a Treaty settlement. The end result is that, as none are obviously shared by non-Māori, the rights will no longer be recognised and will be effectively extinguished unless the holder has secured the rights in a settlement agreement or has an outstanding claim against the Crown the settlement of which preserves the rights. That seems unlikely. No one should be surprised at the anger this has generated amongst both Māori and non-Māori alike.

Sir Douglas Graham
Former Minister of Treaty of Waitangi Negotiations

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SPECIALIST LAWYERS

Tikanga and the Law: Ngā Tohu o te Ture
Te Tikanga me te Ture: Ngā Tohu o te Ture

Justice Christian Whata

Ko te pae tawhiti, whāia kia tata

Ko te pae tata, whakamaua kia tīna

As for the distant horizon, pursue it and bring it closer

As for the close horizon, grasp hold of it and make it secure.

I. Introduction

In my lecture delivered at the 25th Anniversary of Te Piringa – Faculty of Law in 2018 I closed with this whakataukī as a metaphor for future engagement between tikanga and the law. Since then I think it can be fairly said that the Supreme Court has pursued the distant horizon and brought it closer. It might also be fairly said that there are some dark storm clouds on the horizon, challenging the assumptions underpinning the direction taken, with some questioning whether we have held firm to the close horizon and made it secure.

Put in less metaphorical terms, the common law has in the last five years moved to recognise tikanga as a source of law without recourse to traditional custom law tests for incorporation. As Justice Glazebrook put it in *Ellis*:[1]

> I consider the tests to be colonial relics with no place in modern Aotearoa/New Zealand.
>
> … [The] tests for certainty and consistency, being contrary to the very nature of tikanga, are therefore clearly inappropriate.
>
> [115] In a similar vein, the requirements for a custom to be reasonable and not repugnant to justice and morality were based on colonial attitudes that are artefacts of a different time …

This development is seen as part of a wider commitment to recognition of tikanga values as inhering within the common law. This direction of travel has raised concerns that the approach taken by the Supreme Court here, and elsewhere, is destabilising the law and may undermine the rule of law.[2]

Jack Hodder KC, referring to the majority judgments in *Ellis*, identified the problem in this way:[3]

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1 *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239 at [113]–[115].

2 Jack Hodder "One Advocate's Opinions: Predictabilities and the 'Least Dangerous Branch'" (paper presented at Supreme Court 20th Anniversary Conference, Auckland, February 2024); and Jason Varuhas "The Future of Public Law in Aotearoa New Zealand" (2023) 21 NZJPIL 1.

3 Jack Hodder, above n 2, at 17.

> For those seeking − indeed, expecting − a significant degree of predictability in our law, which has no substantial tradition of addressing legal rules in terms of explicit "societal values", these judgments are problematic in multiple ways.

Professor Jason Varuhas has spoken of an even more fundamental, basal, concern about what he calls values driven normativism of recent judgments of the Supreme Court. Indeed, in his recent Cooke lecture, Varuhas identifies *Ellis* as the most significant decision over the last five years. He says:[4]

> There is no shortage of values, whether common law values such as the rule of law, broad ideas of human rights, Treaty principles such as partnership, or tikanga values. Those are our basic normative resources; the basic building blocks of the system. But they need to manifest in a reasonably stable body of reasonably determinate rules and principles. As Lord Cooke put it, "aspirations" are given "practical content and operation" via doctrinal rules and principles.
>
> (footnotes omitted)

It is not for me, a humble sitting High Court Judge, to advance an opinion about or in defence of the work of my tuākana and tuāhine in the senior appellate courts. However, my recent time at the Law Commission provided me with the opportunity to closely examine the challenges presented by tikanga recognition in statute and the common law. My goal tonight is to share the major findings of that work as well as to speak to the key principles of engagement, ngā tohu o te ture, laid down in the authorities that provide navigational guidance.

In other contexts I have spoken about tikanga frameworks that in my view provide a stable starting point for interaction between the law and tikanga. I am of the view that much of the concern about uncertainty drives from a fundamental misunderstanding of tikanga. I will touch upon this briefly later.

In this lecture however I want to focus on the common law. My central thesis, reflecting that of the Law Commission, is this: the common law method is fit for purpose and that overall, when recognising tikanga, the common law is doing what the common law does. It is moving slowly and incrementally, seeking out where and when tikanga might be woven into the law safely, cognisant of the need to hold close to our legal traditions, including the fundamental ideals of the rule of law and equality before the law. It is doing what McGrath J said it has always done in *Takamore*,[5] evolving to reflect the special needs of this country and its society.

II. The key findings

I think it is always helpful in a lecture like this to provide a summary of the key points at the outset while I have your full attention. So here they are, five of them, each corresponding in large part to the major findings of the Law Commission's recent work, He Poutama.

First, *tikanga is tikanga*. Now that truism is hardly enlightening, but its significance lies in what it does not say − namely that tikanga is explicable so simply as "law".

Second, nevertheless, *tikanga Māori comprises a coherent jural system* that generates rights and duties and an expectation of enforcement or redress in cases of breach.

4 Jason Varuhas, above n 2, at 23.

5 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [150].

Third, *the common law method is fit for purpose***.**

Fourth, there are *four key principles of engagement* that, as I have said, provide the necessary navigational guidance.

Fifth, the future lies in a *slow incremental weave*.

III. The Law Commission's Work

Before I go further I want to mention the work of the Law Commission. The Law Commission is expressly mandated by Parliament to take and keep under review in a systematic way the law of New Zealand, to make recommendations for the reform and development of the law of New Zealand, to advise on the review of any aspect of the Law of New Zealand conducted by a government department, and to advise the Minister of Justice and the responsible Minister on ways in which the law of New Zealand can be made as understandable and accessible as is practicable.[6] In making its recommendations, it must take into account te ao Maori (the Māori dimension) and also give consideration to the multicultural character of New Zealand.[7] It must act independently.[8]

It is under the auspices of this legislative mandate that the Law Commission commenced the tikanga project in October 2021, prior to the Supreme Court decision in *Ellis*, and it was completed in September 2023 with the publication of He Poutama. As explained in He Poutama, we examined the following issues:[9]

> What is tikanga? Where do we find it? To whom does tikanga apply? As state law and tikanga engage, how and where are the proper boundaries set – and by whom? How will risks and challenges be managed, enabling these systems to interact well?

Conscious of the need to ensure the rigour of our work, the Commission retained the assistance of some of New Zealand's pre-eminent experts on tikanga, including Professors Tā Hirini Moko Mead, Tā Pou Temara, and Wiremu Doherty. We also engaged two law firms who specialise in tikanga and Māori issues to review more than 800 briefs of evidence to help assemble an account of tikanga in a way that ensures that whatever account of tikanga we produced, reflected the perspectives of iwi and hapū throughout Aotearoa. Our work was also subject to academic and stakeholder peer review, involved consultation with many public agencies, as well as senior counsel, including Crown counsel and counsel from the senior commercial and Treaty bar as well as consultation with judges of the Māori Land Court, Environment Court, and the Senior Courts.

While a major component of the work was to provide an account of tikanga − what it is and how it works, an equally important part of the Commission's work was to review more than 180 years of jurisprudence dealing with the interaction and intersection between tikanga and the law, especially the common law. From that exercise, we identified more than 50 judgments of the senior courts we considered shaped recognition of tikanga and we laid out an account on that intersection and interaction.

I raise this now only to emphasise the point that the Law Commission was aware of the ebb and flow of engagement between tikanga and the law, and the methods deployed by the courts over

6 Law Commission Act 1985, s 5(1).

7 Law Commission Act 1985, s 5(2).

8 Law Commission Act 1985, s 5(3).

9 Law Commission *He Poutama* (NZLC SP24, 2023) at [1.3].

that 180-year history for recognition, or not, of tikanga as a source of cognisable and sometimes enforceable rights and interests in the law. Returning to the metaphor of horizons, we were therefore deeply familiar with the close horizon, and of the fundamental need to grasp it while looking to the distant horizon. All of this then laid the foundation for the Law Commission's account of the principles or tohu for common law engagement that I will shortly share with you.

IV. Context

I commence my lecture in earnest with some important context. Much has been said about our legal history − one characterised by the eclipse of tikanga for nearly 160 years, and then, its recent re-emergence in the 21st century. I propose only to speak to that re-emergence in the form of three categories of recognition namely as custom law, as values of the law, and third, as law within te ao Māori.

A. Custom law

Dealing first with custom law, there remain two streams − customary property law and general custom law. This traditional form of recognition of tikanga based rights remains important insofar as claimants continue to seek direct enforceability of customary rights by the courts. They are a significant class because once the relevant criteria are met, their enforcement is not a matter of discretion.

(a) The seminal *Ngāti Apa* decision affirmed four basic points about customary property law claims:[10]

(b) The assumption of sovereignty did not displace pre-existing customary land rights and interests held according to tikanga.[11]

(c) The precise nature and form of any customary land rights must be defined by reference to tikanga.[12]

10 *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA). See *He Poutama*, above n 9, at [8.46]–[8.48].

11 At [15] and [32]–[33] per Elias CJ and [137]–[140] per Keith and Anderson JJ.

12 At [32]–[33] and [54] per Elias CJ and [184] per Tipping J.

(d) Statutory extinguishment of these rights must be clear and plain.[13]
(e) There is no presumption in favour of adverse English law norms.[14]

Claims to customary "property" have largely been governed by statute since 1862. The Marine and Coastal Area (Takutai Moana) Act 2011 is an example of legislative recognition of customary law principles. Its operation is a matter of ongoing controversy, so I will not say more about it save to note that on current authority, the nature of the tikanga based rights must be viewed through a tikanga lens and not straight jacketed by proprietary concepts and norms. That method of tikanga based lens approach to ascertainment is, of course, a longstanding one in the common law and important when assessing the nature of any tikanga based rights and interests.[15]

The second stream, dealing with general custom, was until the *Ellis* decision, governed by three basic criteria:[16]

(a) The custom existed as a general custom (from time immemorial).
(b) It must not be contrary to Statute.
(c) It must be reasonable.

As also noted, in *Ellis* however, a majority in the Supreme Court identified these criteria as outmoded. No replacement criteria were identified, the majority preferring to leave the common law to develop incrementally. Nevertheless, the Law Commission did not consider that this decision prevented further evolution of "custom" law claims, noting that *Ellis* was not in fact a custom law case. Importantly, the Commission considered that the principles applicable for customary property claims may provide guidance in relation to other types of customary non-proprietary rights and interests, and I note in this regard that the Supreme Court has recently confirmed that these comments in *Ellis* did not affect the law as it relates to customary property claims.[17]

B. Values

The second class of tikanga based claim involves the recognition of tikanga values in the application of the common law or statute or in the development of the law more generally. This is the type of law to which the *Ellis* reasoning has the most relevance, but it's true genesis lies first in the many and various statutory provisions that refer to tikanga values, for example in Family and Resource Management law. Furthermore, in terms of common law recognition, the possibility of the recognition of tikanga values outside of the custom law category, was first mooted in earnest in *Takamore*, a case involving the power to bury a deceased person and whether applicable tikanga were binding. While none of the five judges found tikanga to be determinative, the significance of this case lies in the reasoning that tikanga values were cognisable for the purposes of the development of the common law. Chief Justice Elias put it simply "[Māori] custom according to tikanga is therefore part of the values of the New Zealand common law."[18]

The Supreme Court in *Ellis* then more recently expressed the unanimous view that tikanga has been and will continue to be recognised in the development of the common law in cases where it

13 At [161] per Keith and Anderson JJ and [47] per Elias CJ.

14 At [33] and [86]–[87] per Elias CJ.

15 *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 (PC).

16 *Public Trustee v Loasby* (1908) 27 NZLR 801 (SC) at 806.

17 *Smith v Fonterra Co-operative Group Ltd* [2024] NZSC 5, [2024] 1 NZLR 134.

18 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94].

is relevant and forms part of the law as a result of being incorporated into statute. A majority went further, noting as I have said that the traditional criteria for customary claims no longer apply, that tikanga is the first law of Aotearoa and an independent source of legal rights and interests. It is this last aspect of the evolution of the law that has caused the most concern in the legal community.

C. Tikanga as Law

Finally in terms of the three categories of tikanga claim, we have seen in recent times claims based purely on tikanga as law within Māori communities. An illustration is the *Ngati Whātua* decision wherein Palmer J was invited to make declarations about who held the mana whenua over the Auckland Isthmus.[19] In a fulsome decision, the Judge addresses the tikanga claims, canvasing detailed tikanga evidence. In the end, the Judge resolved that each iwi was entitled to hold its own tikanga of mana whenua and made declarations to that effect. Related proceedings in the Environment Court are still on foot, so I will not offer any further insights other than to observe that care must be taken in cases such as these where the courts are effectively being asked to rule on tikanga per se − effectively to say what it is and what it means in jural terms within te ao Māori.

However, another case, an exemplar, is the decision of the Judge Aiden Warren and Dr Ruakere Hond, a tikanga expert, in *Pokere v Bodger*.[20] The first fully bilingual decision. That case concerned the exercise of trustee duties in the context of a decision to dismantle a whare. The applicants argued that the trustees had breached their fiduciary and tikanga duties in doing so. The Court outlined a tikanga frame of reference and identified mana as central to the obligations of the trustees. It said:[21]

> To respond to the question of "nō wai te Whare" [to whom does the house belong] within a perception of tikanga, we need to return to the concept of "mana" in the tikanga framework.

The Court explained:

> [12] An initial description of core tikanga elements is centred on the concept of "mana". Which form of mana is being referred to here? There is mana associated with land, with ancestors, with people, with homes, with authority, with management, and with decision-making that are all to some extent a part of this decision. These forms of mana are described separately as pou, each having their own lines of relationship to be able to respond to issues of tikanga. They are:
>
> a) The forming of mana: Mana is born of a firm relationship, and that firm relationship is founded in something that holds significant value.
>
> b) The outcomes of mana: Mana in turn has offspring, the role of guardianship, that gives rise to the ability to provide value.
>
> [13] These are the lines of relationship within mana, used to give structure to this decision …

I highlight this decision for two reasons. First as an illustration of where the courts are being asked to resolve an issue specifically by reference to tikanga, and to amplify the expertise required to make such decisions.

So, in summary, the law has evolved to the point where there are three pathways for tikanga based claims. Each presents its own challenges for the law. As Glazebrook J put it in *Ellis*, the law

19 *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601.

20 *Pokere v Bodger* – Ōuri 1A3 [2022] 459 Aotea MB 210 (459 AOT 210).

21 At [76].

is in a state of transition.[22] But as I will hope to show, the common law and the common law method is well able to cope and is in fact coping as it should, case by case.

V. Tikanga is Tikanga

I turn then to the first major finding − *tikanga is tikanga*. For many if not most lawyers, Māori rights and interests that predated the arrival of English law in the 19th century were simply referred to as customary rights and an aspect of customary law. Even the Law Commission in its seminal paper in 2001, based on the work of one of our leading jurists, Tā Taihakurei Durie referred to tikanga as Māori Custom Law. That obviously has something to do with the fact that statutory and common law recognition of tikanga historically occurred in terms of the custom law method. But that is to conflate two important ideas – tikanga as it is understood within te ao Māori, and common law recognition of certain rights and interests based on what the law calls custom. As the legal philosopher, Brian Tamanaha put it, custom law involves the transplantation of indigenous norms into the common law.[23] It is not tikanga.

I wish to be clear that in saying this I am not criticising the custom law method as inherently flawed or wrong. It is what it is. It seeks to reify rights and interests from indigenous value systems into a form of rights and interests enforceable in the law. That must necessarily come with some reconfiguration to make it work within the full matrix of rights and interests already permeating the common law universe. I also acknowledge that for many jurists, custom is the foundation of the law – indeed some view the common law as custom.[24]

But what the Law Commission wanted to emphasise is that tikanga is much more than "law" and to distinguish it from custom law. As the Commission noted in He Poutama, tikanga scholars acknowledge the immense ambit of tikanga, encompassing philosophical, ethical, and social frameworks, with spiritual and socio-political dimensions. All of this must be considered when we speak of incorporating tikanga into the law. This has two related aspects. First, from a te ao Māori perspective, the risks inherent in the reification of tikanga into law. Second, from law's perspective, the firmly entrenched limitations of the law as a vehicle for recognising "values". As Lord Atken put it in *Donoghue v Stevenson*:[25]

> The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa" is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy.

I return to the significance of all of this when I come to the principles of engagement.

22 Above n 1, at [82].

23 Brian Z Tamanaha *A General Jurisprudence of Law and Society* (Oxford University Press, Oxford, 2001).

24 See *He Poutama*, above n 9, at [5.4], above n 2.

25 *Donoghue v Stevenson* [1932] AC 562 (HL) at 580.

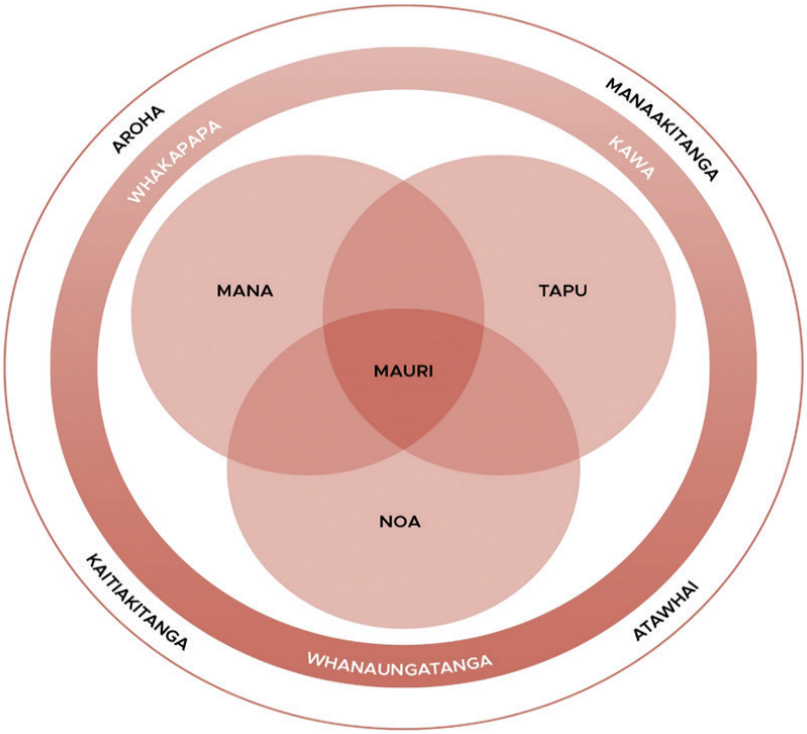
VI. Tikanga as a Coherent Jural System

The second key finding that tikanga operates as a coherent jural system will hardly be surprising to those who live under its korowai. But as Associate Professor Nin Tomas said in her doctoral thesis:

> [Tikanga Māori] needs to be more than just a grab bag of amorphous concepts and principles if it is to have credibility as a coherent, workable system of law within the Māori community and wider New Zealand Society.

The Law Commission expended considerable energy in identifying the core elements of tikanga's jurality. We did not consider it sufficient to rely on anthropological accounts. We had to source the explanations of tikanga from within te ao Māori, and then endeavour to provide an account of tikanga based on those explanations. The review of more than 800 briefs of evidence provided a key basis for developing this account – for identifying core principles and critically their application at a local level. I wish to emphasise that in briefing our researchers we were careful to ensure that we did not go looking for the principles and examples that proved either the existence of jural concepts or the coherency of their operation.

In the result, we identified a commonly shared arrangement of such concepts that provided a clear and coherent basis for ordering life within Māori communities. I have spoken at length about this system in other contexts, and I wish only to highlight for present purposes, the interlocking operation of what we have called the structural norms or principles of whakapapa and whanaungatanga, and the relational norms or principles that provide the framework for jural relations in te ao Māori.



Put simply, whakapapa provides the formal framework or map identifying the relational interests between all things. Within whakapapa we also find the reasons for those rights and interests. Whanaungatanga speaks to the obligation to maintain connection. It enables the formal rights and obligations identified through whakapapa to be expanded or contracted to ensure that this basic requirement for connection is discharged. Mana, in shorthand, speaks to a power or right with concomitant responsibility. Tapu refers to restriction, normally associated with the inherent value or danger of a person, place or thing, while noa speaks to the idea of freedom from restriction.

Our research confirmed that Māori communities are ordered by reference to these values and principles, and that the exercise of mana premised on whakapapa and whanaungatanga, and the designation of tapu and noa, provided order to relationships within those communities, derogation of which would invite an expected societal response. It is in this sense that we refer to these concepts in jural terms, and it is these jural relationships with which we consider the law is most concerned and must be able to engage in any meaningful sense.

VII. The Common Law Method Is Fit for Purpose

Turning then to the claim that the common law has been destabilised by recent Supreme Court decisions, including those made in respect of tikanga. We were alive to this claim when we undertook our review. This is not the occasion for a treatise on the common law method, but it is important to understand this method when reflecting on common law engagement with tikanga. As explained by Winkelmann CJ in *Ellis*:[26]

> The common law is the principles that can be extracted from the body of case law. The common law method is the process that courts use to decide the case before them which may, in a case such as this, require them to develop the common law to enable them to do that.

As the Law Commission also explains:[27]

> The common law method takes account of the values of contemporary Aotearoa New Zealand. Values provide an anchor, particularly those that transcend temporary political fluctuations such as the inherent dignity of the person or the right to a fair trial …
>
> (footnotes omitted)

Framed in this broad way, the common law method by itself is unlikely to provide the type of surety sought by Hodder and Varuhas et al. But to this must be added what the Law Commission identified as the guardrails or boundaries of the common law, commencing with the internal guardrails – the doctrines of precedent and the incremental case by case development of the law. These are aimed at ensuring consistency and predictability.

The Law Commission also identified the external guardrails, and in particular the separation of powers, parliamentary supremacy and Te Tiriti o Waitangi | Treaty of Waitangi (the Treaty).[28] The first of these boundaries works to ensure that each of the branches of government stays within their lane. The principle of legislative supremacy ensures that the democratically elected legislature retains the supreme law making power, moderated by the principle of legality and the idea that

26 Above n 1, at [163].

27 Above n 9, at [8.14].

28 Above n 9, at [8.17].

as far as possible legislation is to be read compatibly with fundamental values protected by the common law. Finally, the Law Commission identified that the courts have increasingly identified the constitutional significance of the Treaty. As Varuhas acknowledged, the Treaty is a basic normative resource for the development of rules.

Collectively then, with these guardrails in place, the common law is as John Burrows puts it:[29]

> [The common law] is flexible, it is grounded in the practicality of individual fact situations, it is the refined product of the wisdom of many minds, it is free from political influence, and it is relatively stable …

I acknowledge that this all has a theoretical quality, and could be said to be idealistic. But as the Law Commission also notes this theoretical position conforms to experience. In fact the Law Commission observed "As yet, no case has found tikanga determinative of how a common law rule should be formulated."[30]

The result in *Ellis* exemplifies this basic point. Tikanga recognition in that case was effectively obiter. The rule ultimately formulated by the majority was not based on tikanga values. Similarly, in *Takamore* tikanga was not determinative of the rule governing the burial of the deceased. It also needs to be remembered that *Smith v Fonterra,* dealing with the potential for a climate change tort, has only reached the strike out stage and that, as I understand the argument of Counsel, tikanga is relied upon as a value rather than a rule upon which that tort might be constructed.

It is true that in custom law cases, the common law presumptions in relation to land may be displaced by tikanga lensed rights and interests, so to that extent, tikanga might be said to provide the controlling rule. Tikanga values might also affect the evaluation of fact, for example in *Kusabs v Staite* the issue of whether there was a breach of fiduciary duty was determined by reference to obligations of whanaungatanga.[31] But that is a rather pithy sample upon which to base the destabilising claim, let alone more fundamental concerns about judicial normative overreach. It is really no more than the orthodox application of law according to context.

There must also be a distinction made between this and cases involving the application of statutory provisions where Parliament has directed that a power or discretion is exercised in accordance with tikanga values. The Resource Management Act is illustrative. There the statutory scheme is laden with reference to tikanga concepts, and as the High Court said in *Ngāti Maru*:[32]

> [64] The RMA is replete with references to kupu Māori, including Māori, iwi, hapū, kaitiakitanga, tangata whenua, mana whenua, tāonga, taiapure, mahinga mataitai and tikanga Māori. Parliament plainly anticipated that resource management decision-makers will be able to grasp these concepts and where necessary, apply them in accordance with tikanga Māori. In this regard, local authorities and the Environment Court regularly deal with these concepts and their application, and have done so for nearly 30 years. What can be seen from even a cursory review of that case law over that time span is an evolving understanding and application of mātauranga Māori and tikanga Māori. While tikanga Māori is defined in the RMA as "customary values and practices" it has come to be understood as a body of principles, values and law that is cognisable by the Courts.
>
> (footnotes omitted)

29 John Burrows "Common Law among the Statutes: The Lord Cooke Lecture 2007" (2008) 39 VUWLR 401 at 411.

30 Above n 9, at [8.65].

31 *Kusabs v Staite* [2019] NZCA 420, [2023] 2 NZLR 144.

32 *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768, [2021] 3 NZLR 352.

I return then to my basic point, if the goal is stability, then the common law has not strayed far. This then leads to what I think are the key principles or tohu for engagement that give effect to these underpinning guardrails.

VIII. Principles of Engagement

The Law Commission has assembled from the case law eight general principles of engagement. For my part they coalesce into four key concepts:

(a) Recognition
(b) Relevance
(c) Integrity
(d) Reconciliation

A. Recognition

Dealing first with the concept of recognition, the Supreme Court was unanimous in *Ellis* that "tikanga has been and will continue to be recognised in the development of the common law of Aotearoa/New Zealand in cases where it is relevant."[33]

Notwithstanding recent commentary from some quarters, the basic proposition that tikanga is recognisable by the common law is not a matter of recent invention. While there was a well-known momentary lapse, our highest courts have repeatedly identified that tikanga based rights and interests are recognisable and enforceable in the courts. As the Privy Council said in *Nireaha v Baker* in 1901, it was, even then, rather late in the day to deny the existence of such rights.[34] What is perhaps also missed by some is that our highest courts were deeply aware of the need to view these rights in accordance with tikanga. The trilogy of cases concerning the Whanganui river last century exemplify this point (even if some say the key messages got lost in the translation). Those cases concerned whether customary rights to the river bed were lost with alienation of adjacent title. While ultimately the Court of Appeal would find that they were based on findings about ancestral connection made by the Māori Appellate Court, the key issue was always framed by reference to tikanga. As Hutchison J observed in the first Court of Appeal decision:[35]

> There was evidence for the Maoris, in the Maori Land Court and before Hay J, that the ancestral right, *take tupuna*, to the river was different from that to riparian lands. It might follow from this that persons who owned the bed of the river were different persons from those who owned the land of the banks. If this were established, it would be a strong point in favour of the case for the Maori claimant and may well be conclusive.

This approach, as I have said, followed Privy Council authority that required the courts when assessing the nature of customary rights, to do so from the viewpoint of those exercising the relevant custom.[36] The principle and practice of recognition is therefore settled orthodoxy.

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33 Above n 1, at [19], at [108]–[110] per Glazebrook J, [171]–[174] per Winkelmann CJ, [257]–[259] per Williams J and [279] per O'Regan and Arnold JJ.

34 *Nireaha Tamaki v Baker* [1901] AC 561 (PC).

35 *Re the bed of the Wanganui River* [1955] NZLR 419 at 427.

36 See above n 15.

The more challenging "recognition" issue is how we then define those tikanga values and any rights deriving from them. That was the Gordian knot confronting the Courts in the Whanganui cases. It might be fairly said that in finding that the rights and interests in the riverbed were lost upon the sale of the adjacent lands the Courts conflated notions of proprietorship with a mana based relationship to whenua and failed to appreciate the distinct mana of the awa. To the extent then that the courts are called upon to adjudicate in respect of customary rights and interests – that is tikanga based rights and interests – it is imperative that they, and the lawyers appearing before them, are equipped to properly understand what the applicable tikanga is. I return to this important kaupapa when I come to the concept of integrity, but before that I want to talk about relevance.

B. Relevance

The concept of relevance is well known to lawyers (though sometimes an overly expansive application is adopted by them). The definition of relevant evidence under the Evidence Act 2006 is illustrative – evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.[37] But here we're engaging not simply with whether evidence is admissible, but whether tikanga is relevant to the resolution of a dispute as a matter of legal principle or rule. In many cases that will be obvious especially where the context clearly engages tikanga or where legislation identifies it as a relevant consideration. The recent decisions in *Ellis* and *Smith* are often cited as decisions where the relevance of tikanga is not immediately obvious. The former involved the appeal rights of Mr Ellis who had no Māori whakapapa and the later, dealing with tort law seemed to engage tikanga in a heretofore alien way, both to tikanga and the common law.

But this concern is both exaggerated and ill informed. First, dealing with *Ellis*, the right of appeal in question affected all persons subject to criminal justice, including Māori. When I last looked, persons with Māori whakapapa comprised between 60–80 per cent of those persons subject to a criminal justice procedure and we're multiple times more likely than non-Māori to be prosecuted and then incarcerated. Rights of appeal were therefore a matter of legitimate concern to Māori, and particularly as it relates to considerations of fair trial rights, mana and dignity. In reality *Ellis* fell within a class of cases where the tikanga of mana legitimately features in the calculus of whether fair trial including appeal rights, should be extended to the deceased.

Second, dealing with *Smith.* This is more complicated, and as it is subject to ongoing proceedings I will simply observe that notions of redress for wrongdoing, small or exponentially large is not at all alien to Māori – our creation narrative provides an exemplar. Nor is common law redress for essentially tortious interference of tikanga based interests alien to our courts, as the Supreme Court noted in *Smith*. Indeed, the Privy Council in a case called *McGuire* foreshadowed that possibility when dealing with the proposition that a designation of Māori freehold land may involve an actual and threatened trespass to land. Their Lordships stated:[38]

> The Board is disposed to think that in the context of the [Te Ture Whenua Māori] Act of 1993, with its emphasis on the treasured special significance of ancestral land to Maori, activities other than physical interference could constitute injury to Maori Freehold land. For example activities on adjoining land, albeit not amounting to a common law nuisance, might be an affront to spiritual values or to what in the RMA is called tikanga Maori …

37 Evidence Act 2006, s 7(3).

38 *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC) at 589.

I am of course not naïve to the potential impact of tikanga on the everyday work of our courts. A quick survey of case law since the *Ellis* decision identified 65 different cases engaging with tikanga, across the courts including the Senior Courts, Family Court, Environment Court, Te Kooti Whenua Māori and the Employment Court. While I have not read all of them, in the cases I have read, discerning relevance has not been problematic, whether as a matter of fact or law. As I will now explain in the context of maintaining the integrity of both tikanga and the common law, the courts have been remarkably adept, for better or worse, at controlling and where necessary moderating the reach of both tikanga and the common law.

C. Integrity

As the majority in *Ellis* emphasised, the courts must not exceed their function when engaging with tikanga. This has two related aspects, first care must be taken not to impair the operation of tikanga as a system of law and custom in its own right.[39] Second, the common law cannot give effect to tikanga that is contrary to statute or to fundamental principles and policies of the law.[40] It is the courts' commitment to integrity that I think ensures that the law will develop in a way that is stable. A sample of recent High Court authorities illustrates both the care taken and the corresponding incrementalism of the common law method.

In *Sweeney v the Prison Manager, Spring Hill Corrections Facility*, Lang J rejected the claimed mana based tort, observing that tikanga principles alone do not give rise to distinct causes of action.[41] Similarly, La Hood J in *Kaiwai v New Zealand Police* rejected the argument that utu was a mitigating factor in sentencing because it was contrary to precedent and legislative authority.[42] In *Te Rūnanga o Ngāti Whātua v Kingi*, Harvey J had little trouble recognising that tikanga might be relevant to the assessment of whether a claim should be struck out, but he did not consider that the claim should be struck out for breach of tikanga, and he wholly rejected the claim that Ngāti Awa's mana extended to Tāmaki Makaurau through the ancestor "Tama ki Te Kapua".[43] In another case, *Bamber*, Harvey J rejected the proposition that tikanga could save an adjudicated bankrupt's house from being sold.[44] The short point made by the judge was that tikanga could not override the clear and express terms of insolvency legislation.

Outside of the High Court we see in other jurisdictions caution being exercised. For example, in *Manuka Honey Appellation Society Inc v Australian Manuka Honey Association Ltd,*[45] the Intellectual Property Office (the IPO) had before it an application to trademark the concept MANUKA HONEY. The IPO acknowledged the taonga status of mānuka honey and that tikanga principles were relevant, but concluded that they could not override clear provisions in the Trade Marks Act. The IPO found that on balance the circumstances of the case did not result in the MANUKA HONEY certification mark acquiring sufficient distinctiveness for the purposes of the Act.

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39 Above n 1, at [120] and [122] per Glazebrook J, [181] per Winkelmann CJ and [270]–[272] per Williams J.

40 Above n 5, at [95].

41 *Sweeney v the Prison Manager, Spring Hill Corrections Facility* [2024] NZHC 1361 at [83].

42 *Kaiwai v Police* [2024] NZHC 2491 at [53].

43 *Te Rūnanga o Ngāti Whātua v Kingi* [2023] NZHC 1384, [2023] 3 NZLR 501 at [55] and [98].

44 *Bamber v The Official Assignee* [2023] NZHC 260, [2023] 2 NZLR 636 at [44]–[50].

45 *Manuka Honey Appellation Society Inc v Australian Manuka Honey Association Ltd* [2023] NZIPOTM 19 at [471].

Now in case you were thinking tikanga is now dying at the vine because of the strict application of the integrity principle, in a recent employment case, the Full Employment Court had to address the issue of non-publication.[46] Tikanga was raised as a relevant consideration. The Court expressly acknowledged that caution is needed given that the courts "are not the makers of tikanga."[47] Key common law norms were also engaged, including the principle of open justice, equity, and good conscience. In reaching the conclusion that non-publication was justified, the Court observed that tikanga was relevant to the weighing exercise, though not necessarily determinative. The Court concluded:

> [102] In terms of the role of tikanga, the subsequent hara (breach) by [AB] disrupted the state of ea achieved by the settlement agreement. Tikanga would suggest that the consequences to [BC] of the hara, including the risk of [BC] experiencing whakamā, should not be exacerbated by further publication. Given the circumstances of the case, non-publication is consistent too with equity and good conscience.

This decision, with its cautious woven approach, provides a nice stepping stone to the last of the key principles, reconciliation.

D. Reconciliation

It is the quotidian task of a judge to reconcile competing values, for example as between contractual principles that lionise agency and certainty and principles of equity that lionise fairness. That task is no different when tikanga is in play. When the tikanga values clash with other values in society, for example existing principles and common law, that conflict will need to be worked through.

Fundamental to this is the idea of non-presumptive reconciliation. In many ways this was the major advance of *Ellis*. The majority in rejecting the colonial relics were seeking to remove inbuilt preference for particular norms that are no longer apposite to our society. There is again nothing new or unusual about this whether here or in other comparable jurisdictions. As Lord Steyn famously said, context is everything,[48] and for example, statutes must be interpreted as always speaking, and applied in the world as it exists today, and in light of the legal system and norms currently in force.[49]

Sometimes that reconciliation will be seamless, as it was for example in *Kusabs*. In others it will involve a deep understanding of how tikanga works as exemplified in cases where in the end on closer inspection tikanga and common law values are entirely aligned. A useful illustration is the case of *Doney v Adlam*.[50] In that case, Ms Adlam was found liable to pay a large sum for breach of trustees duties. In seeking to defend recovery of the full monies owed, counsel raised tikanga arguments concerning whakapapa, whanaungatanga and manaakitanga. The Court rejected that argument, first on grounds that they could not prevail in any event because of the controlling statutory provisions. More importantly for present purposes, the Court confirmed that

46 *[BC] v [AB]* [2024] NZEmpC 147, (2024) 20 NZELR 723 (names redacted).

47 At [66].

48 *R v Secretary of State for the Home Department, ex p Daly* [2001] UKHL 26, [2001] 2 AC 532 at [28].

49 See *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277 (HL).

50 *Doney v Adlam* [2023] NZHC 363, [2023] 2 NZLR 521.

those principles, together with the concept of utu, encompassing relationships, honour, duty, and restoration, were congruent with the legislation's intent. As Harvey J said:[51]

> tikanga cannot provide a haven for such misconduct without the appropriate degree of muru and utu for the hara that has been caused to the satisfaction of the aggrieved party. In short, in terms of tikanga, it is evident that traditional concepts including hara, muru, utu are as relevant as whakapapa, whanaungatanga, tino rangatiratanga and manaakitanga in this proceeding.

There will be some cases where the common law recognises that tikanga should prevail over existing norms where to do so is consistent with the ordinary operation of the common law method. In this regard, I return to Lord Atkin's famous judgment in *Donoghue v Stevenson*:[52]

> I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilised society and the ordinary claims it makes upon its members as to deny a legal remedy where there is so obviously a social wrong.

IX. The Slow Weave

I now finally turn to the last major finding. The Law Commission was fully aware that much work is needed. That both the common law and tikanga is vulnerable to rapid change, and that therefore a modest incremental approach – a slow weave is needed. On this the traditions of both tikanga and the common law are aligned. Neither tikanga nor the common law moves in epiphanic leaps. The law of contract, equity and tort has for example evolved over hundreds of years, and they each continue to evolve. That is hardly surprising, as I said in my last lecture, the common law has always been the law of the community – it is the first point of contact for the community with legal process and it mirrors the values of the community it serves.[53] It is the capacity of the common law to recognise and over time weave those values into the law that is essential to its day to day operation and ultimately its legitimacy. For that reason too, it must move slowly, in step with the community it serves.

My last point is this, whatever the weave, it cannot be right that only tikanga values are missing from the common law universe. Such systemic exclusion plainly violates fundamental ideas about the rule of law and equality before the law, exemplified by the judicial oath that we must do right by all people.

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51 At [106].

52 Above n 25, at 583

53 R Mulgan "Commentary on Chief Judge Durie's Custom Law Paper from the Perspective of a Pakeha Political Scientist" (Unpublished Paper, Law Commission, 1996) at 2 as cited in Christian Whata "Biculturalism in the Law: The I, the Kua and the Ka" (2018) 26 Waikato Law Review | Taumauri 24 at 27, n 18.

Trusts, Ture and Tikanga – "It's All about Relationships"

Ngā Kaitiaki, Te Ture, me Te Tikanga – "Ko te Hononga te Mea Nui"

Judge Aidan Warren*

Ki te Kotahi te kākaho, ka whati; ki te kāpua, e kore e whati[1]

I. Introduction

In 2021, Williams J, Natalie Coates and Isaac Hikaka presented papers on trust law and tikanga at a NZLS conference.[2] They conceded that tikanga had not yet infiltrated trust law, at least in terms of a body of decisions of the Senior Courts.[3] They identified the synergies, differences, challenges and opportunities for when tikanga starts to collide with trust law.

Since 2021 there have been three significant developments regarding tikanga and trust law:[4]

(a) The establishment of a growing body of case law from senior and specialist courts, where tikanga and trust law have collided.

(b) The introduction of the Trusts Act 2019 (which came into force in early 2021) codifying a number of common law trust law principles and trustee duties.

(c) The release of *He Poutama*, the Law Commission's comprehensive study on the role of tikanga concepts in state law.[5]

This trifecta of events creates a timely opportunity to identify some of the themes that have evolved and how the trust law-tikanga relationship is trending, as a subset of the "tikanga in law project" (as Paul Majurey described it in his recent Salmon Lecture).[6]

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* Presented to *Equity and Trusts Conference: The Law in Practice*, Auckland, 8 August 2024

1 *When we stand alone we are vulnerable, but together we are unbreakable*. I commence most of my written decisions with a whakataukī, as it sets a Māori context for the decision that is to follow. The use of this whakataukī here, seeks to imbue a sense of the connected nature of tikanga, the reality that the profession needs to work together to protect tikanga when it is before the courts and the reality that trust law and equity, like tikanga is all about relationships.

2 Joe Williams "Can we Trust tikanga?" (paper presented to Trusts Conference – 2021 A Trust Odyssey, Wellington, June 2021); and Isaac Hikaka and Natalie Coates "Tikanga and Trusts" (paper presented to Trusts Conference – 2021 A Trust Odyssey, Wellington, June 2021).

3 Whilst tikanga is always at play in a Māori land trust context, there was no extensive body of cases from my court on matters of trustee duties, equity, breach of trust where tikanga loomed large.

4 There is something spiritual in the Māori world about things coming in "threes".

5 Law Commission *Purongo Rangahau: He Poutama* (NZLC SP24, September 2023).

6 Paul F Majurey "The Tikanga in Law Project: Aotearoa originalism or Potemkin Law? Legitimacy of all branches of government under the microscope" (Resource Management Law Association | Te Kahui Ture Taiao Salmon Lecture, Auckland, 31 July 2024).

I will attempt to achieve three things in this paper:

(a) Provide an overview of the key messages coming from the courts about tikanga in state law.
(b) Complete a brief review of the Trusts Act 2019 in search of a tikanga voice in the newly minted statutory scheme.
(c) Identify evidential and procedural issues when engaging with tikanga based claims to assist practitioners in this space.

I address these matters from the perspective of a relatively new judge who spent 21 years in private practice, and so I have a strong practitioner bent, as opposed to a theoretical one.

II. Context Remains King!

Lord Steyn's seminal words that "in law context is everything"[7] now sits squarely with the proposition that "in tikanga, context is everything".[8] This is true both in te ao Māori and when tikanga based claims come before the courts.

The Supreme Court has shown a strong preference for the contextual approach to incorporating tikanga.[9] Commentators have noted the risk of this approach, as it leaves behind the certainty of the colonial test in favour of the uncertainty of determining each case on its own merits.[10] This brings a level of imprecision to the law that some do not consider a good trade-off for the benefits that the application of tikanga to non-Māori may bring. This concern, however, rejects the notion that Aotearoa has been operating a hybrid legal system for much longer than only the last ten years as seen in historical case law.[11]

Writing extrajudicially, Whata J rejects the notion that tikanga is too uncertain to be applied as consistently as the common law.[12] He explains that tikanga provides boundaries to identify when it is relevant, and points out that while the common law is not always certain, fundamental tikanga does have certainty at its core.[13] However, some hapū and iwi consider that a fundamental aspect

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7 *R (Daly) v Home Secretary* [2001] UKHL 26 at [28].

8 See the many references in *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239. Tikanga itself is not just a set of rules that can be rigidly applied, just as the content of the common law is not prescriptive nor to be divorced from context. For example:

> [261] So, if that test is set aside, when will tikanga principles be relevant in a legal dispute governed in whole or in part by the common law? And, if relevant, how much weight should those tikanga principles be accorded? It may seem a little unhelpful to answer that both when and how much, will always depend on context, but there is no getting past that fact.
>
> [267] The more difficult task is in determining the weight the relevant tikanga principle should carry in the determination. Should it be the controlling rule or principle or merely an ingredient in a more multi-layered analysis? Again the best guide will be context. A dispute taking place entirely within Te Ao Māori or one in which the disputants' expectations are that tikanga should be the controlling law is likely to be resolved according to tikanga, whether it is resolved by the community or by the courts.

9 See *Wairarapa Moana ki Pouakani Incorporation v Mercury NZ Limited and the Waitangi Tribunal and Others* [2022] NZSC 142, [2022] 1 NZLR 767; and *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239.

10 Christian Whata "Tikanga and the Law: A Model of Recognition" (2023) 4(3) Amicus Curiae 610.

11 See, for example, *R v Symonds* (1847) NZPCC 387; P*ublic Trustee v Loasby* (1908) 27 NZLR 801 (SC); and *Baldick v Jackson* (1910) 30 NZLR 343.

12 Christian Whata "Tikanga and the Law: A Model of Recognition" (2023) 4(3) Amicus Curiae 610 at 612.

13 Christian Whata "Tikanga and the Law: A Model of Recognition" (2023) 4(3) Amicus Curiae 610 at 612.

of tino rangatiratanga is that tikanga should only be managed and enforced by iwi Māori.[14] Whata J warns that this means the judicial system must be careful about the inclusion of tikanga into the common law environment, recognise those that consider it should remain within te ao Māori and ensure its integrity is maintained.[15]

With those clear guardrails in mind, it seems that "context" underpins a high-level synergy between understanding and applying trust law-equitable principles and tikanga. Thus, the relationship between them has a promising start.[16] Tikanga craves synergies, in the Māori world, it's all about relationships.

Normally, one would spend time outlining what tikanga is and how it may or may not align with trust law and equity. That exercise was done well by Williams J, Hikaka and Coates and I invite you to supplement my kōrero by reading their papers. But, there is another reason why I have chosen not to engage in a comparative analysis in any detail. Experts caution against wrongfully transplanting tikanga concepts into established common law categories to make sense of them.[17] *He Poutama* states that tikanga is made up of norms that may have broader relational, ethical, moral and spiritual elements.[18] These twin reasons provide sufficient caution to avoid such an exercise without the necessary time for careful scholarship. Scholarship that requires legal and tikanga expertise.

What I will add however, is a reference to two important directives from the senior courts that help us understand tikanga in a state law context and to know when tikanga is relevant to a matter before the courts.

Palmer J in *Ngāti Whātua Ōrākei Trust v Attorney-General (Ngāti Whātua)* set out some key observations for understanding tikanga:[19]

(a) Tikanga must be understood holistically as an interlocking set of reinforcing norms – there may more than one principle of tikanga which determines what is tika in a given situation.[20]

(b) Tikanga revolves around values and a value system and the implications of this speak to the role of tikanga in constituting iwi and hapū.[21] "It follows that tikanga is quintessentially developed by each iwi or hapū, in the exercise of their rangatiratanga."[22]

(c) There are different versions of which principles are regarded as "core" to tikanga, including whanaungatanga, kaitiakitanga, mana, tapu and noa, utu and ea. Tikanga is inherently contextual.[23]

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14 Christian Whata "Tikanga and the Law: A Model of Recognition" (2023) 4(3) Amicus Curiae 610 at 612.

15 Christian Whata "Tikanga and the Law: A Model of Recognition" (2023) 4(3) Amicus Curiae 610 at 612.

16 See Williams J, above n 2: "Widespread adoption of the trust model in te ao Māori speaks to the reasonably comfortable fit between the concept of trust and tikanga such as whanaungatanga, kaitiakitanga and mana. Like tikanga the trust is relational rather than transactional. And it is usually long term. It fits naturally within the idea of reciprocal kin obligations."

17 Christian Whata "Finding tikanga – a journey into legal pluralism in Aotearoa New Zealand" (2024 Public Law Conference, Public Law Centre, University of Ottawa, July 2024).

18 Law Commission *Purongo Rangahau: He Poutama* (NZLC SP24, September 2023) at 49.

19 *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601.

20 At [306].

21 At [307]−[310].

22 At [310].

23 At [311].

(d) Tikanga and its practice can change over time – it evolves and is not static.[24]
(e) Tikanga is a way of life the ideas and beliefs of which are carried in the minds of individuals, building up during their lifetimes through observation, instruction and study.[25]

In *Ellis v R*, Williams J gave guidance about when tikanga might be relevant:[26]

(a) Context will dictate when and to what extent tikanga applies.[27]
(b) The context will determine the weight to be afforded to tikanga in determining:[28]
    (i) a dispute entirely within te ao Māori requiring tikanga to be controlling.
    (ii) a dispute at an intersection with te ao Māori will require careful weighing.

A. What Unites Tikanga and Trust Law?

We know that trust law survives because certain relationships exist. Relationships that give rise to rights, powers and a set of imposed duties. Without these duties there is no trust.

Tikanga survives because certain relationships exist in the Māori world. These relationships give rise to rights, powers and a set of imposed duties, mostly notably under the banner of the "law of whanaungatanga". In most contexts a trust involves people and assets. Tikanga is fundamentally about people, place and managing how people behave with respect to people and place.

Trust law came to Aotearoa with the English legal system and is now codified [in several respects] in the Trust Act 2019 as a distinct local development of this area of law. Trust law has evolved to the wider concept of a trust as a fiduciary relationship – a relationship between trustees and beneficiaries in which good faith is of fundamental importance.

Tikanga came to Aotearoa with early Māori settlers, *codified* in whakapapa, waiata, kōrero tuku iho (a-iwi and a-Māori), carvings, tā moko and whakataukī. Tikanga evolved to suit the context that this land served up and has evolved and continues to evolve to this day. The fundamental values that underpin tikanga stay unchanged, but its application to fit the changing context continually evolves.[29]

Like state law, tikanga demands a level of certainty to enable a coherent functioning community, but it also demands flexibility.[30] As *He Poutama* observes, tikanga may be more sensitive to context than the common law, but this does not mean that tikanga itself is uncertain.[31]

Like trust law, tikanga is arrowed towards duties and obligations. Framing the relationship in this way gives the tikanga-trust law relationship a context; a frame of reference and commonality that arises in some of the cases post-2021.

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24 At [312].

25 At [314], citing Hirini Moko Mead *Tikanga Māori* (Huia Publishers, Wellington, 2016) at 16–17.

26 *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239.

27 At [263].

28 At [267].

29 The best contemporary example is the changes made to deal with Covid-19, for examples the modifications made to pōwhiri, hongi, and koha.

30 As stated in John Burrows "Common law among the statutes: the Lord Cooke Lecture 2007" (2008) 39(3) VUWLR 401 at 411: "The common law is flexible, it is grounded in the practically of individual fact situations".

31 Law Commission *Purongo Rangahau: He Poutama* (NZLC SP24, September 2023) at 219.

III. Tiati Law

Having addressed matters of context, I turn to the decisions since 2021, where several courts have engaged with tikanga, including in a trust law and equity context. By reference to selective quotes and findings from case law, I draw out some key themes that fall out of the tikanga-state law engagement over this three-year period. In that short space of time, it is mindboggling to reflect on how quickly things have evolved.

A. Theme one: Tikanga is the First Law of Aotearoa and Part of the Common Law

In *Ellis v R* the majority judges stated that tikanga was the first law of Aotearoa/New Zealand.[32]

In the 2024 *Smith v Fonterra Co-operative Group Ltd* case, the Supreme Court summarised the current precedent about the place of tikanga within the legal system:[33]

> this Court considered the relationship between tikanga and the common law as it operates outside the sphere of customary title. To summarise the essential conclusions reached, *tikanga was the first law of New Zealand, and it will continue to influence New Zealand's distinctive common law as appropriate according to the case and to the extent appropriate in the case*. (emphasis added)
>
> [Footnotes omitted]

B. Theme Two: The Need for Caution when Determining if Tikanga is Applicable

In *Ellis v R*, the minority decision raised issues which subsequent courts may have to grapple with in relation to the role of tikanga in the courts:[34]

> So the tikanga issue has come before the Court in an uncontested environment and in circumstances where the Court has not had to address a number of difficult issues of both legal and constitutional significance. These include: how the Court can identify when tikanga is relevant to the case at hand and when it is not; if it is relevant how should it be addressed; whether tikanga is a separate or third source of law; how the relevant tikanga should be brought to the Court's attention … how the application of tikanga in one area of the law affects the common law in another area; and how to avoid tikanga being distorted when applied by courts. Also, … how … precedents are affected by arguments that tikanga should be taken into account when it was not taken into account in an earlier decision.
>
> [Footnotes omitted]

C. Theme Three: The Importance of Courts Keeping in Their Lanes with Respect to Determining Tikanga

In *Ngāti Whātua*, the High Court cautioned:[35]

> [37] Just because a Court can do something does not mean it should. One reason for judicial caution is that legal precedents in case law will not be authoritative as to the content of tikanga. This flows

32 *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239 at [22].

33 *Smith v Fonterra Co-operative Group Ltd* [2024] NZSC 5, [2014] 1 NZLR 134 at [187].

34 *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239 at [285].

35 *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 at [37].

> from the ongoing capacity for tikanga to change and for there to be differences in tikanga, and the application of tikanga, between iwi and hapū. Iwi and hapū create, determine and change tikanga through exercising their rangatiratanga. Courts do not and cannot make, freeze or codify tikanga. *If a court approaches tikanga in a particular case, it must recognise tikanga on the basis of the evidence before it for the purpose of that case. What is recognised by a court cannot change the underlying fact or validity of tikanga in its own terms …* (emphasis added)
>
> [Footnotes omitted]

The Court in *Kusabs v Staite* emphasised the need for courts to make sure to incorporate tikanga when it is relevant:[36]

> But care is needed. *If fiduciary duties are applied to Māori land administration without due regard to whanaungatanga, the former may frustrate the positive expression of the latter. This would be contrary to the underlying values of equity which, after all, developed as a response to the rigid formalism of the common law courts*. (emphasis added)
>
> [Footnotes omitted]

In recent commentary by Powell J on the application of the test for customary marine title under the Marine and Coastal Area (Takutai Moana) Act 2011 (MACA 2011), he noted the difficulty of applying tikanga to a western legal test in a way that does justice to both.[37] Part of the difficulty is caused by the fact that the test is not limited to tikanga, but it must not be ignored that the test takes customary rights which were originally defined by tikanga and fits them into a foreign legal framework.[38]

D. Theme Four: Tikanga is Not a "Free Pass" or "Soft Law"

In *Doney v Adlam*, Harvey J emphasised that the application of tikanga does not lead to more lenient outcomes:[39]

> *Put another way, there are no principles of tikanga that I am aware of, or that were cited by counsel with examples, that would support the approach proposed by Mrs Adlam, especially where there are assets available to contribute to the remedy the trust is entitled to pursue*. In doing so, the trustees are seeking to apply the principles of tikanga to achieve ea for the trust beneficiaries, including themselves and Mrs Adlam, in accordance with their duties.
>
> …
>
> [106] Ultimately, in the context of this long running proceeding dating back almost 15 years, *tikanga cannot provide a haven for such misconduct without the appropriate degree of muru and utu for the hara that has been caused to the satisfaction of the aggrieved party* … To even contemplate the restoration of a state of ea between the trustees, the trust beneficiaries on the one hand, and Mrs Adlam

36 *Kusabs v Staite* [2019] NZCA 420, [2023] 2 NZLR 144 at [124].

37 Grant Powell "The Marine and Coastal Area (Takutai Moana) Act 2011 and Tikanga: Some Challenges Arising" (2003) 4(3) Amicus Curiae 623.

38 Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1.

39 *Doney v Adlam* [2023] NZHC 363, [2023] 2 NZLR 521 at [103].

> and her whānau on the other, it is essential that there continues to be recompense to the trust and its beneficiaries to the fullest extent practicable. The alternative would be to allow Mrs Adlam to effectively avoid responsibility to the trust for in excess of $10 million in circumstances where she continues to fail to provide a proper accounting for the loss or use of those funds. *That can hardly be a just outcome, either in ture Pākehā or tikanga terms*. (emphasis added)
>
> [Footnotes omitted]

In the *Pokere v Bodger* costs decision, Dr Hond and I also emphasised that tikanga does not lead to more lenient outcomes stating that "tikanga principles create reciprocal obligations and should not only be considered as a mitigating tool only".[40] We also observed that the application of tikanga may in fact lead to what seems like a harsher outcome:[41]

> [25] Applying tikanga in this holistic manner can produce what may seem a very harsh outcome, especially in a modern context. This harsh perception is exacerbated by the reality that the Act only allows the Court to make an award of costs in monetary terms and not any other traditional restorative options to create a sense of ea.

E. Theme Five: The Legal Effect of Tikanga and Whether Courts Can Recognise Rights and Interests under It

Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2) confirmed that tikanga has legal effect, and the court was required to make decisions consistent with tikanga (provided there is no other conflicting law):[42]

> [59] *This case arises under trust law*. Courts have an inherent supervisory jurisdiction over trusts, to protect the interests of the beneficiaries consistent with the trust deed. The trust here constitutes the legal form of the hapū Ngāti Rehua-Ngātiwai ki Aotea. *In these circumstances, in exercising its jurisdiction where there is no conflicting law, I consider the Court is bound to make decisions consistent with tikanga Ngāti Rehua-Ngātiwai ki Aotea*.
>
> …
>
> [66] For those reasons, the plaintiffs and second to fourth defendants are not legally able to arbitrate about the whakapapa of Ngāti Rehua-Ngātiwai ki Aotea contrary to tikanga Ngāti Rehua-Ngātiwai ki Aotea. To that extent, at least, tikanga has legal effect. (emphasis added)
>
> [Footnotes omitted]

In *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd*, Whata J was emphatic that the jurisdiction of the Environment Court did not extend so far as to confer, declare or affirm tikanga based rights, powers and/or authority.[43] At most, the Environment Court may make evidential findings about those matters, but only where they are relevant to the obligations to Māori under the

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40 *Pokere v Bodger - Ōuri 1A3* (2023) 466 Aotea MB 120 (466 AOT 120) at [22]. This decision is subject of an appeal to the Court of Appeal.

41 At [25].

42 *Ngawaka v Ngāti Rehua-Ngātiwai Ki Aotea Trust Board (No 2)* [2021] NZHC 291, [2021] 2 NZLR 1.

43 *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768, [2021] 3 NZLR 352 at [67].

Resource Management Act 1991.[44] This finding was grounded in the legislation, which provides no such jurisdiction. Whata J held that this was not the case for either the High Court or the Māori Land Court, which each do have jurisdiction to make such declarations.[45]

Ngāti Whātua found that the High Court has a discretionary jurisdiction to grant declarations on tikanga.[46] In contrast, the majority in *Ellis v R* warned that courts do not have the mandate nor expertise to "declare" tikanga as they do the common law.[47]

The claims concerning tikanga in each case were starkly different, with *Ngāti Whātua* being a consideration of mana whenua and the interplay of different tikanga, while *Ellis v R* was a consideration of whether tikanga may bring a different lens to a legal test.

Ngāti Whātua considered there was a variety of different ways by which a court could seek to resolve a dispute over tikanga that may also be consistent with tikanga.[48] This may be by appointment of a pūkenga with a strong connection to the relevant iwi or hapū and/or a deep understanding of the relevant tikanga, to make a decision. Also raised was the ability to refer a question of tikanga to the Māori Appellate Court.[49]

F. Theme Six: How Should Courts Adjudicate Competing Tikanga?

The High Court in *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* stated that the difficulty of deciding an outcome from competing tikanga of multiple groups does not absolve the Court of any obligation it has under statute to determine a claim.[50]

In the same way that the High Court in *Ngāti Whātua* found that Parliament cannot change tikanga, it concluded that one iwi cannot override the tikanga of another iwi without impinging on their rangatiratanga.[51]

The Court of Appeal in *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* (*Creswell*) endorsed the approach of the Supreme Court in questioning the appropriateness of referring to proving tikanga as a question of fact or evidence.[52] In *Creswell*, tikanga evidence was provided for both sides from separate experts of the same iwi. An appeal of the tikanga findings was not allowed as it was not a matter of law.[53] The Court noted that in some cases it would be appropriate to call experts to give evidence about the relevant tikanga and how it should apply, but that is not always necessary.[54]

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44 At [115].

45 At [67].

46 *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 at [366].

47 *Ellis v R* [2022] NZSC 114; [2022] 1 NZLR 239 at [270].

48 *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 at [366]–[367].

49 At [367]. I note that this option has not yet been exercised.

50 *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768, [2021] 3 NZLR 352 at [68].

51 *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 at [33].

52 *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2022] NZCA 598, [2023] NZRMA 280.

53 At [4].

54 At [5].

G. Theme Seven: Tikanga as a Source of Fiduciary and Legal Duties

In *Mercury NZ v Māori Land Court*, Cooke J refused the idea that a fiduciary duty on the Crown to hold land for customary owners arises from tikanga.[55] Such a duty can arise only from the concept of fiduciary duties in itself. The Court did, however, acknowledge that tikanga and te ao Māori generally would inform any question of whether a fiduciary duty exists and what its nature may be.[56]

In *Pokere v Bodger*, I, along with pūkenga Dr Ruakere Hond, found that trustees of Māori land trusts have duties under tikanga, regardless of whether or not these duties are explicitly set out in the trust order. Our reasoning was as follows:[57]

> [96] Kāore he tohutohu ki te wāhanga tarati o te Ture 1993 e anganui ana ki ngā takohanga o ngā taratī ki tikanga, erangi kāore hoki he katinga. He nui tēnei i te mea ka riro mā māua ngā tohutohu o te Ture 1993 e whakamāori, e whakamahi hoki (āpiti atu ko ngā tohutohu ki te Wāhanga 12) ki te ia o ngā mātāpono i te Ture 1993, he mātāpono ērā e kitea ana ki te Kupu Whakataki (ki s 2 o te Ture).[58] He mātāpono e whai tikanga ana.[59]
>
> *[96] There are no express provisions in the trust section of the Act with respect to trustee duties under tikanga, but importantly, there are no express limitations. Important, because we are required to interpret and apply the provisions of the Act (including the trust provisions in Part 12) in a manner that furthers the principles of the Act, principles found in the Preamble (per s 2 of the Act).*[58] *Principles that include tikanga.*[59]
>
> [97] Kei ngā tohutohu motuhake o te Wāhanga 12 o te Ture 1993 e raupapa ana tētehi tukanga 'Māori' ki te whakatū, ki te whakahaere, me te arataki i ngā taratī whenua Māori katoa, e whirinaki nei te tūtohunga mō te hāngai pū o te tikanga (ngā uara me ngā mātāpono ki tikanga) ki ngā whiriwhiringa whakamāori me ngā whakamahinga o Wāhanga 12 o te Ture 1993.[60] He tāpiritanga atu anō, mō ngā momo whenua kei ngā ringaringa o ngā kaitaratī e kaha kitea ana ko ngā whenua tupuna ērā, nō rātou takitini nei, whai whakapapa whanaunga nei, whenua Māori herekore nei, koia e mōhio pai ana he mana nui tō te tikanga ki ā rātou kawekawe whakahaere, pikau takohanga hoki.
>
> *[97] The specific provisions of Part 12 of the Act set out a 'Māori' approach to the creation, operation and supervision of all Māori land trusts, supporting the view that tikanga (the underlying tikanga values and principles) is directly relevant to how we must interpret and apply Part 12 of the Act.*[60] *Add to the mix that the land vested in trustees is invariably ancestral*

55 *Mercury NZ v Māori Land Court* [2023] NZHC 1644 at [72].

56 At [72].

57 *Pokere v Bodger − Ōuri 1A3* (2022) 459 Aotea MB 210 (459 AOT 210).

58 *Baker and others v Trustees of Tataraakina C Block − Tataraakina C Block* (1995) 11 Takitimu Appellate MB 50 (11 ACTK 50) at [10]−[11]. "There are a number of areas, for example on the constitution of trusts or Māori reservations (under Part XII, Part XVII) where it is not specifically provided that tikanga Māori shall be taken into account. *Mindful of the principles set out in the Preamble, it is nevertheless incumbent on the Court in the exercise of its jurisdiction to have regard to tikanga Māori should the issue arise in the course of the proceedings*." [Emphasis added].

59 See, for example: *Adlam v Reihana Himetangai 1H1A* (2022) 447 Aotea MB 1 (447 AOT 1) at [34]−[40]; and *Baker and others v Trustees of Tataraakina C Block − Tataraakina C Block* (1995) 11 Takitimu Appellate MB 50 (11 ACTK 50). We also refer to the helpful analysis by Her Honour Justice Glazebrook in *Ellis v R* [2022] NZSC 114; [2022] 1 NZLR 239 at [98]−[102].

60 For example, various hui that are held (and at times directed) to establish trusts, set the terms of trust and to select trustees, with many hui taking place on marae.

land, beneficially owned by a number of Māori related by whakapapa, with the land having the legal status of Māori freehold land, then there is little doubt that tikanga colours how trustees are to exercise their powers and responsibilities.

[98] Kei s 223 o te Ture 1993 te taituara i taua whakaaro.

> **223 General functions of responsible trustees**
>
> Every person who is appointed as a responsible trustee of a trust constituted under this Part shall be responsible for—
>
> […]
>
> (b) the proper administration and management of the business of the trust:
>
> […]

[98] Section 223 of the Act supports this position.

> ***223 General functions of responsible trustees***
>
> *Every person who is appointed as a responsible trustee of a trust constituted under this Part shall be responsible for—*
>
> *[…]*
>
> *(b) the proper administration and management of the business of the trust:*
>
> *[…]*

[99] Kei s 223(b) o te Ture 1993 ngā tohutohu ki ngā kaitaratī kia whai haepapa ngā tukanga tari, me ngā whakahaere ki ngā mahi pakihi o te taratī.[61] Ko ngā kupu e takoto ana ki s 223(b) he whānui, arā, me aro matatini atu ki tētehi aro e anga mua ai ngā mātāpono o te Ture 1993, kia tōtika ngā tukanga o te tari, kia tōtika ngā whakahaere i ngā kawe o tētehi taratī Wāhanga 12, me uru marire ētehi hanga whakaaro haepapa ki tikanga.[62]

[99] Section 223(b) of the Act requires trustees to be responsible for the "proper" administration and management of the business of the trust.[61] *Section 223(b) is broadly worded and when interpreted purposively and in a way that furthers the principles of the Act, then the "proper" administration and management of the business of a Part 12 trust must at some level include responsibilities under tikanga.*[62]

[100] Ki tēnei horopaki whai ture, ka tere te kitenga atu kua whai takohanga ki ngā tikanga ngā kaitaratī e whakatūngia ana ki maru o te Wāhanga 12 o te Ture 1993, ahakoa rā tērā e āta kitea ana aua takohanga ki te kawenata o te taratī, kāore rānei. Nō reira, he aha rawa aua takohanga?

[100] Within this statutory context, we have little trouble finding that trustees appointed under Part 12 of the Act have duties under tikanga, regardless of whether these duties are explicitly included in the terms of the trust or not. What then are these duties?

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61 Noting that the word "tika" has been translated as "proper" in the HM Ngata *English-Māori Dictionary* (Learning Media Ltd, Wellington, 1996) at 361.

62 As Ms Thomas argues, both rangatiratanga and the concept of taonga tuku iho, as found in the Preamble, invites tikanga to be considered.

H. Theme Eight: Tikanga as an Aid to Statutory Interpretation

In *Edwards (Te Whakatōhea)*, the use of the word tikanga in the statutory test for customary marine title was found to refer to the "principles of customary law that govern the relationship between iwi, hapū, whānau and the takutai moana, and the rights and responsibilities that flow from that".[63] The Court approached its inquiry into the tests for both Customary Marine Title and Protected Customary Rights primarily beginning and ending with tikanga Māori.[64]

Reeder (Ngā Potiki) adopted the interpretive approach taken by the Court in *Edwards*.[65] That test for customary marine title requires an applicant group to hold the specified area in accordance with tikanga, and does not then require a western concept of property and land holding.[66] The Court confirmed that, although the manifestations of tikanga may appear to an outside observer to have "proprietary-like" elements, that is an essentially coincidental consequence of tikanga.[67] The Court reiterated Churchman J's findings that, when a court is attempting to analyse tikanga Māori, the analysis needs to engage with the concepts as they are understood and applied by Māori.[68]

In *Mercury NZ v Māori Land Court*, the Court did not accept that tikanga and the greater appreciation it has received under the law in recent times warranted an expansion of the Māori Land Court's jurisdiction, either beyond the legislation or to allow it to determine matters in place of the High Court.[69] This finding was in spite of submissions that the Māori Land Court is best placed of all courts to determine matters of tikanga, as acknowledged by the power of the High Court to refer matters to the Māori Land Court, and the power under Te Ture Whenua Māori Act 1993 for temporary expansion of the Māori Land Court's power for specific purposes. Nor did the Court accept that a tikanga interpretation of land can expand the Māori Land Court's jurisdiction to declare proprietary rights in freshwater running over it.[70]

IV. The Trusts Act and Tikanga

In light of those growing themes, I turn to the impact of the Trusts Act 2019 on the infiltration of tikanga into a trust law context. In 2021 Hikaka and Coates understandably argued that with the introduction of the Trusts Act, the influence of tikanga across express trusts may be curbed, at least in relation to judicial consideration and development.[71] The Trusts Act 2019 is the most significant update to the law of trusts in over 50 years, but it contains no express reference to tikanga, the Treaty of Waitangi or te ao Māori generally.[72] So at first blush, Hikaka and Coates may have a point.

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63 *Edwards (Te Whakatōhea)* [2021] NZHC 1025, [2022] 2 NZLR 772 at [279].

64 At [130]−[134] and [144].

65 *Reeder (Nga Pōtiki)* [2021] NZHC 2726, [2022] 3 NZLR 304 at [16], referencing *Re Tipene* [2016] NZHC 3199, [2017] NZAR 559 and *Re Edwards (No 2)* [2021] NZHC 1025, [2022] 2 NZLR 772.

66 *Reeder (Nga Pōtiki)* [2021] NZHC 2726, [2022] 3 NZLR 304 at [25].

67 At [25].

68 At [25].

69 *Mercury NZ v Māori Land Court* [2023] NZHC 1644 at [76].

70 At [89]−[95].

71 Hikaka and Coates, above n 2, at 9.

72 Lindsay Breach *Nevill's Companion to the Trusts Act 2019* (1st ed, Lexis Nexis, Wellington, 2019).

However, Hikaka and Coates also identified that the Trusts Act still allows, by virtue of s 5(8), for the common law to operate and influence trust law. Section 5(8) sets out that the Trusts Act is not an exhaustive code of the law relating to express trusts, and it is intended to be complemented by the rules of the common law and equity. This provision, coupled with the clear Supreme Court statements as to the status of tikanga in the common law, means tikanga may still have a presence in general trusts.

Trusts in the Māori Land Court's jurisdiction are also subject to general trust law, including the now codified trustee duties in the Trusts Act. In *Pokere v Bodger*, we examined this duality of legislative applicability in a Māori land trust context. We took the view that there was a more direct statutory pathway under the Trusts Act for tikanga to influence express trusts, at least in a Māori trust context:[73]

> [94] Waihoki, e tuku ana a s 4 me s 21 o te Ture Taratī 2019, tōna āhua, i tētehi whāriki ā-ture me ngā āheinga kia whanake mai ai ngā takohanga tikanga ki waenga i ngā takohanga tūturu kua toka.[74] Ko tā te s 4, tērā tētehi o ngā mātāpono o te Ture Taratī 2019 e tohu ana me hāngai ngā whakahaere o tētehi taratī ki ngā taki o ana kupu whakataki me ōna whāinga matua. Ko tā te s 21, e tohu ana i ngā takohanga me whai e ngā kaitaratī e aronui ana ki te horopaki me ngā whāinga matua o te taratī. Ka uaua rā te taukume kia kaua te tikanga e whai wāhi mai, nā te horopaki me ngā whāinga matua o ngā taratī whenua Māori.[75]
>
> *[94] Further, ss 4 and 21 of the Trusts Act 2019 provides, on its face, a statutory platform for tikanga duties to evolve within the 'orthodox' duties now codified.[74] Per s 4, one of the principles of the Trusts Act 2019 is that a trust should be administered in a way that is consistent with its terms and objectives. Section 21 states that duties should be performed by trustees having regard to the context and objectives of the trust. It would be difficult to argue that tikanga would not be in the mix considering the context and objectives of Māori land trusts.*[75]

A further potential far-reaching development in the Māori Land Court context is issue as to whether our Court has jurisdiction over trusts not constituted under pt 12 of Te Ture Whenua Māori Act 1993, including private trusts (i.e. post-settlement governance entities).[76] This matter in currently before the Supreme Court, so I leave matters there.

A. Evidential and Procedural Considerations

If it is correct that the Trusts Act provides an opening for tikanga to infiltrate trust law, I now turn to some practical considerations that practitioners will need to consider when tackling tikanga as they arise when claims come before the Courts. There are in my experience several evidential and other procedural issues that arise when tikanga is in the mix.

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73 *Pokere v Bodger*, above n 57.

74 Pursuant to s 4(a) of the Trusts Act 2019, every person or court exercising a power under the Act must have regard to the principle that a trust should be administered in a way that is consistent with its terms and objectives. Pursuant to s 21 of the Trusts Act 2019, in performing their mandatory duties, a trustee must have regard to the context and objectives of the trust.

75 We do not need to consider the common law or the Trusts Act 2019 to assess trustee duties under tikanga in this context, given that the Act provides, in our view, a clear statutory basis. But as noted, the common law and the Trusts Act 2019 may also provide a legal basis in the right circumstances.

76 *Moke v The Trustees of Ngāti Tarāwhai Iwi* [2019] Māori Appellate Court MB 265 (2019 APPEAL 265); *Kruger v Nikora - Tuhoe -Te Uru Taumatua* [2021] Māori Appellate Court MB 444 (2021 APPEAL 444).

B. Framing Tikanga is a Good Start

In *He Poutama*, the authors used the imagery and metaphor of a wharenui to explain tikanga as a normative system and to invite readers into a mātauranga-Māori knowledge-immersed space. In at least three decisions I have been involved with, the decision makers have developed a tikanga frame of reference, or framework, to ensure that the analysis of tikanga was done in context, viewed through a Māori lens and considered in a connected way.[77] At least that was the goal.

In *Pokere v Bodger*, which related to claims by some beneficiaries that the trustees had breached their duties at tikanga by deciding to destroy a whare on trust land, a tikanga frame of reference was developed to help locate where the mana lay with respect to this whare:[78]

> **He anga ki te tikanga ("te anga tikanga")**
>
> ***A tikanga frame of reference***
>
> [12] Hei tīmatanga, ka whārikingia ngā wāhanga o te anga tikanga e whakaiho ana ki te kupu "mana". Ko tēwhea tūmomo mana te mana e kōrerotia ana i konei? He mana whenua, he mana tupuna, he mana tangata, he mana kāinga, he mana motuhake, he mana whakahaere, he mana whakatau, ā, koia ētehi mana i whaiwāhi mai ki tēnei whakatau. Kia whakatūria aua mana hei pou, hei tumu herenga mō ngā ritenga o te mana ki ēnei kōrero e aronui ana ki te tikanga. Arā, ko ēnei:
>
> (a) Te ahunga mai o te mana: Ka whānau mai te mana i te take, ka whānau mai taua take i te taonga
>
> (b) Te huanga atu i te mana: Ka whai uri te mana, ko kaitiaki, muri iho ko manaaki
>
> *[12] An initial description of core tikanga elements is centred on the concept of "mana". Which form of mana is being referred to here? There is mana associated with land, with ancestors, with people, with homes, with authority, with management, and with decision-making that are all to some extent a part of this decision. These forms of mana are described separately as pou, each having their own lines of relationship to be able to respond to issues of tikanga. They are:*
>
> *(a) The forming of mana: Mana is born of a firm relationship, and that firm relationship is founded in something that holds significant value.*
>
> *(b) The outcomes of mana: Mana in turn has offspring, the role of guardianship, that gives rise to the ability to provide value.*
>
> [13] Ko ēnei ngā tumu e herea ai te mana, he anga ki ngā tū kōrero o tēnei whakatau…
>
> *[13] These are the lines of relationship within mana, used to give structure to this decision…*

It was considered that the location of mana was the key tikanga ingredient to this case.[79] The tikanga frame of reference, which connected all relevant principles, was then used to determine contested facts, weighing of the evidence, whether trustees had duties at tikanga and if so, whether they were breached.

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77 See *Pokere v Bodger − Ōuri 1A3* (2022) 459 Aotea MB 210 (459 AOT 210); *Julian v Inia - Succession to Moehuarahi Te Ruuri* (2024) 309 Waiariki MB 197 (309 WAR 197); and *McCallum Bros Limited v Auckland Council* [2024] NZEnvC 085.

78 *Pokere v Bodger*, above n 57, at [12]−[13].

79 At [87].

In *Julian v Inia* [preliminary decision], a Family Protection Act claim, I substituted the metaphorical armchair testatrix with the metaphorical wharenui.[80] In doing so, I was compelled to make my decisions and give my reasons in a mātauranga Māori laden context, without confusing or conflating the western law origins and concepts of the FPA regime with tikanga:[81]

> [86] I endorse the use of the wharenui metaphor in this context, because it introduces a very Māori lens based on collective decision making with all eyes and hearts focused on a tika outcome.

A simple contextualisation exercise is another option. In addressing an application for relief from personal liability per s 131 of the Trusts Act 2019, I tried to contextualise the tikanga arguments placed before me by the trustees in this way:[82]

> [22] Quite apart from the legal trust law context, there is a strong and distinct Māori context here.
>
> [23] The law at times demands retribution and punishment (for good reason). Tikanga invariably demands ea (also for good reason). These two outcomes may not always align. I am clearly dealing with a Māori context here ...
>
> [24] … it is a context where tikanga principles are relevant.

The point here is that framing tikanga in this way is in my view a necessary task of counsel in bringing these arguments to the courts.

C. Evidence

There is an interesting threshold issue, about what evidence do you need in a tikanga based claim.

The Supreme Court in *Ellis* offered a very helpful guide about tikanga evidence:[83]

> [273] How then should the courts receive assistance about tikanga relevant to the disputes before them? I am aware that the orthodox approach is to treat the proof of "foreign" law as a question of evidence and to call experts to give such evidence. I suspect the evidential approach was simply a convenient and efficient way of getting unfamiliar material before the judge who had then to apply it. But I confess to being somewhat uncomfortable with its application to indigenous law.
>
> …
>
> … we are at a stage in our development where lawyers are increasingly likely to have had some exposure to the Treaty of Waitangi and tikanga in legal education if not in practice. In some contexts, it may be sufficient simply to refer to learned texts or reports of the Waitangi Tribunal. We must, after all, recognise that the issues in the particular case as well as the time and the resources of the parties, will not always require or permit more elaborate procedures.
>
> [Footnotes excluded]

80 *Julian v Inia - Succession to Moehuarahi Te Ruuri* (2024) 309 Waiariki MB 197 (309 WAR 197).

81 At [86].

82 *Deputy Registrar v Moeahu − Lot 1 DP 17494 Part Section 2345 New Plymouth (Old Railway Station)* (2023) 468 Aotea MB 117 (468 AOT 117) at [22]–[24].

83 *Ellis v R* [2022] NZSC 114; [2022] 1 NZLR 239 at [273].

In *Julian v Inia,* I was confronted with an argument that the applicant had not filed sufficient tikanga evidence to substantiate any claim of a breach of moral duty at tikanga under the Family Protection Act 1955.[84]

> In the same way that counsel provide authorities to argue the applicability of legal, equitable and fiduciary duties on the facts before a court, so too can they provide authorities …to establish similar findings on tikanga based duties.
>
> [50] In this jurisdiction where tikanga regularly lives and breathes (substantively and procedurally) and where I am effectively addressing general principles of tikanga to define duties, I do not necessarily need direct evidence in the orthodox manner.
>
> …
>
> [52] Mr Pou cited, *Marino v Macey*, to argue that unless tikanga or its values are referenced in the Will, then courts will require direct evidence of tikanga, in order to give it any weight. There is no reference to tikanga or its values anywhere in Moehuarahi's Will and thus Mr Pou submits that I need something (evidence) to "hang my hat on."
>
> [53] I am respectful of the fact that *Marino v Macey* is a decision of the High Court, but may I suggest that judicial thinking about tikanga; as evidence, as fact and as law has evolved significantly since 2013 when that case was decided, including now, having the views of the Supreme Court. I am comfortable that the absence of a direct reference to tikanga in the Will and the lack of direct expert or fact evidence on certain aspects of the tikanga claims is not in and of itself fatal to the FPA applications.
>
> [54] I do accept however, that I must tread carefully given that judges do not make tikanga.

In *Ngāti Whātua*, arguments were held about the appropriateness of "tikanga experts" signing up to the code of conduct for expert witnesses (the code).[85] That is, some tribal witnesses did not sign up to the code on the basis that they were not independent of their tribe; yet were still considered by their own people as experts, and wished to offer opinions to the Court or attend expert witness conferences.

Related to this issue was the appropriateness of "tikanga experts" − who had signed up to the code and did not whakapapa to the tribes in the litigation − providing expert evidence on mana whenua matters relevant to the issues before the court. These twin issues manifested in debates as to who was able attend the "tikanga expert" prehearing conferences.

Some of these issues have been addressed by the Law Commission in its third review of the Evidence Act.[86] The Commission made the following recommendations of interest:[87]

> Insert a new exception to section 17 to provide that the hearsay rule does not apply to a statement offered in evidence to prove the existence or content of mātauranga or tikanga.
>
> Te Komiti mō ngā Tikanga Kooti | Rules Committee should consider amending the Code of Conduct for Expert Witnesses in Schedule 4 of the High Court Rules 2016 to better recognise and provide for mātauranga and tikanga as a unique category of expert evidence.

84 *Julian v Inia - Succession to Moehuarahi Te Ruuri* (2024) 309 Waiariki MB 197 (309 WAR 197) at [49]–[54].

85 *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601.

86 Law Commission *The Third Review of the Evidence Act 2006* (NZLC R148, 2024).

87 At 20.

Watch this space …

The growing multiparty litigation under the (MACA 2011) has seen a rise of pūkenga appointed by the court.

In MACA litigation to date, the pūkenga appointed have provided reports and answers to key issues arising from the claims and evidence before the Court. These pūkenga have been subject to cross examination by the parties and relied upon by the Court in their decisions on key matters of tikanga.

In *Ngāti Whātua* some mana whenua parties applied to the Court for the appointment of the pūkenga. This was opposed by other mana whenua, including the plaintiff Ngāti Whātua Ōrākei.

In declining to appoint a pūkenga in the context of that case Palmer J set out some considerations for such an appointment:[88]

> [37] The relevant considerations are similar to those in allowing an interested party to intervene in proceedings. In deciding whether to appoint pūkenga, the Court will weigh the likelihood the appointment will assist the Court against the risk of prejudice or unfairness to the litigants, guided by the overall interests of justice. The power is more likely to be exercised:
>
> (a) the more important are the questions of tikanga in a case;
>
> (b) the less expert tikanga evidence is provided by the parties; and
>
> (c) the less procedural prejudice or unfairness an appointment would cause to the parties.

Palmer J's decision drew some criticism from the senior Māori lawyer Annette Sykes.[89] Interestingly, Palmer J made a concession in the substantive *Ngāti Whātua* decision, stating that "in retrospect it would have been beneficial to appoint an independent pūkenga to conduct the conference of tikanga experts".[90]

In *Pokere v Bodger,* as noted earlier, I appointed Dr Ruakere Hond as a pūkenga. A request I made as opposed to one requested by the parties.

A pūkenga in this context is different to one appointed under the High Court Rules, in that Dr Hond, who was appointed under s 32A of Te Ture Whenua Māori Act 1993, is actually sitting as part of the Court as a decision maker.

The other important distinction is that our Act allowed me to appoint Dr Hond, even though he had a whakapapa connection or other relationship to the parties before the Court. The explicit provision allowing someone connected to sit as part of the court recognises that in matters of tikanga, having independent decision makers or experts, is not always appropriate. Clearly, a judgment call is required depending on the nature of the relationship. In this context, I invited parties to provide a view on my choice of pūkenga. Importantly, no appeal can be sustained on the basis of the relationship unless the pūkenga acts in bad faith.[91]

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88 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2020] NZHC 3120 at [37].

89 Annette Sykes "The myth of tikanga in the Pākehā law" (2021) 8 Te Tai Haruru Journal of Māori and Indigenous Issues 7 at 27.

90 *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 at [93].

91 Te Ture Whenua Māori Act 1993, s 32A(4).

D. What is the Standard of Proof when it Comes to Tikanga?

The final issue of interest is the question of the standard of proof in tikanga laden proceedings.

In *Ngāti Whātua,* Palmer J remarked that it would be inconsistent with tikanga itself if a court could find the tikanga of an iwi or hapū has or has not been established on the balance of probabilities.[92] As tikanga is established by a dynamic consensus, evidenced by the ongoing practice of an iwi or hapū, a court simply has to be satisfied on the evidence before it, that such a consensus amongst the relevant iwi or hapū prevails at any given time.[93]

In that case, one counsel argued for the "clear and convincing evidence" standard from the United States.[94]

Palmer J responded in one line:

> [382] I do not consider Mr Warren's valiant efforts to introduce American standards of proof bear edible fruit in New Zealand.

V. A Final Word

I conclude with a wero to the profession.

A recent *RNZ* article by academic Rachael Evans, titled "*Can the court measure mana? How Māori tikanga is challenging the justice system"* states that the courts can only build good, authoritative jurisprudence where the arguments presented by lawyers are good and authoritative.[95] She says, and I agree, that lawyers need to understand where, when and how tikanga is relevant in order to properly advise their clients. There is a risk to tikanga concepts if lawyers do not have that knowledge and do not respect the authenticity of tikanga. Themes echoed by Williams J in his paper to the NZ Asian Lawyers Association in 2023. I hope this paper adds to that chorus by drawing together some themes that will help the wider profession in a practical way.

Because trust law, equity and tikanga is here to stay and because of the rise of trust law-tikanga based claims before the courts in the last three years, we all have a duty to come to grips with tikanga. Whilst acknowledging the view that clients will not always have the resources to afford elaborate evidential processes, we (lawyers and judges) must now move from surface level arguments based on generalised notions of tikanga to a more sophisticated place, explaining and analysing these concepts as a connected system of law, properly framed in context. Yes, it is not easy, but nor is it impossible …

Kia kaha koutou.

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92 Annette Sykes, above n 89, at [383].

93 At [383].

94 At [381](d).

95 Rachael Evans "Can the courts measure mana? How Māori tikanga is challenging the justice system" *RNZ* (online ed, New Zealand, 24 June 2024).

Law Making: The Role of the Lawyer
Te Hanga Ture: Te Tūranga o te Poutoko Ture

Hon Margaret Wilson*

I. Introduction

May I first thank Dara and Alberto for the invitation to meet with you all today to discuss a topic that has been a recurring theme throughout my professional life, that is, the important role of the lawyer in the maintenance of our democratic political system through participating in the making of laws. I have been asked to reflect on what I have learnt from the various roles I have had relating to the law. Reflection is never easy and so it proved with this invitation.

I came to the conclusion that, like many lawyers, my primary motivation for pursuing a legal career is because I hate injustice. When I unpacked the notion of justice, I realised that, for me, it meant playing by the rules. Of course the rules can be unfair and lead to injustice, so I see the role of the lawyer to try and make fair rules and redress injustice.

Rules provide the framework within which we live together in relative peace and security. In a democracy like New Zealand, we have the opportunity to participate in the making of those rules. Apart from voting every three years, we can participate in select committees, and provide expert media commentary. As lawyers then we have the skills to ensure that those rules are made and applied justly for all members of our society.

Through our legal education we learn the rules that govern our society. We also learn that these rules must be made by Parliament, are interpreted by the courts, and applied or enforced by agencies authorised to have this role. At each stage of law making, interpretation and enforcement, lawyers are involved in various capacities. This is a role of privilege and responsibility. I thought therefore it may be of interest if I concentrated in this seminar on the role of lawyers in lawmaking.

II. The Rule of Law

The importance of this role is formally acknowledged in s 4 of the Lawyers and Conveyancers Act 2006, that provides one of the fundamental obligations of every lawyer is to uphold the rule of law and facilitate the administration of justice in New Zealand. The rule of law is a much-used concept, but little understood. For many people the rule of law equates with an expectation of fairness when dealing with each other and importantly when dealing with the individuals or institutions exercising public authority.

As an aside, I note that in the New Zealand context fairness has been identified as one of our defining values by a study that contrasts the different value systems of the United States

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* Zoom Te Piringa/Waikato Law Faculty (13 September 2023, 1pm–2pm).

and New Zealand.[1] The study suggests that traditionally the United States has placed a premium value on freedom, while New Zealand has valued fairness above freedom. These differences are attributed to the way in which each country was colonised.

The rule of law has become a notion used extensively in legal and public discourse, often to demonstrate that in the exercise of public power there has been a breach of the rule of law. The concept assumes limits on public power. The limits are of a broadly constitutional character even in the absence of an entrenched constitution like New Zealand. The core principles are first, the country must be governed by general rules laid down in advance. Secondly, these rules (and no other rules) must be applied and enforced. Thirdly disputes about rules must be resolved effectively and fairly through the judicial system.

It is important to note the notion of the rule of law has evolved over time and continues to evolve. Tom Bingham in his book *The Rule of Law* identifies important historical milestones in the development of the notion, beginning with the Magna Carta 1215.[2]

This is not the time or place to undertake an analysis of the various theories, but a current guide to our understanding of the notion is found in Justice Susan Glazebrook's article titled *The Rule of Law: Guiding Principle or Catchphrase?*.[3] After a review of the various contexts in which the notion is used, Justice Glazebrook concluded "The rule of law is a guiding principle as long as it includes human rights, access to justice and I would add, redress for historical disadvantage".[4] With respect, I agree with her analysis that includes both procedural and substantive elements. Her definition, however, is broader than the formal meaning given to the rule of law in New Zealand.

III. Constitution

In the New Zealand context, an authoritative definition is found in the Legislative Design and Advisory Committee Guidelines.[5] The Guidelines state legislation should be consistent with fundamental constitutional principles, including the rule of law. In summary, it identifies the core principles of the rule of law as "[e]veryone is subject to the law, including the Government. The law should be clear and clearly enforceable," and "[t]here should be an independent, impartial judiciary."[6] These are similar to the traditional Dicey and Lord Bingham's definitions and equate with most people's understanding of the rule of law principles.

As future and current practitioners of the law, it is useful to be reminded that the obligation to uphold the rule of law places a special constitutional role on the legal profession. I have always seen the legal profession as the guardian of the constitution because I suspect we are one of the

1 David Hackett Fischer *Fairness and Freedom: A History of Two Open Societies: New Zealand and the United States* (1st ed, Oxford University Press, New York, 2010).

2 Tom Bingham *The Rule of Law* (1st ed, Allen Lane, London, 2010).

3 Susan Glazebrook "The Rule of Law: Guiding Principle or Catchphrase?" (2021) 29 Waikato Law Review 2.

4 Susan Glazebrook "The Rule of Law: Guiding Principle or Catchphrase?" (2021) 29 Waikato Law Review 2 at 19.

5 Legislative Design and Advisory Team *Legislation Guidelines* (September 2021) <www.ldac.org.nz/guidelines/legislation-guidelines-2021-edition>.

6 Legislative Design and Advisory Team *Legislation Guidelines* (September 2021) <www.ldac.org.nz/guidelines/legislation-guidelines-2021-edition> at 23.

few professions that understands our legal architecture and the significance of the rule of law. In the various legal roles that I have fulfilled throughout my professional life I have tried to recognise the importance of our constitutional arrangements and acknowledge their fragility. They are fragile because in reality the rule of law and its place in our constitution is dependent on the support of all of us who abide by the law in our daily lives. It is also dependent on us exercising our vote every three years and participating in the opportunities provided to participate in the making and administration of our legal framework both professionally and through community advocacy.

IV. Legal Education

Part of this process of reflection has included how my legal education prepared me for at least some of my legal roles. To be honest my legal education in the mid-1960s can best be described as eclectic. The notion of a full-time law degree was in its second year when I arrived in Auckland to study law. There were few full-time law teachers but the faculty was supplemented by a group of young American teachers one of whom broke up the tedium of lectures with frisbee throwing in Albert Park. Whatever their methods, they made me think and that was a gift for which I shall be forever grateful. They provided me with analytical and writing skills, and the space to think outside the prescribed curriculum at the time which unlike today was very narrow and case focused. The role of policy and the legislative process rarely mentioned.

I found, what turned out to be my life's work – the legal rights of working people – through an Honours seminar I was assigned. It was on the notion of Regulation. I was given a topic to analyse the regulation of the domestic refrigeration of eggs. Unsurprisingly I sought a more interesting and relevant topic. And eventually I was assigned the topic of the Arbitration Court, an institution that neither I nor my teacher knew much about. It was New Zealand's primary wage-fixing institution and therefore an essential element of the economy. In the 1960s, New Zealand was a place of generational change where existing institutions were being challenged. Amongst those institutions was the conciliation and arbitration wage-fixing system that had developed since 1894.

Although the Arbitration Court was central to wage fixing, at the time it operated outside the formal legal system and was, therefore, never mentioned within the context of a law degree at the time. Yet the decisions and rules of that institution influenced the lives of the majority of New Zealanders. Undertaking my first real research project introduced me to the importance of empirical research. I was seeking to understand the role of the court and this involved talking with trade union leaders and employer advocates at that time who appeared before the Court. This was not easy because of a distrust of academics. This distrust has continued throughout my career and reflected the real hidden class system that pervades our society. However, this experience made me mindful of the importance of treating people with respect when undertaking research or consultation. It also made me aware that legal skills had a role in negotiating and accommodating difference in any project.

My research also exposed me to the reality that law is an economic and social instrument, as well as a system of legal rules. It was this learning experience that started my journey to study law in context and not as a closed system of legal rules operating in isolation for the larger society. That journey ultimately led me to developing the curriculum in 1990 for the then-new law school, now known as Te Piringa/Waikato Law School.

Legal education has always been fundamental to my understanding of the law and the legal system. Some years ago I was asked to write an article for the *New Zealand Universities Law Review*

(NZULR) on 50 years of legal education.[7] Two consistent themes emerged from that research. First there has always been a tension between the academic and professional study of law. That tension was partially resolved with instituting the professional course of study, to be taken after the law degree, as a requirement for the practice of law. In my day at law school, we had 8am and 5pm lectures on professional subjects in our last year of study. For most of us who worked part time in that year, this was not a quality legal education experience.

The second tension was the study of law in the context of a university system that after the 1990s became more commercially focussed. The requirements to prepare students to think analytically and professionally often conflicts with shorter courses and methods of assessments that fail to provide the time and space to develop fundamental legal skills and knowledge. I have written on this subject elsewhere so will not pursue it here. However, I would note that when changes occur within the university system, their impact on legal education will depend on the legal academic leadership of the time.

V. Women and the Law – Importance of the Collective

I was one of five or six women in a class of around 200 enrolled for the study of law at Auckland Law School in the mid-1960s. It was a time when the role of women was being questioned through the reemergence of the women's movement and in particular feminism. For me the rights of women and working people merged at this time as I began to question why women were paid less for doing the same job as their male colleagues. Thus began my work to institute a system of pay equity. My pursuit of pay equity eventually led me into politics and into standing for Parliament in 1999. This experience taught me you need a long-term strategy if you want to achieve a change in existing public power relationships.

When I left law school and was working in a law office, I spent time working with the then-legal employees union that gave me an introduction into how wages were really determined. Wage negotiations at that time were more about economic power than a rational process of determining the economic worth of a job. The collective power of a union was a necessary balance to the power of the employing company or organisation. When I entered the legal workforce as a law clerk in the early 1970s most employees were lucky to be paid the minimum wage. Despite being told I would be lucky to find a legal position in the private sector because I was a woman, I was employed by a lawyer with a Queen St practice and was paid the top rate of $3000 per annum.

My employer to all appearances was a conservative practitioner but when I told him, with some anxiety, about my trade union involvement he revealed he had been active in the union in the 1930s. This was a very valuable lesson in never making assumptions about people or situations. The facts are what matter, not only in legal cases but in life.

The industrial relations system at that time was not perfect, but it reflected the values and economic system of the time that was dependent on agricultural exports to the United Kingdom. The United Kingdom entry into the European Union initiated a series of economic and social changes in New Zealand that eventually resulted in the structural adjustment policies of the 1990s. Those policies of a market-driven approach to public policy still prevail today.

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7 Margaret A Wilson and ATH Smith "Fifty years of legal education in New Zealand, 1963−2013: where to from here?" 25 NZULR 801.

Working within the union movement and the women's movement highlighted for me the importance of working collectively for justice and the need for change in the law. Although I worked in a law office in Auckland when I graduated, I soon realised it was a constant struggle to be taken seriously as a female lawyer and my interests really lay in both understanding the nature of discrimination against women and how to change the law and the legal system to provide a remedy against that discrimination. I therefore returned to the Auckland Law Faculty for a Masters Degree and a Junior Lecturer position, that enabled me to pursue research in that particular area.

With a colleague, we introduced the first Women and the Law course. This course was taught despite opposition from some legal colleagues and male students who demonstrated outside the lecture theatre where the classes were being held. Unlike today where social media generates often toxic opposition to new knowledges, we encountered direct face-to-face confrontation that enabled a conversation to develop and for me, personally, to learn the importance of having rules not only to govern behaviours but also that it was important to always achieve a level of understanding and support from the larger community if you wanted to change the legal rules. I also learnt you will never achieve total support so you must make a judgment call whether to proceed with the project despite opposition.

VI. Political Involvement

During this period of social and legal activism I felt most comfortable with a reformer role as opposed to a radical role. I assume it was the rules that drew me to this role. To achieve sustainable change in a democratic system you needed to take people with you and that could only be achieved through a great deal of engagement and persistence. While radicalism highlighted an issue, it rarely achieved sustainable change.

Once I made the decision to work within the legal and political system, I became more actively involved with the Labour Party which was the Party that reflected my own value system. Much of my early involvement was working within the Constitution Committee of the Party. It was both a frustrating and insightful experience of what it meant to draft rules that ensured democratic process when making decisions. Again the skills of the lawyer were invaluable. To be able to park my own views and listen to various arguments on how the rules should be changed, especially when it came to achieving a more inclusive and diverse representation within the Party organisation and Parliament. This was essential to arriving at an acceptable version of the rules. Being able to draft those rules in a way that clearly expressed their intention was valuable experience for when I was elected to Parliament and became responsible for guiding legislation through the Parliament.

I decided during my active involvement in the Labour Party in the 1980s that I did not want to go into Parliament and instead preferred to remain within the Party organisation. I made this decision because it was my assessment that to achieve sustainable change it required both the development of a policy that would then be implemented if the Party was elected to government. Also the Party had a major role in selecting candidates for election to Parliament. In the 1980s we still had a first past the post system and both National and Labour political parties played a more influential role in both policy and candidate selection. This changed with MMP and the increased number of political parties that led to more compromises in policies and more diversity in candidate selection through use of the party list system. Now is not the time to debate the respective merits of various electoral systems.

I would note, however, the future of democratic process depends heavily on the type of electoral rules that are enacted and followed. If anyone doubts the importance of this often overlooked area of the law, look at what is happening in the United States, where there has been a long campaign by the Republican Party to undermine a democratic electoral process. It seems to me that if the United States is to be seen as upholding the rule of law and the democratic process, then the inquiries and decisions to prosecute Donald Trump were necessary. Arguments that prosecuting him will increase his support should not be an argument to say that the rule of law is no longer a fundamental element of both the legal and political system. If that is what the American people want, then there should be a clear choice before them at the next election.

I have often thought that what we do in life is about timing, which is often out of our control. For me being elected Labour Party President in 1984 came at a time when the Labour Government decided to fundamentally change the basis for policy making to a neoliberal, economic market model. I had little doubt that New Zealand needed to change from the authoritarian model pursued by the National Muldoon governments. As President of the Labour Party, I tried to reach a compromise that reflected both the Government and Party members expectations. Although much was achieved during this period of Labour government in terms of women's rights and the Te Tiriti of Waitangi, the foundations for the market-driven approach to public policy were firmly laid down during this time.

The incoming National government in 1990 continued to pursue and implement this approach to economic and public policy generally for the next three years. An understanding of this period will explain many of the problems currently facing New Zealand, such as greater inequality, the need to restore public services such as health and education after years of underfunding, and costs associated with a contracting out model.

After a period in politics, I returned to law teaching as Dean of the new Waikato Law School in 1990. The School was funded by the Labour government on the recommendation of the Legal Education Council. They were looking for a new approach to legal education that considered the social, economic and cultural context within which legal education was taught. I was appointed as Dean and given the opportunity and privilege to develop a new curriculum and provide an opportunity for students of the region to have access to a legal education. I shall not go into the early years with the withdrawal of the funding by the new National government because that has been told before. What I want to emphasis is that the experience of establishing a new form of legal education was very challenging not only to the incoming National government but also to other law schools and many members of the legal profession.

The support of the then Vice Chancellor Wilf Malcom was the difference between the law school continuing or closing before it started. Having good, progressive leadership is vital in periods of change. The courage to take risks on developing a new pathway for different knowledge to be taught and research encouraged was essential at the time. The result has been not only opportunities for hundreds of students to access a legal education and go on to contribute to the legal profession through both legal practice and the judiciary, but it enabled other law schools to also adopt a legal curriculum that better reflected the changing needs of people. I need only reference the development of dispute resolution as a method of providing more relevant and appropriate methods of solving disputes and the inclusion of Te Tiriti within the legal curriculum.

VII. Parliament

For me personally, during this time, once my term as Dean was completed, I could undertake research into understanding the impact of the new neoliberal policy framework and develop a course in policy and the law. Lawyers need to keep abreast of changes in policy and how they affect their clients. The Law Society and its members make a major contribution to law-making. By the end of the 1990s, I decided that the best way I could contribute to addressing the growing inequality issues in the community was to stand for Parliament and try to influence law making in that direction.

I was fortunate to be given that opportunity in 1999, when I entered Parliament, and was appointed to the Cabinet with the task of implementing legislation that would be contentious because it sought to halt the neoliberal approach to law-making. Again, this is not the place or time to discuss my time in Parliament, but I think it is relevant to mention some of the law-making I was involved with. It identifies the importance of ensuring the administration of justice was not overlooked.

Amongst the most contentious law-making roles for which I was primarily responsible were the repeal of the Employment Contracts Act 1991 and enactment of Employment Relations Act 2000, the Amendment to the Property (Relationships) Act 1976 relating to the division of property on the breakdown of a relationship, the Supreme Court Act 2003, now the Senior Courts Act 2016, and revision of the Human Rights Act 1993, including the provision in the Bill of Rights Act 1990 for the courts to make declarations of inconsistency. Each of those Acts disturbed existing power relationships – between employers and employees, men and women, the legal profession and the relationship between the courts and Parliament. Despite threats by political opponents to repeal each of those Acts, they have endured, with amendments as is appropriate. All legislation should be reviewed from time to time to ensure it is fit for purpose as the community changes.

Apart from law-making, there was another side to the job that in my view was equally important – for example the changes made to the drafting of legislation and to the accessibility of legislation. The translation of policy into legal regulation is an exacting and skilled process undertaken primarily by the Parliamentary legal drafters. To do their job, they require adequate resourcing and good relationships with Ministers and officials to ensure the intent of the law is expressed in the wording of the legislation. This is no easy task but vital to ensure the rule of law is upheld because it is the judges who must interpret the legislation. Personal liberty and economic and social well-being are influenced by what the law says.

In terms of accessibility, I oversaw the policy to introduce a plain English approach to legislation and also to make the wording of statutes gender-neutral. At the same time, the very expensive exercise of placing legislation online and making it freely available was undertaken. This innovation was due mainly to the then Minister of Finance, Michael Cullen, who supported my frequent requests for funding to sustain the conversion project. Constitutionally, I saw it as important because the law became much more accessible.

There was another aspect of my role as Attorney General that was important and the most demanding: recommending to the Governor-General the appointments of members of the judiciary. Constitutionally there is no independent process for these appointments. In one sense, they are political, but they are also undertaken in compliance with set procedures and protocols that may change with each new Government. The focus however is always on the qualifications, experience and personal integrity of the appointments. I tried to implement a more independent process similar to that in Scotland and England but was unsuccessful. While I believed the process ensured good

appointments, I also thought a more transparent process would reenforce the perception of the independence of our judiciary. I did receive criticism for the appointments I recommended on the grounds there were too many women, Māori and people from the Waikato. My overall concern was that the judiciary reflected the community they served. In my experience there were plenty of qualified lawyers who were women, Māori, Pasifika and from the provinces. I was conscious that all change is likely to attract criticism but that should not influence the decision making.

VIII. Conclusion

I want to conclude with a brief comment on what needs to be done to preserve the notion of the rule of law as an essential part of our constitution. I do not believe there is any political appetite for constitutional change in the form of a written constitution. Nor is parliamentary sovereignty likely to change as a fundamental element of our constitutional arrangements. Under these circumstances the role of the courts will remain contested by governments that want total control over their right to enact legislation to legitimise their policies. The primary check on governments remains the three-year election cycle, though the obligations under the rule of law, as enacted in legislation or constitutional practice, provide an opportunity to ensure the proper enactment of laws.

The best safeguards for rule of law compliance lie in the policy process reflecting those values in the making of policy and drafting of legislation, and in a rigorous, accessible scrutiny of legislation before it is enacted. This means a proper select committee process that enables changes to be made where needed. While members of parliament who serve on select committees are by and large conscientious, they are too few in number and sometimes they are lacking in the expertise and knowledge required to thoroughly review the Bills before them. Often, they are reliant on submitters to provide that expertise. The Law Society members who freely give of their time and expertise are invaluable to the whole law-making process.

Increasingly the courts are asked to address issues that are contentious and have failed to attract political support from the government. Issues such as the end of life, the voting age, climate change have all recently come before the courts. Often legal action is a strategy to provoke a legislative response as in the case of the pay equity issue. It is also a means to keep the issue politically relevant. While the courts have adroitly managed to carve a role that maintains the constitutional conventions, it is likely the courts, and their judges, will be drawn into politically contentious issues. The international trends towards right ideologies gaining power in legislatures and influencing policies less consistent with human rights and democratic process signals a serious challenge to accepted democratic constitutional norm, even in New Zealand. The power of social media and the development of a cancel culture pose serious challenges to traditional freedoms and rights.

More than ever, we need to safeguard the few institutional protections we have for democratic constitutional rights, including human rights. As lawyers, we have an important role in ensuring the public, as well as those holding governance positions are aware of our constitutional arrangements. Ultimately however our constitution is dependent on the community's support for democratic values, including the rule of law, and its willingness to act in support of those values.

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Section 27 of the Sentencing Act 2002 – Cultural Reports for the Legally Aided Defendant and the Wider Implications of Cultural Background for Litigants Generally

Wāhanga 27 o te Ture Whiu 2002 – Ngā Pūrongo Ahurea mō te Kaikaro Whai Tautoko ā-Ture me ngā Whakahīrautanga Whānui o te Whakamāramatanga ā-Ahurea Whānui mō ngā Tāngata Kēhi

Philip Morgan KC*

Section 27 of the Sentencing Act 2002 provides:

27 Offender may request court to hear person on personal, family, whanau, community, and cultural background of offender

(1) If an offender appears before a court for sentencing, the offender may request the court to hear any person or persons called by the offender to speak on—

(a) the personal, family, whanau, community, and cultural background of the offender:

(b) the way in which that background may have related to the commission of the offence:

(c) any processes that have been tried to resolve, or that are available to resolve, issues relating to the offence, involving the offender and his or her family, whanau, or community and the victim or victims of the offence:

(d) how support from the family, whanau, or community may be available to help prevent further offending by the offender:

(e) how the offender's background, or family, whanau, or community support may be relevant in respect of possible sentences.

(2) The court must hear a person or persons called by the offender under this section on any of the matters specified in subsection (1) unless the court is satisfied that there is some special reason that makes this unnecessary or inappropriate.

(3) If the court declines to hear a person called by the offender under this section, the court must give reasons for doing so.

(4) Without limiting any other powers of a court to adjourn, the court may adjourn the proceedings to enable arrangements to be made to hear a person or persons under this section.

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* Talk delivered to the Waikato Public Law and Policy Research Unit, University of Waikato, 19 June 2025.

> (5) If an offender does not make a request under this section, the court may suggest to the offender that it may be of assistance to the court to hear a person or persons called by the offender on any of the matters specified in subsection (1).

Notwithstanding the change in funding for s 27 reports through the Legal Aid system, the section itself is alive and well. The change to the payments regime by Legal Aid has not really had such a terrible effect that it deserved the great deal of controversy it engendered when the decision was made that the reports would no longer be funded. That is because, to the extent that a legally aided defendant's plea in mitigation is affected by the absence of funding for a s 27 report, it can in a large measure be corrected by the assiduous lawyer acting for a defendant.

Section 27 has been with us for two decades and the likelihood is that the reason for the controversy, which has only just arisen in 2024, is due to some misunderstanding of s 27 itself, and the political points that can be scored by attempting to reduce Government spending on an area which might see a person worthy of a lengthy period of imprisonment having their sentence reduced as the result of a cultural report.

Lawyers didn't really give the section a lot of attention after its enactment in 2002, for the reason being that most lawyers, almost always, make as part of their plea in mitigation, particular reference to an offender's background and how that may have impacted on the commission of the offence. It didn't really need to be the subject of specific reporting by an outside agency, certainly initially.

However, Counsel argued before the Court of Appeal a case where the Court of Appeal allowed a sentence appeal and gave a deduction upon a sentence that had been imposed in a lower court because of the content of a s 27 cultural report.

For those interested in this field and the related authorities, I commend the extensive commentary in *Hall's Sentencing (NZ)*.[1] The news of a substantial discount from sentence on the basis of a s 27 report, following this decision, took off like wildfire and in almost every case where counsel had a client in custody who was facing a term of imprisonment, the client wanted to know what the lawyer had done about obtaining a s 27 report. Clients sought this cultural report because they believed it would invariably result in a deduction from their sentence.

That environment generated in a relatively short period of time quite a thriving industry, whereby third parties could be engaged to write a report, often described misleadingly as a cultural report, which was put before a judge at sentence time with the expectation that it would result in a deduction of the sentence.

What the layman doesn't necessarily understand is that a deduction of 5 per cent or 10 per cent off a sentence depends on what the starting point is. If the public sees someone having their sentence reduced by 10 per cent because of a cultural report, what some may fail to understand is that 10 per cent comes off the initial sentence that the judge has already decided is suitable. Ten per cent off a 15-year sentence isn't necessarily much value to the defendant if counsel had been able to persuade the judge on behalf of the client that the offending by the client really only warranted a 10-year starting point.

Nevertheless, lawyers came under considerable pressure from their clients to obtain s 27 cultural reports in the expectation that it would result in a deduction.

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1 Geoff Hall *Hall's Sentencing* (looseleaf and online eds, LexisNexis).

The quality of the reports provided by outside suppliers varied significantly. Some s 27 reports were such that counsel's advice to the client was that it shouldn't be filed, the judge shouldn't see it, and there should be no reference made to it. Others were enormously valuable, carefully prepared by qualified authors relying as best they could on third-party sources, not just the defendant, and directed to the causes of the offending.

Section 27 clearly envisaged that the court would hear from a person speaking to the court, but practical considerations intervened. Trying to get suitable people before the court and having them speak can be difficult logistically and very time consuming in busy list courts. Therefore, s 27 considerations are almost invariably in written form, which then started to become lengthy and at a significant cost.

For a category 1 or category 2 Legal Aid assignment where the lawyer acts for the defendant when the defendant pleads guilty, the fixed fee for the lawyer is something like $200 plus an appearance fee, which for a category 1 or 2 case might be as little as $54. Yet s 27 reports were incurring the cost of $2,500 to $3,500.

Even for the much more serious cases such as sexual violation by rape, a lawyer's fee for preparation for sentencing under the Legal Aid rate is $1,000. That lawyer has the obligation of meeting with his client, taking his instructions, listing all the aggravating and mitigating features, researching comparative sentencing and then preparing a sentencing memorandum in response to the Crown sentencing memorandum. Yet still, the Legal Services Commissioner was approving $2,500to $3,500 for a cultural report, some of which occupied 30+ pages and did little more than recount what a defendant had said without any real verification or analysis of the consequence of the information to the sentencing process.

It was therefore unsurprising that politicians started clamouring about the cost. Especially when in the public eye the media reported that, for this cost, a particular defendant had committed a terrible crime, would otherwise have gone to jail for 15 years, but was only sentenced to 12 years because of a cultural report.

Cultural reports thereby became an easy target. These issues were in regard to the legally aided defendant; however, s 27 still exists. It is still in the Sentencing Act 2002. It applies today. What the Government has done is essentially removed the Legal Aid funding for these reports. But s 27 remains alive and well.

If we take a closer look at the section, we see that subsection (1) provides "That if an offender appears before the court for sentencing, the offender may request the court to hear from any person or persons called by the offender to speak on". The key expressions are "may request" and "persons".

A defendant who is appearing for sentence is perfectly entitled to request the court to consider material which is relevant to their sentencing. The defendant is entitled under s 27 to call persons to speak on certain topics. It is the topics which are so important.

Subsection (a) reads "to speak on the personal, family, whanau, community and cultural background of the offender". It is quite wrong to treat these merely as cultural reports.

Subsection (b) is directed to the way in which that background may have related to the commission of the offence.

All of this is familiar to lawyers as they have been doing this for decades. They do it from the floor of the court. Sometimes they do it by means of their oral submissions. Sometimes they do it by the calling of evidence. Sometimes they do it by reference to a pre-sentence report now called a Provision of Advice to Courts" (PAC) report.

Any lawyer representing somebody who is appearing for sentence knows that it is extremely worthwhile for the judge to know why the offender has committed this offence. Is it something from their family background, their whanau, their community or their culture, or a combination of all three?

The section goes on to refer to an offender requesting the court to hear from any person or persons to speak on processes that have been tried to resolve, or that are available to resolve, issues relating to the offence. This is nothing more than alternative dispute resolution, making amends or Restorative Justice.

Subsection (d) refers to support from the family, whanau or community being available to help prevent further offending. Preventing further offending is one of the key functions of the sentencing process. Here the statute is making express provision for the court to listen to somebody who knows what they are talking about in regards to what family support, community support and whanau support is available to prevent this offender from committing this sort of crime again.

Subsection (e) allows a person to speak on how support from the family, whanau and community may be relevant in respect of possible sentences. This is a reference to an offender who might be on the cusp of a sentence like home detention, that is somebody who has committed a crime, is due to be sentenced, and the likely sentence is going to be something in the vicinity of two years' imprisonment or less. The question then is can the judge be persuaded to allow the person to serve the sentence on home detention. It is a much easier task for the lawyer to persuade a judge of that if the judge knows that the offender has got the support from his family, his whanau and his community, who can then assure the court that he is going to comply with his home detention sentence. All of these factors may persuade a judge to decide on a home detention sentence in a case where a judge may not have ordinarily been persuaded.

All of these matters are factors that s 27 specifically allows a lawyer to address on behalf of their client. If the particular defendant has enough money, they can still get a s 27 report. However, a lack of legal aid funding for s 27 reports and a lack of funds by the defendant doesn't deprive them from putting this material before the court. My experience is that lawyers for the defendant always have and will continue to do so.

Subsection (2) permits a court to decline to hear from any particular person where it is satisfied that there is some special reason that makes it unnecessary or inappropriate.

This relates back to the point made earlier about the effect people speaking orally in routine cases would have on the court process. Sentencing courts are too busy to always allow this. The whole sentencing process which is already bogged down by the amount of work the courts have, would come to a grinding halt if people routinely were called to speak on these various issues. The courts in 2027 want everything in writing, which is why s 27 reports came into being in the first place. Lawyers wanted to use s 27 to put something before the court which they think is relevant to the final outcome, rather than making a formal request of the court and calling persons to speak to these people from the body of the court. That was achieved by s 27 reports.

Courts declining to hear persons called by the offender under this section is extremely rare. I personally have never heard of it occurring. The court must give reasons for so doing.[2]

Written reports are an efficient way of covering all of these factors. But as referred to previously s 27 still exists. All these issues are still relevant to sentencing. The funding from Legal Aid to generate these reports has been cut, but because the section remains, lawyers still address these

2 Sentencing Act 2002, s 27(3).

very topics. They just attempt to do it by any other method that they can, rather than having to go off to the Legal Aid Commissioner and get an amendment to their Legal Aid grant to commit the payment of $2,500 to $3,500 for a s 27 report.

A simple illustration is a lawyer saying to the judge that their client's mother is present in the court, telling the judge that if it were really necessary the client's mother could tell the judge the reason the defendant has committed these offences. Further, if you could tell the court that if the defendant is sentenced to home detention she will be in the house with them and will ensure that the defendant abides strictly by the conditions of their home detention. Here the lawyer is providing the information in court, rather than it all coming from a s 27 report. This sort of information was routinely made available to a judge in the past by means of a pre-sentence report.

These days, likely due to under-funding, under-staffing and sheer volume of work, what is now PAC reports are of very little value. They are largely cut and paste from a previous report, and they refer to standard tests the Department uses to detect whether somebody is using and abusing alcohol and drugs, which is generally a question along the lines of "how much do you drink?". Consequently, the information that a judge involved in a sentencing would like to have, which the lawyer would like the judge to have, no longer comes to the court through the Department of Corrections in the way it once did. But there is nothing to prevent the legally aided lawyer engaging a third party to write a sentence report for the judge to deal with these sorts of issues. It just doesn't get called a cultural report, it needs to be much more focused on the relevant factors that a judge has to consider in the sentencing exercise. The lawyer can then apply to Legal Aid to see if they will fund this report.

So far as cultural background generally is concerned, the reader is referred to the Supreme Court's decision in *Deng v Zheng*,[3] which was about a partnership entered into by some foreign nationals who had different cultural practices from white Anglo-Saxon Protestants.

The Supreme Court stated, drawing on cases from other jurisdictions, that judges need to be alert to different cultural backgrounds of witnesses. That if a judge hearing a case recognises there may be a different cultural background, this fact should give the judge a red flag about how they should apply their traditional tools for measuring something like credibility where the judge in question may have been a lawyer in private practice for 20 to 30 years in New Zealand and has no experience at all of the culture of the people who are giving evidence.

Essentially the Supreme Court was saying in such circumstances that the judge needs to think: do I need to make allowances? The person giving evidence is not white, not New Zealand born and doesn't only speak English. The person giving evidence might be Malay, Vietnamese, Indonesian, Chinese, Indian, Pacific Islander, Ukrainian, all from different cultural backgrounds, so judges have been encouraged to question whether they can rely on the same tools they usually use to assess credibility such as consistency, demeanour and the like.

The Supreme Court went on to say that judges should be expected to take notice of reputable publications, material that comes from unimpeachable sources to understand a bit more about the culture of the people that the judge is listening to. The parties can call expert evidence on the topic.

There are several reservations about this. The first of them is that in this area of cultural background it is extremely difficult to find a genuine expert witness. Counsel can chase around forever trying to find one. They may find half a dozen who say they were experts, only to discover that of that half dozen the other five claim that the one you have chosen is not an expert and they

3 *Deng v Zheng* [2022] NZSC 76, [2022] 1 NZLR 151.

have got it all wrong. Cultural background witnesses in New Zealand about your client who is not from New Zealand can be very difficult to get expert evidence from. So too is it extremely difficult to get hold of unimpeachable sources about that cultural background. Most of those unimpeachable sources won't be in English.

The second reservation is just how relevant it is. Lawyers have the experience, especially criminal lawyers, of speaking to their clients about the litigation they are involved with, where their clients view things quite differently from how contemporary New Zealand would. Take the circumstance of a client charged with beating his female partner and beating his children. A client from a different culture may well say I've done a terrible thing, I should never have beaten my wife, but both she and I beat our children because that is our duty as parents. Such events, all happening in New Zealand, means the clients are faced with very different penal provisions. Trying to put up an argument in front of the judge that it is a mitigating factor that it is part of this defendant's culture that everyone beats their children, because it is part of good parenting, just invites something from the judge along the lines of "well your client is not where he was, he is in New Zealand now and the law is different". The judge needs to make it clear to everybody in New Zealand that from whatever country they have come from you simply cannot beat your children like this.

So take from this the need for relevance. Whilst a different cultural perspective can be very interesting, it is not necessarily so relevant that counsel has to chase around trying to find an expert about it.

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The Future of Law: Tradition, Innovation, the Environment and Beyond …

Te Ānamata o te Ture: Ngā Tikanga o Neherā, te Auahatanga, te Taiao ki Tua hoki …

Dr Trevor Daya-Winterbottom*

This paper will focus on four pivotal topics – how tradition has influenced the shape of our legal system, the dynamic capability of law for innovation – and how the law has responded to revolutionary industrial developments, interrogating recent developments in environmental law teaching, and the future implications for the law and legal education – and the skills that will be required by tomorrow's lawyers.

I. Tradition

The first law school was established at the University of Bologna in 1088 based on the study of Roman law, which remained the focus of university law school education until the eighteenth century when Sir William Blackstone was appointed the Vinerian Professor of English Law in the University of Oxford in 1759.

Blackstone's *Commentaries on the Laws of England* (published in successive volumes during the period 1765−1769) had a strong influence on the Founding Fathers in the United States and led to the foundation of the William & Mary Law School at Williamsburg, Virginia, in 1779, based on the pragmatic need to train sufficient lawyers to meet the needs of the new republic than could otherwise be trained via the traditional apprenticeship system.[1]

The University of Cambridge subsequently followed suit with the appointment of Edward Christian as the Downing Professor of the Laws of England in 1788. But he was unable to take up his position until 1800 when the litigation concerning the will of Sir George Downing was finally resolved. The protracted litigation by the disappointed Downing family descendants before the Court of Chancery, which commenced in 1769, provided the plot for the fictional case of *Jarndyce v Jarndyce* in Charles Dickens' novel *Bleak House* (published in 1853).[2]

A. English Legal Education

Notwithstanding these developments, the major influence of the law schools at Oxford and Cambridge on the English legal system remained the study of Roman law.

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1 Charles Noble Gregory "A Movement in English Legal Education" (1897) 10 Harv L Rev 418.

2 Graham Virgo, Master, Downing College, Cambridge (pers comm, 12 April 2024).

English legal education was the province of the four Inns of Court, societies of barristers established around the City of London during the fourteenth century. Legal instruction was originally provided via lectures given by Readers and by Moots held in the great halls of the Inns.[3] However, this system fell into desuetude during the seventeenth century and aspiring barristers gained their legal education empirically from reading law as pupils in the chambers of busy barristers,[4] and keeping terms and eating dinners in the great halls of the Inns – effectively, students "were required … to eat their way to the bar".[5]

The parlous state of English legal education came under sharp scrutiny during the nineteenth century when a Parliamentary Select Committee on Legal Education was established in 1846. It recommended "that the Inns should co-operate and establish a joint system of education"[6] – put simply, a legal university "similar to the Colleges of Physicians and Surgeons".[7] However, the appetite for reform was not abated and the Royal Commission on the Inns of Court (1854−1855) was established to inquire into both legal education and the organisation of the Inns themselves.[8] This move finally spurred the Inns to adopt "the suggestion … that it was expedient that there should be a compulsory examination of students previous to being called to the bar",[9] and the first bar examinations were subsequently held in 1872.

While these reform proposals were unsuccessful, they generated a wider debate about opening legal education "to all who desired to know the law of the land, whether intending to become lawyers or not".[10] More importantly, the reform proposals provided the catalyst for teaching English law in the universities, and the BA in Jurisprudence was founded at Oxford in 1872 and the BA in Law tripos was established at Cambridge in 1873.[11] Significantly, law teaching at the then New Zealand university colleges also began at this time, first at Otago in 1873 and then at Canterbury later in the same year.[12]

The newly appointed law professors "were particularly concerned to reconcile the quest for academic credibility with the need for professional legitimacy".[13] They were influenced by the scientific approach to law articulated by Friedrich Carl von Savigny (1779−1861) and John Austin

3 Halsbury's Laws of England (3rd ed) vol 2 Barristers at [2]–[4].

4 Andrew Watson "The Legal Education Revolution that Failed – Attempts to Establish a Legal University in Victorian Britain" (2023) 14(2) Journal on European History of Law 30.

5 Charles Noble Gregory "A Movement in English Legal Education" (1897) 10 Harv L Rev 418 at 420.

6 Charles Noble Gregory "A Movement in English Legal Education" (1897) 10 Harv L Rev 418 at 421.

7 Andrew Watson "The Legal Education Revolution that Failed – Attempts to Establish a Legal University in Victorian Britain" (2023) 14(2) Journal on European History of Law 30 at 32.

8 Andrew Watson "The Legal Education Revolution that Failed – Attempts to Establish a Legal University in Victorian Britain" (2023) 14(2) Journal on European History of Law 30 at 33.

9 Charles Noble Gregory "A Movement in English Legal Education" (1897) 10 Harv L Rev 418 at 421.

10 Charles Noble Gregory "A Movement in English Legal Education" (1897) 10 Harv L Rev 418 at 421.

11 Andrew Watson "The Legal Education Revolution that Failed – Attempts to Establish a Legal University in Victorian Britain" (2023) 14(2) Journal on European History of Law 30 at 32.

12 Peter Spiller "The Legal Profession" in Peter Spiller, Jeremy Finn, and Richard Boast (eds) *A New Zealand Legal History* (2nd ed, Thomson Reuters, Wellington, 2001) 293.

13 Martin Loughlin "Rights Discourse and Public Law Thought in the United Kingdom" in GW Anderson (ed) *Rights and Democracy: Essays in UK-Canadian Constitutionalism* (Blackstone Press, 1999) 196.

(1790−1859).[14] For example, Albert Venn Dicey in his inaugural lecture as Vinerian Professor of English Law at Oxford in 1883 stated that the role of the law professor was "to reduce the mass of legal rules to an orderly series of principles" and "to set forth the law as a coherent whole".[15] This ideal was translated into practical reality via the textbook tradition – which produced Anson's *Law of Contract* (1879), Dicey's *Law of the Constitution* (1885), and Salmond's *Law of Torts* (1907), and provided a "rational and systematic" approach to fundamental legal principles.[16] For Dicey, this was "the most interesting and perhaps the most important sphere of professorial energy".[17] Subsequently, Otto Kahn-Freund underscored the importance of the textbook tradition in the following way:[18]

> Teaching and research should never be separated – this has been said often enough – but what has not been sufficiently emphasized is that, quite apart from research, the process of teaching law, the need for making it intelligible otherwise than in terms of mere practitioners' recipes, has itself a considerable influence on the structure of the law. The writing of textbooks is by some people regarded as an inferior occupation. Nothing could be further from the truth …

The new Oxford dons (and more recently their New Zealand counterparts) were also influenced by the American law schools and considered that they taught law in a more efficient way – which turned out "better instructed" and "practical lawyers".[19] The classic example of the American approach being the case book method.

B. English Legal System

Charles Dickens painted an accurate picture of the English courts and the legal profession during the nineteenth century. Although, Dickens was not a lawyer he was employed as clerk in a number of law offices during his formative years – including, spending some time in the office of Charles Molloy, an attorney, in Old Square, Lincoln's Inn.[20] From Dickens' novels we see an archaic agglomeration of courts that had accumulated since medieval times, exercising sometimes overlapping jurisdiction. For example, the Common Pleas and King's Bench exercised common law jurisdiction, Chancery and the Exchequer held equitable jurisdiction, and the ecclesiastical courts at Doctors' Commons exercised probate, divorce, and admiralty jurisdiction. To address the inevitable delays in obtaining justice under such a fragmented system, these courts were later amalgamated into the divisions of a unitary High Court by the Judicature Acts 1873−1875.[21]

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14 Charles Noble Gregory "A Movement in English Legal Education" (1897) 10 Harv L Rev 418 at 426; Martin Loughlin "Rights Discourse and Public Law Thought in the United Kingdom" in G W Anderson (ed) *Rights and Democracy: Essays in UK-Canadian Constitutionalism* (Blackstone Press, London, 1999) 196 at 196.

15 AV Dicey *Can English Law Be Taught At The Universities* (Macmillan, London, 1883) at 18.

16 Martin Loughlin "Rights Discourse and Public Law Thought in the United Kingdom" in G W Anderson (ed) *Rights and Democracy: Essays in UK-Canadian Constitutionalism* (Blackstone Press, London, 1999) at 196.

17 O Kahn-Freund "Reflections on Legal Education" (1966) 29(2) Mod L Rev 121 at 180.

18 O Kahn-Freund "Reflections on Legal Education" (1966) 29(2) Mod L Rev 121 at 180.

19 Charles Noble Gregory "A Movement in English Legal Education" (1897) 10 Harv L Rev 418 at 426; Geoff McLay "Toward a History of New Zealand Legal Education" (1999) 30 VUWLR 333 at 337−339.

20 William S Holdsworth *Charles Dickens As A Legal Historian* (Yale University Press, Connecticut, US, 1929) at 2 and 9; Robert J Blackham *Wig and Gown: The story of The Temple, Gray's and Lincoln's Inn* (Sampson Low, Marston & Co, London, 1932) 85.

21 *Halsbury's Laws of England* (3rd ed) vol 9 Courts at [940]–[943].

The courts were populated by an array of lawyers. The elite leading counsel, the Serjeants at Law (created by Henry III during the thirteenth century) were assisted by apprentices who had emerged as a separate profession of barristers by 1465, and the advocates who held doctor's degrees in Roman law from Oxford or Cambridge and practiced before the ecclesiastical courts.[22] The elite position of the Serjeants was gradually eroded over the centuries by the designation of Queen's Counsel established by Elizabeth I in 1597, and the ranks of the advocates and serjeants became extinct following the reform of the ecclesiastical courts during 1857−1859 and the enactment of the Judicature Acts.

Counsel were instructed by a similar array of attorneys in the common law courts, solicitors in Chancery, and proctors in the ecclesiastical courts. Conveyancing was carried out by scriveners, licenced by the Scriveners Company, one of the guilds or livery companies established in the City of London in 1373. The solicitors gradually took over the work of the scriveners during the eighteenth century – while the attorneys, solicitors, and proctors merged into a single solicitors profession during the period 1832−1875 (following the establishment of the Law Society).[23]

C. New Zealand Legal Tradition

Peter Spiller observed that English legal tradition has exerted a strong influence on the New Zealand legal system,[24] but only "so far as applicable to the circumstances" of a new country located in the South Pacific.[25] This point was underscored by Judith Bassett who emphasised the coincidence between the timing of the "passionate debate" about English law reform and the European settlement of New Zealand.[26] In particular, she noted:[27]

> During the 1830s the English ruling elite saw the common law as the greatest legal system the world had ever seen. However, in the eyes of the reformers it was tottering on the edge of disreputable collapse. Novelists such as Dickens … would soon satirise the law and its practitioners, including Judges, to large appreciative audiences.

It is not surprising that New Zealand began to chart a different course from the outset. For example, when what is now the High Court of New Zealand was established by the Supreme Court Act 1841, local circumstances required that it should be provided with the full range of legal,[28] equitable,[29] and ecclesiastical jurisdiction exercised by the English Courts.[30] Likewise, to ensure that sufficient lawyers would be available to meet the needs of the country, s 13 of the Act provided for advocates, attorneys, barristers, proctors, and solicitors admitted in Great Britain and Ireland to be enrolled

22 *Halsbury's Laws of England* (3rd ed) vol 2 Barristers at [2]–[4].

23 *Halsbury's Laws of England* (3rd ed) vol 36 Solicitors at [1].

24 Peter Spiller "The Legal Profession" in Peter Spiller, Jeremy Finn, and Richard Boast (eds) *A New Zealand Legal History* (2nd ed, Thomson Reuters, Wellington, 2001) at 249.

25 English Laws Act 1858, s 1.

26 Judith Bassett "The New Zealand Legal System: Early Historical Influences" in Rick Bigwood (ed) *Legal Method in New Zealand* (Butterworths, Wellington, 2001) at 16.

27 Judith Bassett "The New Zealand Legal System: Early Historical Influences" in Rick Bigwood (ed) *Legal Method in New Zealand* (Butterworths, Wellington, 2001) at 16.

28 Supreme Court Act 1841, s 2.

29 Supreme Court Act 1841, s 3.

30 Supreme Court Act 1841, s 4.

to practice before the Court, while s 14 of the Act enabled barristers to practice as solicitors and vice-versa. Effectively, the Supreme Court Act 1841 provided for a fused court system and legal profession.

Provision was later made for promulgating rules and regulations regarding the examination and admission of New Zealand trained barristers and solicitors.[31] The Judges of the High Court were responsible for examinations until 1889,[32] when the responsibility for examining candidates for admission as barristers and solicitors was delegated to the then New Zealand university colleges. Subsequently, the responsibility for examining candidates for admission and prescribing their course of study was formally transferred to the university colleges in 1930.[33] To enable the colleges to discharge these functions, the Council of Legal Education was established with the power to prescribe "the courses of study, the examination, and the educational and practical qualifications of candidates for admission as barristers and solicitors".[34] These statutory amendments transformed the New Zealand LLB degree into a qualifying law degree.

Bassett also observed that in the early days of the then colony, English law coexisted alongside tikanga Māori – "a legal system based upon well-established custom, concepts of collective responsibility, and the resolution of disputes through compensation".[35] Additionally, she noted that Chief Justice Martin spent time on the voyage to New Zealand learning te reo Māori,[36] and that Rangatira sat on the court bench alongside the judges in committal proceedings involving Māori.[37] These formative antecedents of the New Zealand legal system provide a nascent foundation for modern developments to embed tikanga Māori in the LLB curriculum.

After a long abeyance, a joint report commissioned by the New Zealand Law Society and the Council of Legal Education in 1987 acknowledged the need to incorporate tikanga Māori in the law curriculum,[38] and Sir Ivor Richardson emphasised the value of "cultural diversity" and the need to recognise "the unique character of New Zealand founded on the Treaty of Waitangi" in fashioning a modern approach to legal education.[39] The Waikato law school was established in 1990 against the backdrop of these recommendations and "advocated a new approach to legal education, which examined law in the context of the society in which it operates and took account of the growing emphasis on biculturalism".[40]

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31 Supreme Court Act 1844, s 16; Law Practitioners Act 1861, s 8.

32 Admission of Barristers and Solicitors Rules and Regulations under the Law Practitioners Act 1882 [1889] New Zealand Gazette 725.

33 Law Practitioners Amendment Act 1930, s 2.

34 New Zealand University Amendment Act 1930, s 3.

35 Judith Bassett "The New Zealand Legal System: Early Historical Influences" in Rick Bigwood (ed) *Legal Method in New Zealand* (Butterworths, Wellington, 2001) at 17.

36 Judith Bassett "The New Zealand Legal System: Early Historical Influences" in Rick Bigwood (ed) *Legal Method in New Zealand* (Butterworths, Wellington, 2001) at 18.

37 Judith Bassett "The New Zealand Legal System: Early Historical Influences" in Rick Bigwood (ed) *Legal Method in New Zealand* (Butterworths, Wellington, 2001) at 21; citing the Juries Amendment Act 1844, Unsworn Testimony Act 1844, and Native Exemption Act 1844.

38 Peter Spiller "The Legal Profession" in Peter Spiller, Jeremy Finn, and Richard Boast (eds) *A New Zealand Legal History* (2nd ed, Thomson Reuters, Wellington, 2001) 293 at 302.

39 Ivor Richardson "Educating lawyers for the 21st century" [1989] NZLJ 86 at 89.

40 Peter Spiller "The Legal Profession" in Peter Spiller, Jeremy Finn, and Richard Boast (eds) *A New Zealand Legal History* (2nd ed, Thomson Reuters, Wellington, 2001) 293 at 302.

More recently in 2021, the Council of Legal Education consulted on a resolution that Te Ao Māori concepts, including tikanga Māori, should be taught as a core subject within the LLB curriculum[41] – thirty years after the first intake of law students at Waikato. The resolution will be implemented in 2025 and tikanga Māori will now be included as a stand-alone moderated paper in the New Zealand LLB curriculum. In the meantime, the Waikato law school made a significant contribution to developing a distinctive New Zealand jurisprudence through the pages of the Waikato Law Review (1993−2022) by mapping the fusion of Cook's law and Kupe's law.[42]

In England, the Victorian era was a period of reform of an archaic and ramshackle court system, with consequential effects for the structure of the legal profession. In particular, the reforms were devastating for the practice of Roman law before the ecclesiastical courts. New Zealand charted a pragmatically different course dictated by local circumstances in the South Pacific and established a fused court system and legal profession from the outset. The advent of the modern law schools in England and their envious look toward the American experience was timely for establishing law teaching in New Zealand and laid the foundation for the qualifying LLB degree.

II. Innovation

When thinking about the impact of advances with new and emerging technologies in our own age, we are apt to forget that the Victorian era was also a period of substantive law reform and innovation in response to the needs of a rapidly developing industrial society.

A. Civil Liability

At the outset of the nineteenth century "the necessity, or indeed the propriety, of determining the principles of civil liability had not occurred either to judge or jurist".[43] For example, Blackstone in his famous *Commentaries on the Laws of England*, discussed the question of negligence in the context of implied contracts.[44]

However, technology intervened with a rapid increase in the construction of turnpike roads and the development of much faster forms of horse-drawn transport, such as the curricle, based on the Roman racing chariot. This led to a spate of experimental litigation. For example, Cecil Herbert Stuart Fifoot noted:[45]

> The new roads were crossing England; and, in accord with the apparent axiom that disaster is the price of human invention, the unwonted ease of communication multiplied accidents and fertilised litigation. To harvest the rich crop of running-down actions, the judges were forced to recognise negligence as a distinct species of Case.

41 Tai Ahu and others "The case for tikanga Māori: The LLB degree curriculum in a contemporary context" Issue 958 *Law Talk* (New Zealand Law Society, Winter 2024) 24.

42 Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand" (2013) 21 Wai L Rev 1.

43 CHS Fifoot *Judge and Jurist in the Reign of Victoria* (Stevens and Sons Limited, London, 1959) at 31.

44 CHS Fifoot *Judge and Jurist in the Reign of Victoria* (Stevens and Sons Limited, London, 1959) at 32.

45 CHS Fifoot *Judge and Jurist in the Reign of Victoria* (Stevens and Sons Limited, London, 1959) at 32.

To stem the floodgates, the courts restricted liability for negligence to the cases where "the defendant could be said to owe the plaintiff a duty to be careful".[46] But the advent of the railways "tempted plaintiffs with the prospect of still wealthier defendants"[47] than the nineteenth century boy-racers in their chariots, and introduced new questions about third-party liability. For example, in *Austin v Great Western Railway Co* where an un-ticketed child was injured as a result of a collision caused by the company's negligence,[48] the majority in the Queen's Bench awarded damages based on the ticket-contract between the company and his mother, whereas Blackburn J (dissenting) considered that liability rested on a duty of care.

Similarly, occupiers liability posed a difficult question for the courts until Willes J focused on the "character of the entrant"[49] in *Indernaur v Dames*,[50] where a gas-fitter who entered a sugar refinery on the instructions of his employer to check whether a gas-regulator installed on the premises was operating successfully, fell down a shaft which was not properly fenced or lighted and was seriously injured. The refinery argued that it was not liable because the fitter was a bare licensee and should (like a burglar) take the premises as he found them. However, Willes J rejected this argument. Instead, he characterised the gas-fitter as a business visitor or invitee – and found that provided that an invitee used reasonable care for his own safety, he was entitled to expect that the occupier should use reasonable care to prevent damage from any unusual danger which the occupier knew or should have known about. While the application of the decision in *Indemaur v Dames* in the subsequent case of *Heaven v Pender*,[51] where a workman engaged to paint a ship in a dry dock was injured when the staging erected by the dock owner collapsed, arguably created a "generalised" duty of care based on "reasonable foresight"[52] – the courts were quick to retreat from this statement of principle, and preferred to pigeon-hole the decision in *Heaven v Pender* as merely establishing that "under certain circumstances one man may owe a duty to another even though there is no contract between them".[53]

Academic commentary struggled to elucidate a general theory for civil liability and "plunged" into "a catalogue of duties", without attempting any scholarly analysis.[54] Incisive assessment of civil liability was eventually provided by the publication by John Salmond (the New Zealand jurist) of his treatise on *The Law of Torts* in 1907.[55] His genius was demonstrated by his understanding of legal fictions in displacing conventional orthodoxy and asserting that an unborn child should enjoy "the protection of the law against wilful or negligent injury".[56] Overall, Salmond's analysis of civil

46 CHS Fifoot *Judge and Jurist in the Reign of Victoria* (Stevens and Sons Limited, London, 1959) at 32.

47 CHS Fifoot *Judge and Jurist in the Reign of Victoria* (Stevens and Sons Limited, London, 1959) at 32.

48 *Austin v Great Western Railway Co* (1867) LR 2 QB 442.

49 CHS Fifoot *Judge and Jurist in the Reign of Victoria* (Stevens and Sons Limited, London, 1959) at 36.

50 *Indernaur v Dames* (1866) LR 1 CP 274.

51 *Heaven v Pender* (1883) 11 QBD 503.

52 CHS Fifoot *Judge and Jurist in the Reign of Victoria* (Stevens and Sons Limited, London, 1959) at 38.

53 CHS Fifoot *Judge and Jurist in the Reign of Victoria* (Stevens and Sons Limited, London, 1959) at 39, citing *Le Lievre v Gould* [1893] 1 QB 491.

54 CHS Fifoot *Judge and Jurist in the Reign of Victoria* (Stevens and Sons Limited, London, 1959) at 39, 47 and 55.

55 JW Salmond *The Law of Torts* (Stevens and Haynes, London, 1907).

56 JW Salmond "The Principles of Civil Liability" in *Essays in Jurisprudence and Legal History* (Stevens and Haynes, London, 1891) 340.

liability was cited with approval in over 150 judgments across the common law world,[57] his treatise received favourable review in the *Harvard Law Review* and he was awarded the prestigious Ames Medal by the Harvard Law School in 1911.[58]

However, articulating a generalised duty of care in negligence based on reasonable foresight had to await Mrs May Donoghue taking the train from Glasgow to Paisley on Sunday 26 August 1928 to meet her friend in the Wellmeadow Café – and for the famous snail to obligingly crawl into Stevenson's ginger beer bottle. After drinking part of an ice cream float (a mix of ice cream and ginger beer) Mrs Donoghue claimed that she felt ill when the now decomposed snail was poured into her glass together with the remaining ginger beer – and the case (based on the Roman-Dutch law of delict) began its journey through the Scottish courts until it finally arrived before the House of Lords on appeal. Lord Atkin found that "general conceptions of relations giving rise to a duty of care" are of necessity limited for practical reasons, and stated:[59]

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my Neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question …

Currently, the courts are grappling with the question of whether there is a duty of care in negligence to cease emitting greenhouse gases (GHG) by 2030. In *Smith v Fonterra Co-operative Group Ltd*,[60] Michael Smith claims that Fonterra and six other New Zealand companies have contributed materially to the climate crisis. The Supreme Court declined to strike out Mr Smith's claim in public nuisance based on the view that:[61]

> The common law … responds to challenge and change in a considered way, through trial involving the testing of evidence.

Having reached this conclusion, the Supreme Court was reluctant to strike out the claims in negligence and for the novel climate system damage tort also pleaded by Mr Smith.[62] Previously, the authors of *Salmond & Heuston on The law of Torts* found that the courts have been slow to reject claims simply because they are based on the invention of new torts.[63] In particular, they noted that while the English courts have been reluctant to recognise innominate torts based on the suggestion "that the intentional infliction of temporal damage gives rise to a prima facie cause of action which requires some justification by the defendant if he is to escape liability", the New Zealand Court of Appeal recognised that innominate torts exist in *Van Camp Chocolates v Auslebrooks*,[64] concerning

57 RFV Heuston "Sir John Salmond" (1964) Adelaide L Rev 220.

58 Alex Frame *Salmond: Southern Jurist* (Victoria University Press, Wellington, 1995) at 81−82.

59 *Donoghue v Stevenson* [1932] AC 562 at 580.

60 *Smith v Fonterra Co-operative Group Ltd* [2024] NZSC 5; [2024] 1 NZLR 134.

61 *Smith v Fonterra Co-operative Group Ltd* [2024] NZSC 5; [2024] 1 NZLR 134 at [172].

62 *Smith v Fonterra Co-operative Group Ltd* [2024] NZSC 5; [2024] 1 NZLR 134 at [175].

63 RFV Heuston and RA Buckley (eds) *Salmond & Heuston on The law of Torts* (20th ed, Sweet & Maxwell, London, 1992) at 18.

64 *Van Camp Chocolates Ltd v Auslebrooks Ltd* [1984] 1 NZLR 354 (CA).

the unlawful interference with business interests. But more generally, the authors of *Salmond & Heuston on The law of Torts* observed that:[65]

> the law of torts is not a static body of rules, but is capable of alteration to meet the needs of a changing society. Usually, such alteration takes the form of an expansion of liability, especially within the tort of negligence.

The ultimate question, when the claims in *Smith* return to the High Court for trial will likely be the question of attribution of harm to the defendants. While the courts may dismiss claims where there is no evidential link with any one of the multiple defendants involved in the case, the authors of *Salmond & Heuston on The law of Torts* noted that where the damage must have arisen due the negligence of one of the defendants but the plaintiff is unable to determine which defendant was responsible – the onus may shift to the defendants to exculpate themselves, and if they fail to do so plaintiff will be entitled to a remedy.[66] It will therefore be interesting to see how the issue of attribution plays out at trial, but is clear that a number of avenues are available to the High Court to sheet home liability to the defendants either in negligence or the novel climate system damage tort.[67]

B. Corporate Personality

The unprecedented economic activity unleashed by the advent of the railways in the nineteenth century also forced the development of modern company law. For example, Fifoot noted:[68]

> In 1837 fifty railways companies were operating under thirty Acts over five hundred miles of track. Human freight was subsidiary to the carriage of goods and passengers were herded in trucks at the end of coal trains. A depression between 1840 and 1843 was followed, as the classical economists prescribed, by a boom. In 1845 two hundred railway Bills were presented to Parliament, three thousand miles of new line were constructed, a Great Western train reached the speed of forty-four miles an hour on the journey from Paddington to Bristol and a thrilling series of accidents attested the marvels of mechanical science. The "railway mania" culminated in 1846, when two hundred and seventy Bills received Royal Assent and provided for new construction at a cost of £350,000,000 …

This historical insight illustrates the inefficiency of the law, which required the promulgation of a special Act of Parliament in order to incorporate a company. This led to the enactment of the Joint Stock Companies Act 1844, the Limited Liability Act 1855, and the Companies Act 1862. The modern limited liability company was born and could be incorporated easily, simply by complying with the relevant statutory requirements and afforded the shareholders (as the owners of the company) with limited liability.

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65 RFV Heuston and RA Buckley (eds) *Salmond & Heuston on The law of Torts* (20th ed, Sweet & Maxwell, London, 1992) at 42.

66 RFV Heuston and RA Buckley (eds) *Salmond & Heuston on The law of Torts* (20th ed, Sweet & Maxwell, London, 1992) at 246.

67 *Smith v Fonterra Co-operative Group Ltd* [2024] NZSC 5; [2024] 1 NZLR 134 at [171].

68 CHS Fifoot *Judge and Jurist in the Reign of Victoria* (Stevens and Sons Limited, London, 1959) at 39, 47 and 55 at 57−58.

The statutory regime for the modern company was stress-tested in *Salomon v Salomon & Co*,[69] where Aron Salomon (a hitherto successful boot maker) incorporated a company to carry on the business in the Whitechapel High Street in the East End of London. Salomon held 20,001 shares in the company and six members of his family held one share each in strict compliance with the minimum requirements of the Companies Act 1862. However, the company failed within 12 months, due to a depression and strikes in the boot trade, and was wound up. The question for the court, was who should be responsible for the debts owed to the company's unsecured creditors – put simply, were Salomon and the company "distinct legal personalities".[70] The High Court and the Court of Appeal held that Salomon should be responsible for indemnifying the company, and the case came before the House of Lords on appeal. The underlying issue was a general judicial dislike of one-man companies. For example, Fifoot observed:[71]

> This curious creature was so disliked by some judges that they were ready to strain the process of interpretation if they might thus prevent sharp practice.

In particular, Lindley LJ (the last Serjeant-at-Law to be appointed before the order was abolished by the Judicature Act 1873) denounced the company in the Court of Appeal as "a device to defraud creditors".[72] But Lord Halsbury (absolving Salomon of liability) criticised the reasoning of the Court of Appeal and summed matters up in the following way:[73]

> My Lords, the learned judges appear to me not to have been absolutely certain in their own minds whether to treat the company as a real thing or not. If it was a real thing; if it had legal existence, and if consequently the law attributed to it certain rights and liabilities in its constitution as a company, it appears to me to follow as a consequence that it is impossible to deny the validity of the transactions into which it has entered.

Lord Macnaghten focused on the one-man company and stated:[74]

> It has become the fashion, to call companies of this class 'one-man companies.' That is a taking nickname, but does not help one much in the way of argument. If it is intended to convey the meaning that a company which is under the absolute control of one person is not a company legally incorporated, although the requirements of the Act of 1862 may have been complied with, it is inaccurate and misleading. If it merely means that there is a predominant partner possessing an overwhelming influence and entitled practically to the whole of the profits, there is nothing in that contrary to the true intention of the Act or against public policy or detrimental to the interests of the creditors. If the shares are fully paid up, it cannot matter whether they are in the hands of one or many. If the shares are not fully paid, it is as easy to gauge the solvency of an individual as to estimate the financial ability of a crowd.

Put simply:[75]

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69 *Salomon v Salomon & Co* [1897] AC 22.

70 CHS Fifoot *Judge and Jurist in the Reign of Victoria* (Stevens and Sons Limited, London, 1959) at 39, 47 and 55 at 65.

71 CHS Fifoot *Judge and Jurist in the Reign of Victoria* (Stevens and Sons Limited, London, 1959) at 39, 47 and 55 at 65.

72 *Broderip v Salomon* [1895] 2 Ch 323 at 339.

73 *Salomon v Salomon & Co* [1897] AC 22 at 33.

74 *Salomon v Salomon & Co* [1897] AC 22 at 53.

75 *Salomon v Salomon & Co* [1897] AC 22 at 31 (Lord Halsbury).

> Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Mr Salomon. If it was not, there was no person and thing to be an agent at all. It is impossible to say at the same time that there is a company and there is not.

The global impact of the House of Lords' decision in *Salomon* subsequently led Laurence Cecil Bartlett Gower to conclude in the leading scholarly work on company law:[76]

> Unquestionably the limited liability company has been a major instrument in making possible the industrial and commercial developments which have occurred throughout the world.

More generally, the dynamic conception of legal personality was captured by Salmond in his statement that:[77]

> A legal person is any subject-matter to which the law attributes a merely legal or fictitious personality. This extension, for good and sufficient reasons, of the conception of personality beyond the limits of fact – this recognition of persons who are not men – is one of the most noteworthy feats of the legal imagination.

Most recently, the concept of legal personality was utilized in s 14 of the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 which provides that:

> Te Awa Tupua is a legal person and has all the rights, powers, duties, and liabilities of a legal person.

Effectively, this formulation is substantively similar to the conferral of separate legal personality, capacity, and powers on New Zealand registered companies under s 15 and s 16(1) of the Companies Act 1993 – and readily illustrates the dynamic capability of law for innovation.

III. The Environment

"In law context is everything".[78] The Waikato law school was established two years after the Intergovernmental Panel on Climate Change (IPCC) was founded by the World Meteorological Organization and the United Nations Environment Programme in 1988, and two years before the United Nations Conference on Environment and Development was held in Rio de Janeiro in 1992. More locally, consultation on resource management law reform was underway, the government had issued a reform proposal in December 1988, and subsequently the Resource Management Act received assent on 22 July 1991 and came into force later in the same year on 1 October 1991. Previously, in the landmark High Court decision in *Huakina Development Trust v Waikato Valley Authority*,[79] Chilwell J declared that the Treaty of Waitangi was "part of the fabric of New Zealand society" and therefore relevant when deciding an application for the discharge of treated dairy farm water into a tributary of the Waikato River under s 21 of the Water and Soil Conservation Act 1967.

A. Climate change litigation

Notwithstanding the progress made internationally to address climate change under the United Nations Framework Convention on Climate Change 1992, the Kyoto Protocol 1997, and the Paris

76 LCB Gower *Principles of Modern Company Law* (5th ed, Sweet & Maxwell, London, 1992) at 70.

77 John Salmond *Jurisprudence* (7th ed, Sweet & Maxwell, London, 1924) at 336.

78 *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at 548 per Lord Steyn.

79 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210.

Agreement 2015 – the scale and urgency of the challenge of the "climate catastrophe" remains for the current generation to address,[80] and a sense of urgency and frustration with "inadequate efforts to respond to climate change"[81] has resulted in a stream of climate change litigation.

The litigation includes a spate of judicial review applications before the New Zealand senior courts, for example – questioning whether a Crown research institute had used the right methodology to adjust historic temperature data,[82] questioning whether implementing emissions standards for used cars imported into New Zealand would actually reduce pollution,[83] questioning whether the relevant minister was obliged to amend the targets for greenhouse gas (GHG) emissions reductions when new scientific data was published by the IPCC or new international treaty obligations were entered into,[84] questioning whether advice provided by the Climate Change Commission was mathematically consistent with legislative requirements,[85] questioning whether a council decision refusing to sign the Local Government Leaders' Climate Change Declaration was lawful,[86] questioning whether a decision to build a new road in Auckland (the Mill Road project) was lawful under New Zealand's climate change commitments,[87] questioning whether the adoption of a proposed regional land transport plan that would increase GHG emissions was lawful,[88] questioning whether the government was required to consider GHG effects when granting petroleum exploration permits,[89] questioning whether the national land transport programme made sufficient GHG emissions reductions for transition to a zero carbon future,[90] and questioning whether proposed price controls under the New Zealand emissions trading scheme would meet statutory GHG emissions reduction targets.[91]

Additionally, climate change issues have also been litigated in immigration and refugee appeals,[92] in cases under the Fair Trading Act 1986 questioning whether an energy company had engaged in misleading or deceptive conduct regarding statements made about its GHG emissions policies,[93] and most recently (as noted above) in landmark tort claims against GHG emitters.[94]

What is interesting about these decisions is the range of legal issues raised before the courts, the use of general legal principles to argue these cases, and the lawyers engaged to litigate these

80 David Attenborough and others "The Climate Crisis: Towards Zero Carbon" (presentation for the University of Cambridge, February 2020).

81 *Thomson v Minister for Climate Change Issues* [2017] NZHC 733, [2018] 2 NZLR 160 at [133] per Mallon J.

82 *New Zealand Climate Science Education Trust v National Institute of Water and Atmospheric Research Ltd* [2012] NZHC 2297; and [2013] NZCA 555.

83 *Imported Motor Vehicle Industry Association Inc v Minister of Transport* [2011] NZHC 1702.

84 *Thomson v Minister for Climate Change Issues* [2017] NZHC 733, [2018] 2 NZLR 160.

85 *Lawyers for Climate Action NZ Inc v Climate Change Commission* [2022] NZHC 3064.

86 *Hauraki Coromandel Climate Action Inc v Thames-Coromandel District Council* [2020] NZHC 3228.

87 *All Aboard Aotearoa v Waka Kotahi* (filed in the High Court on 25 March 2021). Subsequently, the Government announced on 4 June 2021 that the Mill Road project would not go ahead.

88 *All Aboard Aotearoa v Auckland Transport* [2022] NZHC 1620.

89 *Students for Climate Solutions Inc v Minister of Energy and Resources* [2022] NZHC 2116.

90 *Movement v Waka Kotahi* [2023] NZHC 342.

91 *Lawyers for Climate Action NZ v Minister of Climate Change* [2023] NZHC 1835.

92 *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZSC 107.

93 *Consumer NZ Inc v Z Energy Ltd* [2024] NZHC 2018.

94 *Smith v Fonterra Co-operative Group Ltd* [2024] NZSC 5; [2024] 1 NZLR 134.

matters – who are typically general commercial and litigation lawyers (acting on a pro bono basis) rather than specialist environmental or climate change lawyers. Put simply, climate change litigation is "legally disruptive" because it cannot easily be addressed within existing frameworks[95] – and pushes at the edge of law reform.

B. Specialisation in the LLB Degree

The wide range of issues raised by climate change litigation has therefore reopened the debate about specialisation in the LLB degree – which on the one-hand enriches the student experience and arguably improves the quality of legal practice, but on the other-hand puts at risk the ability "to keep an eye on the bigger picture"[96] – to see "the world whole".[97]

For example, Eloise Scotford and Steven Vaughan reflected on the relationship between environmental law and the core legal subjects – legal systems, public law, contracts, torts, crimes, and property law. They noted that environmental law is typically offered as an LLB elective paper, which "suggests that it is an 'extra' to the core of legal learning, a 'nice to have' for students if they care about the environment and can forgo other subjects often perceived as more relevant for their future careers".[98] In particular, Scotford and Vaughan observed:[99]

> As environmental law teachers know well, we are faced with difficult pedagogical and disciplinary decisions in teaching environmental law. Can we assume that environmental law students have learned or assimilated enough foundational legal knowledge that we can expect them to 'apply' this or move beyond this in learning about law that relates to environmental problems? Can we explore interesting facets of environmental law – examining new regimes or complex legal questions in a range of areas – safe in the knowledge that students understand basic legal doctrines, procedures and frames of analysis? In our experience, the answer is often no. Students can struggle to connect their foundational legal knowledge to environmental problems, or this connection may be obscured through teaching choices that stray from 'core' legal concepts and skills.

This analysis led them to consider whether core legal principles should be included in environmental law papers, or alternatively whether core law papers should be restructured and taught through the lens of environmental problems or whether new compulsory first-year papers should be designed to focus on case studies (like climate change) and provide a disciplinary foundation for the study of law and an "intensive introduction to the … role of law in addressing social challenges".[100]

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95 Elizabeth Fisher, Eloise Scotford and Emily Barritt "The Legally Disruptive Nature of Climate Change" (2017) 80 Mod L Rev 173.

96 Rabinder Singh "The Unity of Law – or the dangers of over-specialization" (paper presented for the Society of Legal Scholars Centenary Lecture, Birmingham, November 2013) 1.

97 Dean Knight and Claudia Geiringer (eds) *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008).

98 Eloise Scotford and Steven Vaughan "Environmental law and the core of legal learning: framing the future of environmental lawyers" OUP Blog (15 October 2018).

99 Eloise Scotford and Steven Vaughan "Environmental law and the core of legal learning: framing the future of environmental lawyers" OUP Blog (15 October 2018).

100 Eloise Scotford and Steven Vaughan "Environmental law and the core of legal learning: framing the future of environmental lawyers" OUP Blog (15 October 2018).

C. Embedding Climate Change in the LLB Degree Curriculum

Kim Bouwer also argued that climate change should be included in the core law curriculum "to ensure students are properly equipped" for the "fast-changing risk factors that will dominate their professional lives".[101] Additionally, she considered that focusing on the core curriculum was appropriate because "the laws that are most relevant to the environment are also the most relevant to wealth creation through the use and ownership of land and natural resources".[102]

In the context of producing climate conscious lawyers, Brian Preston stressed the importance of increasing "the salience of climate change issues in the teaching of not only elective environmental law courses" but also in papers, such as corporate entities, evidence, procedure, and legal ethics.[103] He also emphasised the importance of providing holistic legal advice, beyond merely giving advice narrowly about the relevant law:[104]

> A commonly held view is that lawyers should give advice only about the law … The problem with this view is that legal problems and disputes are never only about the law. Providing clients with sound advice to solve a legal problem or dispute requires addressing not merely legal issues but also the financial, the emotional and psychological, the relational and social, the environmental, and ethical consequences of different courses of action. Clients can thereby understand the consequences, costs and uncertainties associated with alternative courses of action and make an informed choice. This holistic advice is given by lawyers to clients in many areas of law on a daily basis. Adding the climate change consequences as a consideration is a natural extension of this everyday practice.

An essential component of this approach to mainstreaming climate consciousness in the law curriculum is the focus on legal ethics. For example, Vaughan interrogated the responsibility of lawyers where clients wish to carry out lawful but potentially environmentally harmful activities. He argued that professional responsibility under conduct and client care rules my go beyond simple requirements to avoid "assisting in fraud or crime"[105] and may by implication prevent lawyers from taking a narrow view in relation to harmful but otherwise lawful activities. In particular, he argued that narrow conceptions of professional responsibility are inappropriate in the context of the character and scale of current environmental issues. More importantly, he considered that decisions to take on new clients or to take on new matters for existing clients should be guided by "ordinary morality" where the client wishes to carry out lawful but environmentally harmful activities. Beyond that, Vaughan also considered that other factors may also prevent lawyers from acting for clients who wish to carry out such harmful activities, including, the reputation of the firm, pressure from young lawyers in the firm, and pressure from other clients who are committed to environmental and social responsibility.[106]

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101 Kim Bouwer and others "Climate Change isn't Optional: Climate Change in the Core Law Curriculum" Legal Studies (2023) 43 at 240 and 246.

102 Kim Bouwer and others "Climate Change isn't Optional: Climate Change in the Core Law Curriculum" Legal Studies (2023) 43 at 246.

103 Brian J Preston "Climate Conscious Lawyering" (2021) 95 Australian Law Journal 51 at 66.

104 Brian J Preston "Climate Conscious Lawyering" (2021) 95 Australian Law Journal 51 at 52.

105 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, Chapter 2 Rule of law and administration of justice.

106 Steven Vaughan "Existential Ethics: Thinking Hard About Lawyer Responsibility for Clients' Environmental Harms" (2023) 76 Current Legal Problems 3.

D. Legal Ethics

More broadly, David Howarth emphasised the vital importance of teaching legal ethics as part of the LLB degree, based on experience from the global banking and financial crisis (2007−2009) and the role potentially played by lawyers in the market failure.[107] In particular he considered that:[108]

> The ethical formation of lawyers should take account of what lawyers actually do. That means more emphasis on questions of consent, the conditions for maintaining the rule of law, harm avoidance and public benefit and less on the peculiar conditions of litigation. The central conflicts of lawyers' lives, beyond the obvious one between their own interests and those of their clients, are … not so much between the claims of their clients and the claims of their clients' opponents as between the claims of their clients and the claims of the rest of the world.

The central question posed by Howarth is whether lawyers should use their "knowledge of the law and skill in manipulating legal rules" to meet client objectives[109] – put simply, whether they should help their clients to breach ordinary moral standards. He observed that approaching legal ethics as merely code compliance "seems to miss the point that the public interest needs to be constructed and respected".[110] Taking the public interest into account and avoiding harm are central to protecting the environment and promoting a more sustainable, carbon zero, future.

Legal ethics has been included in the New Zealand LLB degree curriculum as a mandatory paper for admission as a barrister and solicitor since 2000, to address previous concerns about "a lack of clear and generally accepted principles of professional responsibility and ethical conduct".[111] While, Howarth supported this approach, he considered that more in-depth study of legal ethics may be required either via an advanced-level paper (like the paper on "The Responsibilities of Public Action" offered by the Kennedy School of Government at Harvard)[112] or by embedding "ethical questioning of the role of lawyers in furthering public welfare" across the substantive papers in the law degree curriculum – including, in particular, commercial law.[113]

Both Vaughan and Howarth referred to the importance of maintaining the rule of law. For Vaughan, upholding the rule of law goes beyond merely paying lip service to procedural justice, but requires the delivery of substantive justice – promoting a peaceful and inclusive society focused

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107 David Howarth *Law as Engineering: Thinking about What Lawyers Do* (Edward Elgar Publishing, Cheltenham, UK, 2013) at 97.

108 David Howarth *Law as Engineering: Thinking about What Lawyers Do* (Edward Elgar Publishing, Cheltenham, UK, 2013) at 178.

109 David Howarth *Law as Engineering: Thinking about What Lawyers Do* (Edward Elgar Publishing, Cheltenham, UK, 2013) at 179.

110 David Howarth *Law as Engineering: Thinking about What Lawyers Do* (Edward Elgar Publishing, Cheltenham, UK, 2013) at 181.

111 Peter Spiller "The Legal Profession" in Peter Spiller, Jeremy Finn, and Richard Boast (eds) *A New Zealand Legal History* (2nd ed, Thomson Reuters, Wellington, 2001) 293 at 306.

112 David Howarth *Law as Engineering: Thinking about What Lawyers Do* (Edward Elgar Publishing, Cheltenham, UK, 2013) at 179.

113 David Howarth *Law as Engineering: Thinking about What Lawyers Do* (Edward Elgar Publishing, Cheltenham, UK, 2013) at 181.

on the transition to a more sustainable future.[114] Uniquely, New Zealand lawyers are placed under a statutory duty to uphold the rule of law.[115]

E. Future Environmental Law Teaching

Waikato has responded to these pedagogical challenges by establishing the world's first Bachelor of Climate Change degree (which includes a law major) in 2022. However, the current debate within the discipline of law presents thought-provoking options for how climate change law and environmental law should be taught in the future, for example:

- whether core law papers should be restructured and taught through the lens of environmental problems; or
- whether a disciplinary foundation paper like the paper on "Law's Connections" taught by Maria Lee at University College London should be included in the LLB degree;[116] or
- whether a wider view should be taken about addressing societal challenges (like climate change) by including a more general disciplinary foundation paper as a component of all bachelors degrees offered by the university, like the papers which aim to embed trans-disciplinarity, innovation, and entrepreneurship competencies and skills across the curriculum and enable students to "engage with "wicked" or complex problems", recommended by the Curriculum Framework Transformation Taskforce at the University of Auckland.[117]

This does not mean that offering LLB elective papers on climate change law or environmental law is redundant. But the scale of current environmental issues, and the novel use of general legal principles in climate change litigation demonstrates that a more holistic view of the dynamic capability for law to drive transformational societal change should be actively considered.

IV. BEYOND …

The Waikato law school has had the clear advantage of a forward looking and innovative vision for legal education based on the principles of professionalism, biculturalism, and the study of law in context. This has been achieved:

- through a focus on law and technology (with the first New Zealand computer lab funded by the District Law Society)[118] and by offering compulsory papers on corporate entities and dispute resolution;[119]

114 Steven Vaughan "Existential Ethics: Thinking Hard About Lawyer Responsibility for Clients' Environmental Harms" (2023) 76 Current Legal Problems 3 at 18.

115 Lawyers and Conveyancers Act 2006, s 4(a).

116 Eloise Scotford and Steven Vaughan "Environmental law and the core of legal learning: framing the future of environmental lawyers" OUP Blog (15 October 2018).

117 Jaime King and Marie McEntee *Curriculum Framework Transformation Taskforce − Embedding Transdisciplinarity, Innovation and Entrepreneurship in the Curriculum: Recommendations* (University of Auckland, 2022) 1.

118 Margaret Wilson "Challenges of Legal Education: The Waikato Law School Experience" (2010) 18 Wai L Rev 15 at 21.

119 Margaret Wilson "Challenges of Legal Education: The Waikato Law School Experience" (2010) 18 Wai L Rev 15 at 20.

- by providing an introduction to biculturalism through the materials selected for compulsory law papers;[120] and
- offering "students a multi-disciplinary approach to the study of law" by including non-law papers in the LLB degree to address "the relationship between the legal system and the social, economic, cultural, and political systems".[121]

But the challenge for the law school is to continue the tradition of innovation.[122]

Studying law is a stimulating experience that equips graduates for life. For example, Richard Susskind observed:[123]

> the law is one of humanity's most remarkable and sophisticated constructs, a comprehensive system of knowledge that provides a framework for human order and behaviour.

He also emphasised the value of legal education for a wide variety of employment opportunities across all sectors of the economy:[124]

> not just because law graduates have a grasp of a large body of rules and regulations but for the intellectual rigour, the clarity of analysis, the precision with language, the facility for critical thought, the capacity for intensive research, and the confidence in public speaking that a good degree in law should build and provide.

Simon Chesterman made a similar point and emphasised that studying law enables graduates to make a difference in the world and change peoples' lives.[125]

However, the fundamental question posed by Susskind is "what are we training large number of young lawyers to become?" – are we training young lawyers to be craftsmen giving jurisdiction specific bespoke advice:[126]

> Or are we preparing the next generation of lawyers to be more flexible, team-based, technologically sophisticated, commercially astute, hybrid professionals, who are able to transcend legal and professional boundaries, and speak the language of the boardroom and the marketplace?

Generally, the point made by Susskind is that legal practice will be radically transformed by the dynamic force of consumer demand for more legal services at less cost,[127] the liberalisation of legal practice by permitting the uptake of alternative business structures to the typical partnership and by allowing external investment to be injected into law firms by private equity and venture

120 Margaret Wilson "Waikato Law School: A New Beginning" (1990) 14 NZULR 103 at 111.

121 Margaret Wilson "Waikato Law School: A New Beginning" (1990) 14 NZULR 103 at 107.

122 Margaret Wilson "Challenges of Legal Education: The Waikato Law School Experience" (2010) 18 Wai L Rev 15 at 25.

123 Richard Susskind *Tomorrow's Lawyers: An Introduction to Your Future* (Third Edition, Oxford University Press, Oxford, 2023) at 222.

124 Richard Susskind *Tomorrow's Lawyers: An Introduction to Your Future* (Third Edition, Oxford University Press, Oxford, 2023) at 223.

125 Simon Chesterman "NUS Law Open House 2022" (presentation for National University of Singapore, Faculty of Law, February 2022).

126 Richard Susskind *Tomorrow's Lawyers: An Introduction to Your Future* (Third Edition, Oxford University Press, Oxford, 2023) at 224.

127 Richard Susskind *Tomorrow's Lawyers: An Introduction to Your Future* (Third Edition, Oxford University Press, Oxford, 2023) at 13.

capital,[128] and through the introduction of technology (including artificial intelligence and machine learning).[129] For example:

- The dynamic force of liberalisation is now firmly an area for debate following the publication of the independent review, *Regulating Lawyers in Aotearoa New Zealand*, in March 2023.
- The launch of *Lexis+*, a legal research platform powered by extractive AI technology, by LexisNexis New Zealand in July 2024, will likely transform how we approach legal research – both in legal practice and in the law school.
- Litigation technology specialists have emerged, developing AI software-based systems, with the launch of *Digital litigation solutions* by Chapman Tripp in July 2024.
- Automated online dispute resolution services have been part of the New Zealand legal scene since the launch of CODR by Michael Herron KC in 2016.
- Chief Justice Helen Winkelmann launched the *Digital Strategy for Courts and Tribunals* in March 2023, which identifies opportunities for "enhanced use of technology" by New Zealand courts and tribunals for digital document and case management and updating audio-visual technologies to support online hearings.

What does this mean for the future of legal education? The core legal subjects – legal systems, public law, contracts, torts, crimes, and property law – will remain at the heart of the law degree. Similarly, the disciplinary foundation provided by legal method will remain critical because it teaches students:[130]

> how to think like a lawyer, how to marshal and organize a complex set of facts, how to conduct legal research, how to reason with the law (deductively, inductively, and analogically), how to interpret legislation and case law …

Beyond that, Susskind also emphasised the important place in the law degree for theoretical subjects like jurisprudence (the philosophy of law) and Roman law – which are "immensely rewarding as self-contained intellectual pursuits"[131] – and provide a firm link with legal tradition. In particular, David Howarth focused on the field of jurisprudence that studies "the properties of legal rules"[132] – the building blocks which "provide lawyers with the materials they use for making … devices and structures",[133] and emphasised the "intensely practical" outcome of this form of philosophical inquiry:[134]

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128 Richard Susskind *Tomorrow's Lawyers: An Introduction to Your Future* (Third Edition, Oxford University Press, Oxford, 2023) at 15.

129 Richard Susskind *Tomorrow's Lawyers: An Introduction to Your Future* (Third Edition, Oxford University Press, Oxford, 2023) at 27.

130 Richard Susskind *Tomorrow's Lawyers: An Introduction to Your Future* (Third Edition, Oxford University Press, Oxford, 2023) at 226.

131 Richard Susskind *Tomorrow's Lawyers: An Introduction to Your Future* (Third Edition, Oxford University Press, Oxford, 2023) at 222.

132 Exemplified by the work of HLA Hart *The Concept of Law* (Clarendon Press, Oxford, 1961); and Ronald Dworkin *Taking Rights Seriously* (Harvard University Press, 1978).

133 David Howarth *Law as Engineering: Thinking about What Lawyers Do* (Edward Elgar Publishing, Cheltenham, UK, 2013) at 160.

134 David Howarth *Law as Engineering: Thinking about What Lawyers Do* (Edward Elgar Publishing, Cheltenham, UK, 2013) at 160.

> Anyone with a contract or a statute to draft uses them everyday, and if robustly useable new ones were developed, the effect would be the legal equivalent of the invention of plastics or semiconductors.

But more importantly, Susskind argued for teaching about "future trends in legal services" either as a compulsory paper or embedded across the law curriculum,[135] together with electives that will enable students "to learn some key twenty-first century legal skills that will support future law jobs" – such as, organisational psychology, project management, and risk management[136] – echoing the call by HG Wells for "Professors of Foresight".[137] Enhancing the law curriculum in this way would involve practitioners and experts from other disciplines in teaching delivery.

Preston, as noted above, also called for papers on corporate entities, evidence, and procedures to be offered as standard components of the LLB degree curriculum, while Vaughan and Howarth emphasised the importance of teaching legal ethics and Scotford and Vaughan raised the issue of student employability – and the focus on LLB elective law papers that are perceived as more relevant for their future careers, such as, family law, commercial transactions, immigration and refugee law, employment law, mediation, intellectual property, banking and finance law, and revenue law.

Additionally, law schools will also need to satisfy curiosity and imagination (the great intellectual virtues of university study) which are at their sharpest and their most elastic during undergraduate study[138] – and offer the widest practicable selection of LLB elective law papers.[139]

The space for elective law papers in the LLB degree curriculum is likely to become more competitive and crowded as a result, and law schools will be faced with difficult prescriptions choices about which papers to timetable within a university environment focused on viability and minimum student enrolment numbers.

Overall, Susskind considered that law academics and the legal profession should be better "dovetailed" and he articulated a future view of law schools based on the London teaching hospitals where:[140]

> under one roof, a professor of medicine will treat patients, train young doctors, and undertake research, often in the one day. In continental Europe there is a stronger tradition of university law professors also being in legal practice. But in England and to a large extent in the US and Canada, legal practitioners and legal scholars operate in different worlds …

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135 Richard Susskind T*omorrow's Lawyers: An Introduction to Your Future* (Third Edition, Oxford University Press, Oxford, 2023) at 226.

136 Richard Susskind *Tomorrow's Lawyers: An Introduction to Your Future* (Third Edition, Oxford University Press, Oxford, 2023) at 227.; Roland Schultz "Psychology and Effective Lawyering: How can Psychological Insights Shape Legal Practice and Decisions and do Psychologically Savvy Lawyers Perform More Effectively?" (presentation to Fiji Law Society Convention, January 2024).

137 Elen Stokes "Wanted: Professors of Foresight in Environmental Law!" (2019) 31 Journal of Environmental Law 175 at 176.

138 Lord Sumption "Those who wish to Practice Law should not Study Law at University" (presentation to the Faculty of Law, University of Cambridge, April 2014).

139 Wayne Courtney "NUS Law Open House 2022" (presentation for NUS Faculty of Law, Singapore, February 2022).

140 Richard Susskind *Tomorrow's Lawyers: An Introduction to Your Future* (Third Edition, Oxford University Press, Oxford, 2023) at 223.

The medical school analogy is not entirely unrealistic – because the point of both disciplines "is not just to understand the world but to change it"[141] – and, it is for note that, the first modern treatise on medical ethics was published under the title of "jurisprudence" in 1794.[142] However, William Twining noted that this "most prestigious" variant of the professional law school has not yet been realised.[143]

Alternatively, Howarth suggested that law schools could operate like law reform commissions, thinking holistically about law and policy.[144] In articulating the research-based, law reform commission concept, he considered that law schools would be innovative in understanding problems and developing solutions that are "superior" to those "currently in use in practice".[145] This approach would encourage both interdisciplinary team work with academics from other disciplines within the university and with public and private sector stakeholders, and with intradisciplinary teams in the law school. The ultimate objective of research in the future law school would be "to solve design problems and create new devices".[146] Consistent with the law reform commission concept is the approach to "practical legal scholarship" articulated by Lord Justice Robert Goff (as he then was) and latterly by Lord Burrows which views law academics and judges as playing complementary roles in the development of the common law[147] – in particular, by placing particular disputes in a larger context that can "assist the proper judicial development of principle".[148]

Consistent with these future views of the law school, Spiller noted that law is an applied discipline that requires law schools to look both inwards toward the intellectual university community and outwards toward the legal profession,[149] while Howarth was emphatic that law academics need to exist in both worlds.[150] The firm relationship with the profession in providing the knowledge and skills required for admission to legal practice was also emphasised by Spiller who found that law schools could not "function effectively unless a good proportion of the staff have themselves had reasonable and recent experience of the practice of law".[151] In particular, Ernest Weinrib observed

141 David Howarth *Law as Engineering: Thinking about What Lawyers Do* (Edward Elgar Publishing, Cheltenham, UK, 2013) at 149.

142 Thomas Percival *Medical Jurisprudence; or A Code of Ethics and Institutes, Adapted to the Professions of Physic and Surgery* (Manchester, 1794).

143 William Twining *Blackstone's Tower: The English Law School* (Sweet & Maxwell, London, 1994) at 52.

144 David Howarth *Law as Engineering: Thinking about What Lawyers Do* (Edward Elgar Publishing, Cheltenham, UK, 2013) at 153.

145 David Howarth *Law as Engineering: Thinking about What Lawyers Do* (Edward Elgar Publishing, Cheltenham, UK, 2013) at 169.

146 David Howarth *Law as Engineering: Thinking about What Lawyers Do* (Edward Elgar Publishing, Cheltenham, UK, 2013) at 169.

147 Robert Goff "The Search for Principle" (paper presented as the Maccabean Lecture in Jurisprudence, The British Academy, London, May 1983) Proceedings of the British Academy 69 at 187.

148 Lord Burrows "Judges and Academics, and the Endless Road to Unattainable Perfection" (paper presented as The Lionel Cohen Lecture 2021, Hebrew University of Jerusalem, December 2021) 4.

149 Peter Spiller "The Legal Profession" in Peter Spiller, Jeremy Finn, and Richard Boast (eds) *A New Zealand Legal History* (2nd ed, Thomson Reuters, Wellington, 2001) 293 at 303.

150 David Howarth *Law as Engineering: Thinking about What Lawyers Do* (Edward Elgar Publishing, Cheltenham, UK, 2013) at 148.

151 Peter Spiller "The Legal Profession" in Peter Spiller, Jeremy Finn, and Richard Boast (eds) *A New Zealand Legal History* (2nd ed, Thomson Reuters, Wellington, 2001) 293 at 303.

that legal practice and university law study will only be "disjointed" when there is no shared common understanding of the law.[152]

Looking to the future of university education more generally, Richard and Daniel Susskind observed that while traditional "one size fits all" approaches to lectures and tutorials can produce outstanding results for "the brightest students" in well-resourced universities, the sharp division between the delivery of content in lectures and independent study does not serve the majority of students well.[153] In contrast, deploying "adaptive" or "personalized" learning systems like Moodle allows academics to interact with students outside class, but more importantly replicates "the personal attention involved in the desirable, but unaffordable system of intensive one-to-one tutoring" that continues to work effectively at Oxbridge.[154] They also noted that TED-style video lectures can be used to "flip" the classroom and enable students to focus in class on the skills necessary for completing assessment work.[155] Similarly, they found that online systems can also be deployed to mark student assessment work, for example, using "peer-grading" tools "where students mark each other's work" and "machine-grading" algorithms that computerise marking.[156] More generally, they observed that greater uptake of online learning platforms (like Moodle) captures a more diverse and rich data set about student activity and performance that can be harnessed via "learning analytics" (such as the Ōritetanga learner success project at Waikato) to provide better information about where academic intervention is most needed to support student learning and achievement and to continually refine the adaptive and personalised approach to learning via the Moodle platform.[157]

Harnessing student achievement and success segues into academic quality. Margaret Wilson and ATH Smith noted the ongoing "interest and concern amongst legal academics in the development of the best teaching methods",[158] while Margaret Thornton and Lucinda Shannon emphasised the importance of brand marketing and the need for law schools to "work hard to associate their product with the idealised futures imagined by prospective customers".[159] Put simply, successful brands are underpinned by customer service and assured product quality.

The predictions regarding the future of university education led Richard and Daniel Susskind to conclude that:[160]

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152 Ernest J Weinrib "Can Law Survive Legal Education?" (2007) 60 Vand L Rev 401 at 404.

153 Richard Susskind and Daniel Susskind *The Future of the Professions: How Technology will Transform the Work of Human Experts* (Oxford University Press, Oxford, 2017) at 55.

154 Richard Susskind and Daniel Susskind *The Future of the Professions: How Technology will Transform the Work of Human Experts* (Oxford University Press, Oxford, 2017) at 56 and 166.

155 Richard Susskind and Daniel Susskind *The Future of the Professions: How Technology will Transform the Work of Human Experts* (Oxford University Press, Oxford, 2017) at 57.

156 Richard Susskind and Daniel Susskind *The Future of the Professions: How Technology will Transform the Work of Human Experts* (Oxford University Press, Oxford, 2017) at 58.

157 Richard Susskind and Daniel Susskind *The Future of the Professions: How Technology will Transform the Work of Human Experts* (Oxford University Press, Oxford, 2017) at 59 and 163.

158 Margaret Wilson and ATH Smith "Fifty years of legal education in New Zealand: 1963−2013 where to from here?" (2013) 25 NZULR 801 at 813 and 815.

159 Margaret Thornton and Lucinda Shannon "Selling the Dream: Law School Branding and the Illusion of Choice", (2013) 23 Legal Education Review 249 at 256.

160 Richard Susskind and Daniel Susskind *The Future of the Professions: How Technology will Transform the Work of Human Experts* (Oxford University Press, Oxford, 2017) at 60.

> In all of these illustrations the historical monopoly of traditional teachers, tutors, and lecturers is challenged. There is less need for the 'sage on the stage' and more of a job for the 'guide on the side' – those who help students navigate through alternative sources of expertise. There are new roles and new disciplines, like education software designers who build the 'adaptive' learning systems, the content curators who compile and manage online content, and the data scientists who collect large data sets and develop 'learning analytics' to interpret them …

Underlying these trends is the increasing move away from the bespoke craftsmanship model typified by popular media portrayals of the "advocate in the courtroom, the surgeon in the operating theatre, the professor in the tutorial" toward more cost-effective systems that increasingly rely on the contribution of professional support staff and the use of technology.[161] This does not inevitably mean that law schools and universities will become redundant, but a dynamic shift in focus will be required to meet the education and training needs of tomorrow's society,[162] and law academics will therefore need to ply their craft in different ways. Richard and Daniel Susskind also found that the general consumer desire to purchase "more professional work at less cost" is likely to have an impact on university academics in the same way that it will impact other professions.[163] For example, Natalie Skead observed that administrative burdens and teaching workloads are increasing and academic life is "becoming less noble".[164] But unwillingness to revisit our methods of educational delivery would not appear to be an option.[165]

It will therefore be important for law schools to focus on fundamental principles underpinned by the core law papers and legal method skills, and the moral and professional values from legal ethics – together with cultural competence,[166] and the wider range of skills identified by Susskind that future law graduates will require. The demographics of the current Waikato law student cohort (female 72 per cent, Māori 30 per cent, and Pacific 14 per cent) also likely represents the future 2040 gender and ethnicity balance of the legal profession. Arguably, the potential increase in the number of Pacific lawyers (from 3 per cent of the profession in 2023)[167] also increases the importance of cultural competence, and the minimum need to include a paper on Pacific peoples and the law as a compulsory aspect of the LLB degree curriculum.[168] Going forward, research-led

161 Richard Susskind and Daniel Susskind *The Future of the Professions: How Technology will Transform the Work of Human Experts* (Oxford University Press, Oxford, 2017) at 198.

162 Richard Susskind and Daniel Susskind *The Future of the Professions: How Technology will Transform the Work of Human Experts* (Oxford University Press, Oxford, 2017) at 199.

163 Richard Susskind and Daniel Susskind *The Future of the Professions: How Technology will Transform the Work of Human Experts* (Oxford University Press, Oxford, 2017) at 258−260.

164 Natalie Skead and others "Global Law Deans: The Changing Patterns of Law School Administration" (presentation to Global Law Schools' Summit, OP Jindal University, India, December 2021).

165 Richard Susskind and Daniel Susskind *The Future of the Professions: How Technology will Transform the Work of Human Experts* (Oxford University Press, Oxford, 2017) at 259.

166 Natalie Skead and others "Global Law Deans: The Changing Patterns of Law School Administration" (presentation to Global Law Schools' Summit, OP Jindal University, India, December 2021).

167 Marianne Burt and Jaqui Van Der Kaay "Snapshot of the Profession 2023" (Summer 2023) 956 Law Talk (New Zealand Law Society) 8.

168 Mele Tupou-Vaitohi and William Gucake *Improving Pasifika Legal Education Project Literature Review* (Michael & Suzanne Borrin Foundation, 2022).

teaching where law academics are experts in their fields, and students are taught by subject-matter experts, will also remain important to underpin academic quality.[169]

Overall, we are likely to see more change in university education during the period to 2040 than has occurred since the innovation by Blackstone of teaching English law in universities in 1759.[170] Establishment of the Waikato Law School provided a unique opportunity to develop a new approach to legal education, designed to provide graduates with "a better education" than that which was available at other universities – and the challenge for the law school is continue the tradition for innovation.[171] Importantly, universities and law schools (and medical schools) have "a built-in ability to survive over very long periods of time"[172] as the Bologna experience demonstrates.

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169 Margaret Wilson "Waikato Law School: A New Beginning" (1990) 14 NZULR 103 at 112; Simon Chesterman "NUS Law Open House 2022" (presentation for National University of Singapore, Faculty of Law, February 2022); Natalie Skead "Supportive Learning in the UWA Juris Doctor" (presentation for the University of Western Australia Law School, April 2023).

170 Richard Susskind and Daniel Susskind *The Future of the Professions: How Technology will Transform the Work of Human Experts* (Oxford University Press, Oxford, 2017) at 60−61.

171 Margaret Wilson "Waikato Law School: A New Beginning" (1990) 14 NZULR 103 at 104 and 109.

172 David Howarth *Law as Engineering: Thinking about What Lawyers Do* (Edward Elgar Publishing, Cheltenham, UK, 2013) at 150.

"The 21st Century Enlightenment": A Legal Perspective on the Need for Stronger Long-Term Thinking in New Zealand Climate Change Policy

"Te Whakamāramatanga o te Rautau 21": He Tirohanga ā-Ture mō te Matea kia Kaha Ake te Whakaaroaro i roto i te Wā Roa e pā ana ki te Kaupapahere Panonitanga Āhuarangi i Aotearoa

Finn Gambrill

> There is an opportunity for us to turn to our advantage and reshape our identity. It is a transition that can and must be made, and it is a transition that can and must be just. This is my generation's nuclear-free moment.[1]

Those words, spoken by, at the time, future Prime Minister Jacinda Ardern at Labour's 2017 election campaign launch, inspired the possibility that a politician may have a strong long-term vision. Such a long-term vision is sorely lacking in the current political world.[2] This essay will examine the issues approaching climate change from a short-term perspective, the problems with current long-term policies, in particular with the Statute and finally, suggest some potential solutions in relation to climate change policy, all from a New Zealand perspective.

I. Short-Term Policy: Causes and Problems

Short-term policy is generally popular. Humans do not have an evolutionary urge to focus on long-term issues.[3] In the totality of our existence, knowledge of our material impact on the future is an extraordinarily recent discovery − this predisposition to focus on the short-term leads to a lack of emphasis on sustainability.[4] With a lack of emphasis on sustainability, long-term interests are the first to suffer.[5] When long-term interests suffer, problems which are not immediately visible become even less important. These problems are known as *creeping problems*.[6] A creeping

1 Jacinda Ardern "Labour Party Campaign Launch" (Wellington, New Zealand, 7 September 2017).

2 Jonathan Boston "Protecting Long-Term Interests in a Short-Term World: An Agenda for Better Governmental Stewardship" (2017) 15 NZJPIL 93 at 93−96.

3 At 96.

4 Natalie Slawinski and others "The Role of Short-Termism and Uncertainty Avoidance in Organisational Inaction on Climate Change: A Multi-Level Framework" (2017) 56(2) Bus Soc 254 at 260.

5 Boston, above n 2, at 101.

6 At 101.

problem has long and incremental changes, imperceptible to the naked eye.[7] The majority of the climate crisis problems, at least for most of the Western world, present as creeping problems. The greenhouse gas (GHG) concentrations in the atmosphere, or the increase of acidity in the oceans, are not perceptible on a day-to-day basis. Neither is the accumulation of chemicals or the decline of honeybees, nor the decline in general water quality.[8] Because these problems are not always noticeable, they are neglected.

Long-term interests are also at risk when policies take a long time to implement. If bipartisanship is required, it is often nowhere to be seen, especially in the ever more polarised political world.[9] Such intertemporal exchanges face similar hurdles to creeping problems.[10] There can be a considerable period of time between a policy being brought in and the goals of said policy actualising it into a measurable good for society.[11] The difficulty of these policies is exacerbated further when future governments need to upkeep them – the bipartisanship element. Future governments are inherently unlikely to want to maintain a policy that has proven unpopular as there is little chance for any political gain by doing so.[12] The government may have even been elected to alter or discontinue such a policy.[13] If this is the case, the likelihood of bipartisanship will decrease further. Moreover, when implementation takes a policy beyond the next election, it may be at risk of being abandoned.[14] This creates further problems as the effort of an entire electoral cycle may be undone. Thus, policy is prevented from moving in the direction it needs to.

The ignoring of creeping problems, disregard for intertemporal exchanges, and lack of bipartisanship are evident in policy decisions made by the current coalition government elected in 2023. On 11 June 2024, the government announced they were abandoning the planned 2025 addition of agriculture to the Emissions Trading Scheme (ETS) and disbanding He Waka Eke Noa.[15] The ETS was established in 2008 and is a key tool to assist New Zealand with its climate goals.[16] Agriculture has never been included. This lack of inclusion has been hotly debated.[17] The previous government had legislated to include agriculture in the ETS by 2025.[18]

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7 At 101.

8 At 102.

9 Thomas Carothers and Andrew O'Donoghue "How to Understand the Global Spread of Political Polarization" (1 October 2019) Carnegie Endowment <www.carnegieendowment.org>.

10 Boston, above n 2, at 102.

11 At 102.

12 At 98−100.

13 A large part of the 2023 National Campaign was the repealing of "Three Waters".

14 Jonathan Boston *Governing for the Future* (1st ed, Emerald Publishing Ltd, Leeds, 2017) at 75.

15 Julia Gabel "Agriculture Removed from the Emissions Trading Scheme; He Waka Eke Noa disbanded" *New Zealand Herald* (New Zealand, 11 June 2024) at 1.

16 Climate Change Response (Emissions Trading) Amendment Act 2008, s 2A.

17 Russell Palmer "Law removing future ETS agriculture obligations passes first reading" *Radio New Zealand* (New Zealand, 26 June 2024) <www.rnz.co.nz/news/political/520624/law-removing-future-ets-agriculture-obligations-passes-first-reading>.

18 Julia Gabel "Agriculture Removed from the Emissions Trading Scheme; He Waka Eke Noa disbanded" *New Zealand Herald* (New Zealand, 11 June 2024) at 1.

The alteration of both these policies is an example of the struggles of implementing intertemporal exchanges. Jonathan Boston outlined five conditions of how all other things being equal, such polarising policies can be problematic politically:[19]

1. There is a significant gap between the timing of the costs and the benefit of the investment.
2. The costs fall disproportionately on powerful groups, and the benefits are spread among the population.
3. The risks or effects are not observable … while the costs are obvious.
4. The cost and benefit are largely incommensurable. For example, costs are financial, and the benefits are something more intangible.
5. There is more certainty about the nature of the costs than the nature of the benefits.

All five of these problems are relevant to the coalition government's decision. The first and second conditions are clear in that the cost for the agricultural industry, New Zealand's largest exporter, would be felt as soon as they are included in the ETS, and the industry would not see a benefit immediately; the intended benefit is also the entire country and the world not just the agricultural industry. The nature of climate change as a creeping problem evidences the third condition. The fourth and fifth conditions are also relevant because of the creeping problem nature of the issues; the benefits are all theoretical (albeit scientifically clear), and the costs are all material (as costs almost always are). By altering these policies, particularly the ETS alteration, the can is being kicked down the road, and the burden will fall on future generations. The real issue here goes beyond the mere policy itself; it is an obsession with idealism. There is no consideration for the importance of doing something to combat the problems the world is faced with. Instead, the policymakers play a political game of hot potato, with the future of the world the item being tossed around. The policy need not be perfect, but it needs to be planned, clear and intentional.[20]

II. Issues with Current Long-Term Policy

In 2002, New Zealand passed the Climate Change Response Act (CCRA).[21] Since then, multiple significant amendments have been passed. One of those amendments, the Climate Change Response (Zero Carbon) Amendment Act 2019, or so-called Zero Carbon Act (ZCA),[22] has particular relevance to the issues at hand.

The leading change the ZCA enacted was the creation of a Climate Change Commission (CCC); this was a drastic change in how New Zealand conducted climate policy and is a step in the right direction.[23] However, upon further examination, the Act is insufficient to bind the Government to direct and linear action regarding climate change. The sections of the Act relevant to both the CCC and net zero goal shall be examined, although more focus will be paid to the CCC areas of the ZCA.

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19 Boston, above n 2, at 103.

20 Anders Gustafsson "Busy doing nothing: why politicians implement inefficient policies" (2019) 30 Const Polit Econ 282 at 290−294.

21 Climate Change Response Act 2002.

22 Climate Change Response (Zero Carbon) Amendment Act 2019.

23 Climate Change Response (Zero Carbon) Amendment Act 2019, s 5A.

A. The Net Zero Goal

Net zero by 2050 as a goal rose to popularity following the 2018 Intergovernmental Panel on Climate Change (IPCC) special report.[24] Since then, it has become a fundamental goal of emission reduction throughout the world. The ZCA committed New Zealand to the goal of net zero.[25]

Although the sections of the ZCA discussed also include the CCC, for this section, all that shall be addressed is the net zero goal in a vacuum. The reason for isolating the language concerning the net zero goal is because, when doing so, fundamental issues in the language of the ZCA, particularly in s 5T of the ZCA, become apparent. The section allows for amendments to be made to the 2050 target. Amendments may be made to the timeframe, levels of reductions, relevant GHGs and how to meet the target.[26] The Act further stipulates that the CCC may only recommend an alteration upon specific conditions being met.[27] The issue here is that there is nowhere a minimum requirement set out or a provision requiring any alteration to increase the goal, not decrease it.[28] Moreover, the specific conditions are incredibly broad, allowing for a change in economic circumstances to be the reason for such a change.[29] No guidance is provided on the extent to which the economic or fiscal circumstances must change. This, again, is a clear failure of long-term policy planning. It is a minimal change, which would close the door to any future potential for a rogue government to make a cataclysmic alteration to the net zero goal.

The lack of a minimum requirement in the ZCA may be a mere oversight, but further inspection reveals something more serious. It appears the Act leaves a series of legislative hoops that one could jump through to alter the 2050 target and avoid any possible legal ramifications. Section 5ZM of the Act protects the Government from legal liability if the 2050 goal is not adhered to, and as mentioned, the 2050 goal may be amended. This may be an attempt to avoid what happened in Germany and the Netherlands.[30] Both were successful cases brought against the respective Governments on the grounds that they were unlawfully failing to meet their climate goals and steps were being taken in the opposite direction.

This is a failure in long-term policy in a way that is different from the CCC implementation. Rather than cause direct harm, it allows for avoidance. Avoidance is exacerbated by New Zealand not having the human right to a healthy environment. So, the remedy for a failure to meet the goal is not accessible through alternative avenues.

B. The Climate Change Commission

The first significant addition of the ZCA was establishing a Commission that would independently advise the governmental policy and review its progress on climate change issues, especially

24 Intergovernmental Panel on Climate Change *Global Warming of 1.5C* (2018) 12 at [C.1].

25 Climate Change Response (Zero Carbon) Amendment Act 2019, s 5Q.

26 Climate Change Response (Zero Carbon) Amendment Act 2019, ss 5T(1)(a)−5T(1)(d).

27 Climate Change Response (Zero Carbon) Amendment Act 2019, ss 5T(2)(a)(i)−5T(2)(a)(ix).

28 I am suggesting something much like the NDC programme in the Paris Agreement, where parties can amend their contribution, but only to increase it.

29 Climate Change Response (Zero Carbon) Amendment Act 2019, s 5T(2)(a)(iii).

30 *Neubauer v Germany*, Case No. BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20; *Urgenda Foundation v Netherlands* (2019) Hague DC C/09/456689/HA 2A 13-1396.

regarding meeting emissions budgets and building toward the 2050 goal.[31] The CCC is required to consider cost-to-benefit analysis applicable to future generations[32] – strong evidence of the long-term intentions of the policy. The CCC also have the power to recommend alterations to the 2050 target, emissions budgets and emission reduction plans.[33] This all appears as though it is a sufficient long-term policy and will be instrumental in helping New Zealand achieve its climate goals. Although the latter of those two features may be true, the former does not appear so. The ZCA is a cornerstone of the net zero goal but does not go far enough. The CCC advice is not binding on the Government as everything is merely recommendations, albeit from experts.[34] The Climate Change Minister (the Minister) may agree with the CCC's advice, and the Government may still ignore it. In 2022, the Labour Cabinet ignored the advice of both the CCC and the Minister regarding price controls in the ETS.[35] The price controls would have marginally put up prices for the average household by $1.67 per week.[36] Although the government later backtracked on their position, this only came after a group of concerned lawyers took the Government to the High Court.[37]

Lawyers for Climate Action v Minister[38] was a case where the Minister was taken to court due to his alleged failure of process and, in turn, violation of s 30GC(2) or 30GC(3) of the CCRA.[39] Before the case was due to appear in the High Court, the Minister admitted fault, and the parties agreed on the relief required, upon which the Court concurred.[40] The Court made a statement that the Government, upon following the correct process, could still reject the CCC recommendations.[41] The fact that the option to ignore what is independently provided expert advice even exists goes to evidence the inadequacies of the ZCA provisions. It is entirely possible that a different Government would have dug their heels in and refused to budge on their initial decision.[42] For this reason, I believe the rejection constitutes grounds for analysis.

The problems with these provisions relate to the previously mentioned issues regarding short-term prioritisation. What Boston has called a "Presentist Bias".[43] When rejecting the

31 Climate Change Response (Zero Carbon) Amendment Act 2019, ss 5A, 5J and 5O.

32 Climate Change Response (Zero Carbon) Amendment Act 2019, s 5M.

33 Climate Change Response (Zero Carbon) Amendment Act 2019, s 5J.

34 Climate Change Response (Zero Carbon) Amendment Act 2019, s 5J and 5T.

35 Marc Daalder "Cabinet overrides Shaw and Commission on carbon price" *Newsroom* (New Zealand, 15 December 2022) <www.newsroom.co.nz/2022/12/15/cabinet-overrides-shaw-and-commission-on-carbon-price/>.

36 Marc Daalder "Surprise decision restores Climate Commission's legitimacy" *Newsroom* (New Zealand, 25 July 2023) <www.newsroom.co.nz/2023/07/25/surprise-decision-restores-climate-commissions-legitimacy/>.

37 Marc Daalder "Govt taken to court for ignoring Climate Commission on ETS" *Newsroom* (New Zealand, 9 May 2023) <www.newsroom.co.nz/2023/05/09/govt-taken-to-court-for-ignoring-climate-commission-on-ets/>.

38 *Lawyers for Climate Action v Minister of Climate Change* [2023] NZHC 1835, [2023] ELHNZ 203.

39 At [1].

40 At [1].

41 At [51]−[54].

42 ACT party policy is that the CCC should be scrapped. This policy was last reiterated after they were elected to government: Simon Court "Climate Change Commission reminds us why it needs to be scrapped" (11 December 2023) Act <www.act.org.nz>.

43 Boston, above n 14, at 65−98.

CCC's advice, the Government cited economic reasons.[44] Despite this, other recommendations were accepted. These policies were not as controversial as the price controls − evidence that the initial public reaction is a Governmental consideration. Three key relevant factors compound the importance of the public reaction.

Firstly, the opposition at the time is far less disposed to radical climate action. When a decision has an immediate monetary impact and the opposing party holds a position that does not involve that monetary impact, it is less likely to be the chosen path, even if it is the better long-term decision.[45]

Secondly, and linking with the first reason, the decision was made with less than a year left until the next election. Policies which increase short-term costs are more likely to be unpopular.[46] In the time leading up to an election, decisions and policy plan outlines are increasingly tailored towards the presentist bias.[47] American businessman Warren Buffett made the point: "When human politicians choose between the next election and the next generation, it's clear what usually happens."[48] Humans possess cognitive bias against policy, which leads to short-term costs.[49]

Third and finally, there are issues sustaining public support for policies which are long-term investments.[50] Boston has a useful graph to highlight such problems.[51]

44 Marc Daalder "Govt should explain why it rejected our advice – Climate Commission" *Newsroom* (New Zealand, 21 March 2023) <www.newsroom.co.nz/2023/03/21/govt-should-explain-why-it-rejected-our-advice-climate-commission/>.

45 Boston, above n 14, at 82−83.

46 Jared J Finnegan "Institutions, Climate Change, and the Foundations of Long-Term Policymaking" (2022) 55(7) Comp Polit Stud 1198.

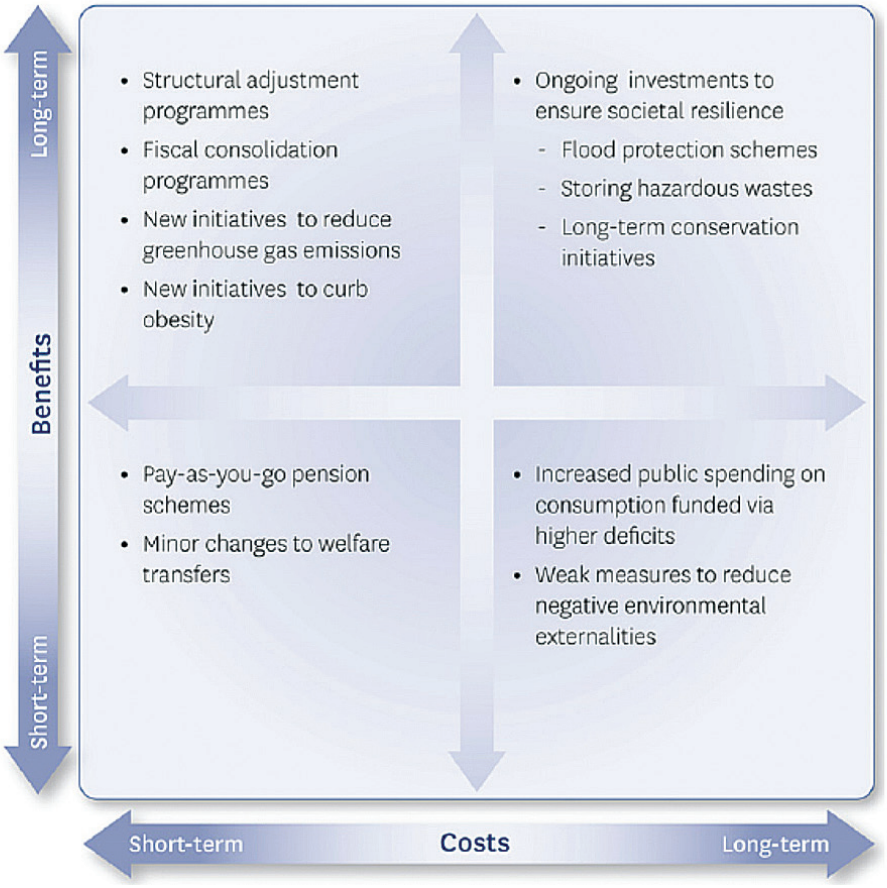
47 Boston, above n 14, at 13.

48 Warren Buffet "How inflation swindles the equity investor" *Fortune* (United States, 1 May 1977) <www.fortune.com>.

49 Finnegan, above n 47, at 1206.

50 Boston, above n 14, at 116.

51 At 117.



As is clear, most climate policies have short-term costs and long-term benefits. There is no difference in the price controls. Further compounding these problems is the fact that it will be extraordinarily simple for the opposition government to directly oppose this policy and appeal to the electorate that, if elected, they will reduce costs on the population.[52]

With these factors considered, it is evident that policymakers are hindered in their ability to implement independent advice adequately. What, then, can be done to solve this issue?

52 At 117.

III. Solutions to the Long-Term Policy Issues

The two issues examined in the ZCA pose different problems but are related; they are both evidence of the overarching problem, the failure of the government to adequately legislate for climate change issues. These issues are only going to become more important as the days go by.[53] The problems related to the net zero goal require the insertion of new sections into the Act, whereas the problem of adequately enabling the CCC to perform its role requires a far more radical change.

The best way to improve the long-term policy is to make a change to the ZCA that would make the CCC advice legally binding on the Government. Such a proposition is known as an insulating device.[54] The type of insulation device is "altering the choice architecture".[55] Boston discusses the potential of altering the choice architecture over selected areas of public policy, the goal of which is to depoliticise a given issue and remove it from the normal democratic process.[56] Changing this structure will allow policy to be informed by the best available scientific expertise and also mitigate political opportunism.[57] A similar policy has been suggested by former Green Party leader James Shaw, who suggested that it would be beneficial for the CCC to set ETS unit limits and price controls directly, much like the Reserve Bank does with interest rates.[58] The proposal will give that power, along with the other powers stipulated in the ZCA, to the CCC. New Zealand is at risk of failing to meet its 2030 and 2035 emissions budgets.[59] If the Commission is given full control, it can ensure the government is beholden to emissions budgets and the 2050 goal.

Boston has warned of the potential risks of removing democratic control as a solution to presentist bias. However, he also acknowledges the success throughout the 1980s and 1990s many countries found in reforming their central banking systems.[60]

In his chapter on insulating devices, Boston suggests requiring elected officials to accept all of the recommendations of an independent body.[61] Such a change should not be done without strong regulation; of course, the risk of mistakes by the CCC will still exist. This proposal is under no delusion of perfection, but as stated earlier, perfection is not something that is a requirement; rather, it is action.[62] Suppose politicians debate back and forth on the perfect climate policy to take New Zealand forward, and governments continue to alternate semi-frequently. In that case, nothing substantive will be achieved.

I accept that this is a rather radical suggestion, but the fundamental problem with how climate change is discussed in the modern day is that it is viewed through an entirely political lens. This political lens is the reason why the policy is changing depending on the government of the day.

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53 Rachel Warren and others "Increasing impacts of climate change upon ecosystems with increasing global mean temperature rise" (2010) Climate Change 141 at 142.

54 Boston, above n 14, at 285−286.

55 At 287.

56 At 287−295.

57 At 288.

58 Daalder, above n 37, at 1.

59 Climate Change Commission *Emissions Reduction* (Climate Change Commission, Monitoring Report, July 2024) at 60.

60 Boston, above n 14, at 287−289.

61 At 310.

62 Gustafsson, above n 20, at 290−294.

Depoliticising the debate is crucial. It will lay the groundwork for bipartisan relationships to develop and may grow public enthusiasm for climate policy, allowing for more radical changes.[63] This change is not suggested lightly. The grounds for such a proposal are the fact that the science is so definitively clear that drastic reductions in emissions are needed.[64] If the Government have the power to reject the advice of the people who assist in achieving those goals, then the goals will never be radical enough.

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63 Stefan Gosling and Andres Humpe "Net-zero aviation: Transition barriers and radical climate policy design implications" (2024) 912 Sci Total Environ 169107 at 169107.

64 United Nations Climate Change Paris Agreement (12 December 2015), preamble.

The Admissibility of Improperly Obtained Evidence in New Zealand Criminal Procedure

Te Whākina o te Taunakitanga i Hē te Tīkina i te Tikanga Taihara o Aotearoa

Ryan Young

This thesis will consider the operation of improperly obtained evidence and the balancing test stipulated in s 30 of the Evidence Act 2006; this will involve the identification of material issues within the status quo framework and suggest potential reform to alleviate concerns.

In pursuit of the above, this paper will examine the following:

1. section 30 of the Evidence Act 2006;
2. pre-Evidence Act 2006 admissibility of improperly obtained evidence;
3. the operation of the s 30 balancing test;
4. issues within the operation of the balancing test; and
5. potential reform.

Further, this paper primarily concerns the admissibility of improperly obtained evidence in violation of the rights affirmed in the New Zealand Bill of Rights Act 1990 (NZBORA); to examine the subject matter more broadly would fall beyond the prescribed scope of this paper.

I. Section 30 of the Evidence Act 2006

The Evidence Act 2006 (EA) came into force in August 2007 and remains the status quo framework for evidence law determinations in New Zealand.[1] Included in the EA is s 30, which is the statutory starting point for improperly obtained evidence determinations; it involves a two-stage process. The first stage requires that the Judge find, on the balance of probabilities, whether evidence was improperly obtained.[2]

Section 30(2)(b) of the EA is the second stage of the two processes; furthermore, it is the most material for the purpose of this paper. The second stage of the s 30 process is often referred to as the "balancing test"[3] and it reads that:[4]

> *If the Judge finds that the evidence has been improperly obtained*, determine whether or not the exclusion of the evidence is proportionate to the impropriety by means of a balancing process that gives appropriate weight to the impropriety and takes proper account of the need for an effective and credible system of justice.

1 Evidence Act 2006, s 2(1).

2 Evidence Act 2006, s 30(2)(a).

3 Law Commission *The Third Review of the Evidence Act 2006* (NZLC R148, 2024) at 125.

4 Evidence Act 2006, s 30(2)(b).

An emphasis has been attached to the first clause of s 30(2)(b).[5] This is because this paper does not concern how judges determine evidence to be improperly obtained, but its admissibility *once* evidence has been found to be improperly obtained. In conducting the balancing test, s 30(3) sets out a non-exhaustive list of matters that may be considered when determining the admissibility of improperly obtained evidence; it reads that:[6]

> For the purposes of subsection (2), the court may, among other things, have regard to the following:
>
> (a) the importance of any right breached by the impropriety and the seriousness of the intrusion on it:
>
> (b) the nature of the impropriety, in particular, whether it was deliberate, reckless, or done in bad faith:
>
> (c) the nature and quality of the improperly obtained evidence:
>
> (d) the seriousness of the offence with which the defendant is charged:
>
> (e) whether there were any other investigatory techniques not involving any breach of the rights that were known to be available but were not used:
>
> (f) whether there are alternative remedies to the exclusion of evidence that can adequately provide redress to the defendant:
>
> (g) whether the impropriety was necessary to avoid apprehended physical danger to the Police or others:
>
> (h) whether there was any urgency in obtaining the improperly obtained evidence.

From the outset, a wave of ambiguity can be realised under s 30(3). Considered in isolation, for example, s 30(3)(d) does not make clear whether the "seriousness of the offence with which the defendant is charged" should favour the exclusion of improperly obtained evidence, or alternatively, its admission. A detailed discussion on this matter will be duly addressed, but first, greater context leading up to the s 30 balancing test is required.

II. Pre-Evidence Act 2006 Admissibility of Improperly Obtained Evidence

Like most statutory law, the EA did not develop in a vacuum.[7] Therefore, it is important to contextually understand New Zealand's common law principles regarding the admissibility of improperly obtained evidence prior to its codification in 2007.[8] When considered in the context of the New Zealand Bill of Rights Act 1990 (NZBORA), this can be broken down into three subparts:

(a) the common law discretion to exclude evidence on the grounds of unfairness (<1991);
(b) the prima facie rule (1991−2002); and
(c) the *Shaheed* balancing test substitute (>2002).

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5 Evidence Act 2006, s 30(2)(b): "If the Judge finds that the evidence has been improperly obtained".

6 Evidence Act 2006, s 30(3).

7 Geoffery Palmer *Protecting New Zealand's Environment* (Resource Management Act 1991 Paper, September 2013): observes that statutory law does not develop in a vacuum.

8 Evidence Act 2006, ss 2(1) and 30.

A. The Common Law Discretion to Exclude Evidence on the Grounds of Unfairness

The least desirable of the three pre-codification phases relates to the common law discretion to exclude evidence on the grounds of unfairness. For example, in the 1985 New Zealand Court of Appeal (NZCA) case of *R v Coombs,* it was unanimously affirmed that illegal searches were admissible subject to a "discretion based on the jurisdiction to prevent an abuse of process."[9] Moreover, in 1989, the NZCA held in *R v Grace* that evidence "should be admitted unless there is the likelihood of a miscarriage of justice".[10] Ultimately, the admission of improperly obtained evidence was favoured, subject to the exercise of judicial discretion in exceptional circumstances.[11]

The words "least desirable" have been used to describe this period because quasi-constitutional rights imposed by the NZBORA were yet to be enacted.[12] Additionally, as Scott Optican rightfully observed, the pre-NZBORA discretionary rule was "a somewhat murky jurisdiction pegged to various instances of police misconduct".[13] This is because the discretionary rule did not cover all instances of police misconduct.[14] Moreover, even when improperly obtained evidence fell within this "murky jurisdiction", its utility was eroded by discretion.

Judicial discretion in criminal law proceedings should be treated with caution. James Vorenberg astutely observed that high-level discretion in judicial decision-making leads to "wide and unjustified disparity among like cases".[15] Unjustified disparity repudiates the rule of law; as Karen Steyn noted, "the rule of law requires that laws be applied equally, without unjustifiable differentiation."[16] Therefore, New Zealand jurisprudence must avoid readopting a generalised broad-based common law power to exclude improperly obtained evidence;[17] however, as will be deduced, it may already have *(albeit under a new codified fabric)*.

B. The New Zealand Bill of Rights Act and the Prima Facie Exclusion Rule

Following the enactment of the NZBORA,[18] the courts were quick to adopt a prima facie rule of exclusion for evidence obtained in violation of multiple provisions relating to police: search and seizure, investigative handling, and the questioning of suspects.[19] In late 1991,[20] the NZCA in

9 *R v Coombs* [1985] 1 NZLR 318 (CA) at 321.

10 *R v Grace* [1989] 1 NZLR 197 (CA) at 202.

11 See *R v Shaheed* [2002] 2 NZLR 377 (CA) at [16].

12 New Zealand Bill of Rights Act 1990.

13 Scott Optican "*R v Williams* and the Exclusionary Rule: Continuing Issues in the Application and Interpretation of Section 30 of the Evidence Act 2006" (2011) 1 NZ L Rev 507 at 508.

14 At 508.

15 James Vorenberg "Narrowing the Discretion of Criminal Justice Officials" (1976) 1 Duke Law Journal 651 at 663.

16 Karen Steyn "Consistency – A Principle of Public Law" (1997) 2(1) Judicial Review 22 at 22.

17 Scott Optican, above n 13, at 508.

18 New Zealand Bill of Rights Act 1990, s 1(2).

19 Scott Optican, above n 13; see also *R v Butcher* [1992] 2 NZLR 257 (CA).

20 Case reported in 1992.

R v Butcher held that evidence obtained in violation of the NZBORA should result in a prima facie finding of inadmissibility ("the prima facie rule");[21] this rule remained the status quo until 2002.[22]

"Prima facie" is the Latin maxim for "at first sight".[23] This first sight presumption, in favour of exclusion for evidence obtained in violation of NZBORA rights, was not absolute. Instead, when the rule did apply, the prosecution reserved the "onus of satisfying the Court that there [was] good reason for admitting the evidence despite the violation".[24] Summarily, the prima facie rule was a presumptive finding that favoured exclusion, subject to reasoning to the contrary.

Reasoning to the contrary that deposed the prima facie finding was outlined in *R v H*; this included where the breach was inconsequential, where there was an insufficient nexus between the breach and the realisation of evidence, or where the evidence would have still been discovered notwithstanding the breach.[25] Furthermore, in *R v Goodwin,* the Court indicated departures from the prima facie presumption if the breach was trivial, committed in circumstances that gave rise to urgency, or where there was a reasonably apprehended danger to police officers.[26]

Significantly, the prima facie rule embodied a rights-centred approach.[27] In *R v Goodwin,* Richardson J observed that this rights-centred approach required "primacy to be given to the vindication of human rights and that the prima facie answer or presumption where evidence has been obtained in breach of an Act right is that the evidence should be excluded."[28] This rights-centred approach should not be overlooked, and despite the substitution of the prima facie rule in 2002,[29] it remains material in present time. Further insight will be provided in the later stages of this paper.

The 2001 edition of *Cross on Evidence* illustrates a wide range of rights conferred under the NZBORA that instigated the prima facie rule when evidence was obtained in violation of its provisions; this included, inter alia, ss 9, 21, 22, 23(1)(a), 23(1)(b), 23(2), 23(3), 23(4), 23(5), 24(a), 25(b), and 24(d).[30] Nevertheless, this paper lays a caveat to the fact that although the prima facie rule protected evidence obtained by NZBORA violations, this finding did not extend to all instances of police impropriety. Where a quasi-constitutional right had not been breached but evidence was found to be improperly obtained, the Court reserved its common law discretion to exclude evidence on the murky grounds of unfairness.[31] However, as stated prior, this paper mainly concerns the admissibility of improperly obtained evidence in violation of the NZBORA.

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21 *R v Butcher*, above n 19, at 266; see also *R v Kirifi* [1992] 2 NZLR 8 (CA), which came before *R v Butcher* but did not expressly use the words "prima facie".

22 Scott Optican and Peter Sankoff "The New Exclusionary Rule: A Preliminary Assessment of *R v Shaheed*" (2003) 1 NZ L Rev 1 at 2.

23 Legal Information Institute "Prima Facie" (Cornell Law School) <www.law.cornell.edu/wex/prima_facie>.

24 *R v Butcher*, above n 19, at 266.

25 *R v H* [1994] 2 NZLR 143 (CA) at 150.

26 *R v Goodwin* [1993] 2 NZLR 153 (CA) at 171.

27 Donald L Mathieson *Cross on Evidence* (7th New Zealand ed, Butterworths, 2001) at 340.

28 *R v Goodwin*, above n 26, at 194.

29 See *R v Shaheed*, above 11.

30 For further detail, refer to Donald Mathieson, above n 27, at 399−400.

31 *R v Shaheed*, above n 11, at [16]; see also Scott Optican and Peter Sankoff, above n 22, at 2.

C. The Shaheed Balancing Test Substitute

The prima facie rule was a positive addition to New Zealand's criminal procedure and constitutional framework. It increased consistency among like cases and vindicated quasi-constitutional human rights.[32] However, the prima facie rule was curtailed by a six-to-one majority in the 2002 NZCA *R v Shaheed* judgment, whereby a balancing exercise was introduced as a substitute ("the balancing test").[33] Of concern, inter alia, is that the balancing test has been observed as "purely discretionary."[34]

The leading judgment in *Shaheed* consisted of three judges and was delivered by Blanchard J; his dictum has since been largely codified in s 30 of the EA.[35] To illustrate Blanchard J's now largely codified approach, footnotes have been added to the proceeding extract from his judgment, which reads that:[36]

> In this case the Court has reviewed the approach which should be taken to the admissibility in a criminal trial of evidence obtained as a result of a breach of a right guaranteed by the New Zealand Bill of Rights Act 1990. The majority has concluded that in place of what has become known as the prima facie exclusion rule, admissibility should be determined by means of the Judge conducting a balancing exercise[37] in which, *as a starting point, appropriate and significant weight is given to the fact that there has been a breach of a right guaranteed to a suspect by the Bill of Rights*. The Judge must decide by a balancing of the relevant factors[38] whether exclusion of the evidence is in the circumstances a response which is proportionate to the breach which has occurred of the right in question. Account is to be taken of the need for an effective and credible system of justice.[39] Matters which are likely to be relevant to the balancing exercise in a particular case will be the value which the right protects and the seriousness of the intrusion on it;[40] whether the breach has been committed deliberately or with reckless disregard of the suspect's rights or has arisen through gross carelessness on the part of the police;[41] whether other investigatory techniques, not involving any breach of rights, were known to be available and not used;[42] the nature and quality of the disputed evidence; the centrality of the evidence to the prosecution's case;[43] and, in some cases, the availability of an alternative remedy or remedies.[44]

32 See New Zealand Bill of Rights Act 1990.

33 *R v Shaheed*, above n 11, (Elias CJ dissenting).

34 Scott Optican and Peter Sankoff, above n 22, at 4.

35 *R v Shaheed*, above n 11, at 386−426.

36 At [26]; see also Scott L Optican and Peter J Sankoff, above n 22, at 9.

37 See now, Evidence Act 2006, s 30(2)(b).

38 Evidence Act 2006, s 30(3).

39 Evidence Act 2006, s 30(2)(b).

40 Evidence Act 2006, s 30(3)(a).

41 Evidence Act 2006, s 30(3)(b).

42 Evidence Act 2006, s 30(3)(e).

43 Excluded from the Evidence Act 2006; see Evidence Bill 2005 (256-2) (select committee report) at 4; see also (21 November 2006) 635 NZPD 6647 (in committee).

44 Evidence Act 2006, s 30(3)(f) (emphasis added).

Overall, six judges agreed to the abovementioned balancing test substitute.[45] Therefore, the prima facie rule was abolished by a six-to-one majority, with Elias CJ dissenting.[46] Nevertheless, this paper submits that Elias CJ's dissenting judgment was the most well-reasoned, and the prima facie rule should have been retained. This is because her Honour noted that the prima facie rule had the "considerable advantage of giving clear guidance to police, prosecutors, and Judges in an important area which has practical application to their everyday work."[47] This ratifies compliance with the rule of law in two ways. Firstly, the prima facie rule guided police and prosecutors on the permissible parameters of conduct in the exercise of their duties, embodying the idea that no one is above the law.[48] Secondly, the operation of the prima facie rule guided judges on consistent decision making, mitigating unjustified disparity among like cases.[49] Moreover, Elias CJ appreciated the importance of rights-based and deterrence-based rationales that favoured exclusion.[50] Accordingly, Elias CJ's dissenting judgment persuasively supported the retention of the prima facie rule, and this will be further considered in the later stages of this paper.

Optican was quick to critique *Shaheed*; his initial concerns included a lack of justification for abandoning the prima facie rule, the uncertainty created by the balancing substitute (which has become ever more apparent with its codified equivalent today)[51] and the structural defects it endured.[52] Somewhat ironically, even the first application of the *Shaheed* balancing test was the product of uncertainty. Although six judges agreed to the balancing substitute, their application of the test on the facts led to differing decisions. For example, although Richardson P, Blanchard and Tipping JJ determined that the defendant's DNA blood samples should be excluded after applying the balancing test,[53] Anderson J opined that the evidence was, after using that same test, admissible.[54]

Despite its promptly realised issues,[55] the balancing test was included in the Evidence Bill 2005 and was set to be enacted in August 2007 under s 30 of the EA. However, shortly prior to its enactment, *R v Williams* was delivered.[56] *Williams* was a 2007 NZCA case that considered the admissibility of evidence obtained in violation of s 21 of the NZBORA (unreasonable search and seizure). The judgment can be described as a pragmatic attempt to alleviate the issue of uncertainty

45 *R v Shaheed*, above n 11, at [26] (per Richardson P, Blanchard and Tipping JJ); [172] (per Gault J); [192] (per McGrath J); and [200] (per Anderson J).

46 At [5].

47 At [19].

48 David Baragwanath "Magna Carta and the New Zealand Constitution" (Address to English Speaking Union, 29 June 2008) at 11.

49 See Karen Steyn, above n 16, at 1.

50 *R v Shaheed*, above n 11, at [24].

51 Evidence Act 2006, s 30(2)(b).

52 See Scott Optican and Peter Sankoff, above n 22, at 19.

53 *R v Shaheed*, above n 11, at [166].

54 At [214].

55 See Scott Optican and Peter Sankoff, above n 22.

56 *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207.

realised in the common law *Shaheed* balancing test and its, then, soon to be codified equivalent.[57] This can be found in Glazebrook J's judgment, where:[58]

> One of the main criticisms levelled at the *Shaheed* balancing approach is the perception that, although numerous factors are to be taken into account, it is uncertain what weight should be given to each factor… we have attempted… to lay down a structured approach to the *Shaheed* exercise that should lead to more consistent results. In doing so, we have emphasised that in many cases significant weight should be given to particular factors.

By way of a synopsis, *Williams* held that the first step was to examine the magnitude of the breach; this involved an assessment of illegality,[59] the nature of the rights-based interest considered objectively,[60] and any aggravating and mitigating factors.[61] Moreover, the Court noted aggravating factors to include: substantive breaches of specific statutory code, unreasonable interference, and police misconduct.[62] On the other hand, the Court noted mitigating factors to include where: the breach occurred in situations of urgency; the nexus between the breach and the discovery of evidence was weak; there was an attenuation of the link between the breach and the evidence; and the discovery was inevitable.[63]

Williams also observed two public interest factors that required simultaneous assessment.[64] This included the seriousness of the crime and the nature and quality of evidence.[65] However, this paper does not condone this assessment. As Optican and Sankoff have rightfully cautioned, the more serious a crime, the more need there is for procedural safeguard measures in criminal procedure.[66] After all, as offences increase in culpability, so too does the punitive term which an accused may be subject to following a guilty verdict. Arguably, the more one's liberty is at stake, the more an exclusion of improperly obtained evidence should be favoured in the name of procedural fairness.

Overall, *Williams* was the final significant determination on improperly obtained evidence prior to, but in light of, the soon to be enacted EA. It attempted to set out a structured approach for judges to use in the future and did so with some success. At the least, *Williams* deserves distinction as "a laudable attempt to bring precision and rigour" to the balancing test and its, then, soon to be codified equivalent.[67]

57 Evidence Act 2006, s 30.

58 *R v Williams*, above n 56, at [147].

59 At [110]–[112].

60 At [113]–[114].

61 At [245].

62 At [246].

63 At [247].

64 At [250].

65 At [250].

66 Scott Optican and Peter Sankoff, above n 22, at 24.

67 Scott Optican "Criminal Procedure" in Julia Tolmie and Warren Brookbanks (eds) *Criminal Justice in New Zealand* (Lexis Nexis, Wellington, 2007) 153 at 179.

III. The Operation of the Section 30 Balancing Test

The balancing test was codified in August 2007 under s 30 of the EA.[68] However, of importance is that the balancing test was amended in several material aspects. Although the Evidence Bill initially proposed "the centrality of the evidence to the prosecution's case" as one of the s 30(3) factors to be listed for consideration in the balancing test, this was removed on the recommendation of the Select Committee.[69] Moreover, albeit of less relevance to this paper, the balancing test was codified to cover a wider range of improperly obtained evidence matters, beyond NZBORA violations.[70]

This paper will now examine the operation of the s 30 balancing test from its early developments to the recent leading judgments. The first case for discussion is the somewhat paradoxical determination of *R v Hennessey.*[71] Although the outcome of the judgment was well-reasoned, the prescriptive balancing test promulgated in *Williams* was not effectively utilised.

Considering the well-reasoned aspect of *Williams*, it was held that evidence obtained in violation of the Chief Justice's *Practice Note – Policing Questioning (s 30(6) of the Evidence Act 2006)*[72] ("the Guidelines") was inadmissible. Although the violation did not directly entail a NZBORA breach, the Court held that the Guidelines promoted the "affording and protection of rights articulated in ss 23 and 24 of the [NZBORA]."[73] Moreover, the Court held that a "civilised society cannot tolerate confession being extracted by improper means" and "there is then considerable public interest in maintaining compliance with the standard of conduct set out in the Guidelines."[74] Consequently, the Court held that the evidence obtained in violation of the Guidelines was inadmissible.[75] Materially, the judgment afforded broad-based primacy to quasi-constitutional rights and affirmed pragmatic rationales that favour exclusion.

The pragmatic rationales set out in *Hennessey* are analogous to the "rights-based" and "deterrence-based" considerations discussed by Elias CJ in *Shaheed.*[76] The rights-based rationale in *Hennessey* was utilised when it was held that the Guidelines were imposed to protect NZBORA rights (ss 23 and 24 of the NZBORA in that instance).[77] Moreover, the deterrence-based rationale in *Hennessey* can be realised through the discussion of "*considerable public interest* in maintaining compliance" with the Guidelines.[78] To ensure compliance is to deter non-compliance. Having regard to society as a whole, the Court noted that the justice system must not readily condone evidence being extracted by improper means (legitimacy-based rationale; to be revisited).[79]

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68 Evidence Act 2006, ss 2(1) and 30.

69 Evidence Bill 2005 (256-2) (select committee report) at 4; see also (21 November 2006) 635 NZPD 6647 (in committee).

70 See Evidence Act 2006, s 30(5)(b) and (c).

71 *R v Hennessey* [2009] NZCA 363.

72 *Practice Note – Policing Questioning (s 30(6) of the Evidence Act 2006)* [2007] 3 NZLR 297 (SC); see also Evidence Act 2006, s 30(6).

73 *R v Hennessey*, above n 71, at [30].

74 At [30].

75 At [37].

76 *R v Shaheed*, above n 11, at [24].

77 *R v Hennessey*, above n 71, at [30] (emphasis added); New Zealand Bill of Rights Act 1990, ss 23 and 24.

78 At [30].

79 At [30].

Interestingly, although the offending in *Hennessey* was "very serious",[80] it was held that public interest could still be used to support exclusion as opposed to admission. After all, as Blanchard J remarked in *Shaheed,* "societal interest, in which any victim's interest is subsumed, rather than being treated as a separate interest, will not normally outweigh an egregious breach of rights".[81] *Hennessey,* therefore, insightfully observes that public interest ought to weigh in favour of exclusion when considering deterrence-based, rights-based and legitimacy-based rationales, notwithstanding the imposition of "very serious" offending.[82]

Although *Hennessey* excites persuasive reasoning for excluding improperly obtained evidence, the judgment failed to apply the systematic weighting exercising presumed to be the status quo at the time of judgment.[83] For example, when *Hennessey* considered the "seriousness of the offence" factor, all the judgment had to say was:[84]

> Another relevant consideration is the seriousness of the offence for which Mr H is charged (s 30(3)(d)). We accept Crown's submission that Mr H is charged with a very serious offence.

Although the Court iterated that it had weighed the "seriousness of the offence"[85] among other matters, nothing in the judgment substantiates how this was achieved. Irregularities of this kind, shortly after the EA's introduction, were not isolated to *Hennessey.* In 2011, Optican observed an array of cases that, although sometimes having favourable outcomes in his opinion, failed to properly apply the s 30 balancing test and prescriptive guidelines set out in *Williams*.[86] Nevertheless, Optican's concerns were likely short lived, as a new wave of anxiety was set ripple through New Zealand's improperly obtained evidence framework shortly thereafter.

A. Hamed v R: A Jurisprudential Relapse into Broad-Based Judicial Discretion in Improperly Obtained Evidence Determinations

In 2011, the Supreme Court considered the s 30 balancing test in *Hamed v R*.[87] *Hamed* was the first Supreme Court decision to consider the balancing test in detail.[88] This paper labels *Hamed* to be the hallmark of jurisprudential relapse into broad-based judicial discretion in improperly obtained evidence determinations; as previously noted, broad-based judicial discretion in this context is undesirable.[89]

Hamed did not explicitly overrule the *Williams* prescriptive approach for s 30 determinations; however, it neglected to apply its scheme.[90] Moreover, *Hamed* ignored the jurisprudential reasoning

80 At [33].

81 *R v Shaheed*, above n 11, at [143].

82 *R v Hennessey*, above n 71, at [30].

83 See for example, Mahoney, McDonald, Optican and Tinsley *The Evidence Act 2006: Act and Analysis* (2nd ed, Thomson Reuters, Wellington, 2010) at 125; see also *R v Williams*, above n 56.

84 *R v Hennessey*, above n 71, at [33].

85 At [35].

86 Scott Optican, above n 13, at 520; *R v Collins* [2009] NZCA 388.

87 *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305.

88 Law Commission T*he 2013 Review of The Evidence Act 2006* (NZLC R127, 2013) at [4.10].

89 See paper discussion, at [II.A].

90 Scott Optican "*Hamed*, *Williams* and the Exclusionary Rule: Critiquing the Supreme Court's Approach to s 30 of the Evidence Act 2006" (2012) 4 NZ L Rev 605 at 612.

behind *Williams* (to facilitate greater consistency in judicial decision making under the balancing test)[91] and instead opted for greater broad-based judicial discretion.

Perhaps in response to cases such as *R v Hennessey,*[92] which failed to adequately perform the prescriptive approach set out in *Williams,*[93] Elias CJ called for conscientious disclosure and full reasoning in decisions on exclusionary matters.[94] However, her Honour further purported that the Court need not be more prescriptive in their approach.[95] Ultimately, Elias CJ fettered the prescriptive guidance promulgated by *Williams* in relation to the balancing test.[96] Yet, even more concerningly, her Honour noted that factors within the balancing test would be adopted for determination on a contextualised basis.[97]

A contextualised basis, in essence, promotes improperly obtained evidence determinations on a case-by-case basis primarily on the circumstances and less so on previous judgments; this is a great divergence from the "laudable attempt"[98] *Williams* sought to achieve by increasing consistency among like cases.[99] Furthermore, Elias CJ's approach in *Hamed* appears rather ignorant to her previous remarks in *Shaheed* where, "[b]reaches of rights recognised by the [NZBORA] are relegated to an important factor *militating against admission in the exercise of a broad based discretion.*"[100] Ultimately, Elias CJ's judgment in *Williams* substituted prescriptive measures for contextualised findings.

Blanchard J, in his *Hamed* judgment, announced that the balancing test and its factors "may go either way" and it was up to the judge to evaluate the matters when they come to light.[101] This, once again, resembles an adoption of broad-based judicial discretion on a case-to-case basis given that it would be up to the "Judge to identify and evaluate the relevant matters".[102] This reasoning was also expressed by Tipping J, albeit with slightly different wording.[103]

Finally, however, as Optican rightfully observes to be the "boldest surrender to the indeterminacy in s 30 decision-making"[104] Gault J stated that:[105]

> All of the factors specified in s 30(3) call for value judgments that may well depend on the inclinations of particular judges, as will the comparative weighting to be accorded those factors.

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91 At 612.

92 *R v Hennessey*, above n 71; see also *R v Collins*, above n 86.

93 *R v Williams*, above n 56.

94 *Hamed v R*, above n 87, at [59].

95 At [59].

96 Evidence Act, s 30; see also *R v Williams*, above n 56.

97 *Hamed v R*, above n 87, at [64].

98 Scott Optican, above n 90, at 610.

99 See *R v Williams*, above n 56, at [147].

100 *R v Shaheed*, above n 11, at [17] (emphasis added).

101 *Hamed v R*, above n 87, at [189].

102 At [189].

103 At [231].

104 Scott Optican, above n 90, at 612.

105 *Hamed v R*, above n 87, at [282].

In light of the above, this paper observes that Gault J directly thwarted two preceding decades of jurisprudential impetus. Although nine years had passed since the abolition of the prima facie rule when the Supreme Court ruled on *Hamed*, fundamental NZCA decisions regarding the s 30 balancing test had sought to provide some sense of "precision and rigour"[106] to determinations among like cases.[107] Nevertheless, Gault J repudiated this judicial development. Instead, his remarks revered the murky jurisdictional grounds realised in common law some 20 years prior,[108] before the NZBORA was enacted.[109]

In further critique of *Hamed,* Elias CJ, Blanchard, Tipping and Gault JJ neglected to express any "starting point" in relation to evidence obtained in violation of NZBORA rights.[110] This is a significant departure from *Shaheed,* where, as a "starting point, appropriate and significant weight was to be given to the fact that there had been a breach of a right guaranteed by the Bill of Rights Act";[111] moreover, the s 30 balancing test was intended to carry over this starting point consideration when it was codified.[112]

Notwithstanding this paper's disapproval of *Hamed,* McGrath J's passage therein is deserving of recognition. This is because his Honour reasoned that "in undertaking the balancing exercise, it is implicit that *the court should reach its decision by a process of structured reasoning rather than a matter of broad impression*."[113] Therefore, unlike the other judges in *Hamed*, McGrath J astutely observed the need for decreased broad-based discretion and increased structured reasoning, which would best facilitate consistent decision making and uphold the rule of law.[114] Moreover, McGrath J can be further appreciated for his attempt to reserve the "starting point" matter relating to the "importance of the rights breached by the impropriety and the seriousness of the intrusion" when applying the balancing test.[115]

Summarily, *Hamed* is a Supreme Court failure for two reasons. Firstly, the Court sidestepped an opportunity to provide better guidance on the s 30 balancing test. Secondly, and evermore significantly, the Court dropped (or in Gault J's case, threw) a burning matchstick into a pool of arbitrary oil, reigniting unrestrained broad-based judicial decision making in judgments thereafter. For this reason, *Hamed* ought to be considered a jurisprudential relapse into broad-based judicial discretion in improperly obtained evidence determinations.

106 Scott Optican, above n 67, at 179.

107 *See R v Williams*, above n 56.

108 Scott Optican, above n 13, at 508.

109 New Zealand Bill of Rights Act 1990, s 1(2).

110 *Hamed v R*, above n 87.

111 *R v Shaheed*, above n 11.

112 Andru Isac *Cross on Evidence (NZ)* (online looseleaf ed, LexisNexis NZ Limited) at [EVA30.1]; see also Law Commission *The 2013 Review of The Evidence Act 2006* (NZLC R127, 2013) at [4.4].

113 *Hamed v R*, above n 87, at [261] (emphasis added).

114 Karen Steyn, above n 16, at 22.

115 *Hamed v R*, above n 87, at [263].

B. Post-Hamed Judgments

Since *Hamed,* a flurry of inconsistent and split decisions arising from s 30 balancing test determinations has surmounted the courts; this paper will outline some examples to substantiate how so.

In *Kalekale v R,* a determination had to be made on the admissibility of improperly obtained real evidence.[116] Although Wild and Brewer JJ held that the evidence should nevertheless be admitted,[117] Clifford J was in dissent. Justice Clifford observed that admitting the evidence may run the risk identified in *Hamed,* of "withdrawing the basic rights those laws protect from persons charged with serious offending."[118] Summarily, this was a two-to-one split decision in the NZCA in 2016.

In 2018, the Supreme Court heard the case of *R v Chetty* on the grounds of admitting improperly obtained confessional evidence.[119] In that case, William Young, Glazebrook, Arnold and O'Regan JJ held that the confessionary evidence should be admitted, notwithstanding a significant police breach of guidelines poised to protect NZBORA rights.[120] This is a great divergence from the more than trivial approach stipulated in previous case law.[121] Moreover, it appears beyond the scope of what even *Shaheed* intended, where the public interest in convicting those of a serious crime would "not normally outweigh an egregious breach of rights."[122] Furthermore, this judgment was another split decision, with Elias CJ dissenting, in favour of excluding the evidence.[123]

In 2020, the case of *R v Reti* was delivered by the Supreme Court.[124] This judgment had a favourable outcome for the defendant, albeit by a thin three-to-two majority; therefore, this is another split decision. Nevertheless, the majority held that, although the seriousness of the offending swayed in favour of admission,[125] the seriousness of the breach strongly favoured the exclusion of the evidence.[126] With incredible pragmatism, the majority also justified the exclusion of the evidence, "taking into account the long-term interest there is in the maintenance of an effective and credible system of justice".[127] In this sense, the majority considered that deterrence from future police misconduct, at the cost of excluding evidence, would nevertheless be in the best interests of New Zealand's justice system. This deterrence reasoning will be further addressed in due course; but for now, note how it connects to the ideas poised in *Hennessey*: a "civilised society cannot tolerate confessions being extracted by improper means" and "there is then considerable public interest in maintaining compliance with the standard of [Police] conduct".[128]

116 *Kalekale v R* [2016] NZCA 259.

117 At [51].

118 At [55].

119 *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26.

120 At [45].

121 See for example, *R v Goodwin*, above n 26, at 171.

122 *R v Shaheed*, above n 11, at [143].

123 *R v Chetty*, above n 119, at [193].

124 *R v Reti* [2020] NZSC 16, [2020] 1 NZLR 108.

125 At [92].

126 At [94].

127 At [94].

128 *R v Hennessey*, above n 71, at [30].

IV. Issues with the Operation of the Balancing Test

The first three chapters were intended to gently guide the reader through New Zealand developments relating to the admissibility of improperly obtained evidence in criminal procedure and illustrate the, albeit concerning, operation of the s 30 balancing test. On the other hand, this chapter seeks to be more forthright in addressing material issues realised in New Zealand's current s 30 balancing test framework. Although there are a myriad of enduring issues within the balancing test, this paper endeavours to, where appropriate, discuss novel issues that may meaningfully add to the argument in favour of reinstating the prima facie rule.

A. Inconsistent Decision Making

The issue of inconsistent decision making has been woven throughout the preceding chapters of this paper. It was noted that prior to the NZBORA, judges retained a generalised common law power to exclude improperly obtained evidence on the grounds of unfairness in exceptional circumstances.[129] Nevertheless, the utility of this power was eroded by discretion.[130] However, following the enactment of the NZBORA, the courts were quick to adopt a prima facie rule of exclusion for evidence obtained in violation of its provisions.[131] This allowed for a stringent rule of law that produced consistency.[132] However, without justification,[133] *Shaheed* abolished the prima facie rule in substitution for the balancing test.[134]

In response to prompt concerns regarding *Shaheed* and the soon to be enacted EA, *Williams* attempted to set out prescriptive guidelines to produce "more consistent results" among like cases.[135] However, some four years later, the Supreme Court in *Hamed* thwarted this impetus and relapsed into the grounds of broad-based judicial discretion favouring "value judgments that may well depend on the inclinations of particular judges".[136] Thereafter, considerable volumes of inconsistent decisions have surmounted throughout the courts.[137]

Approximately one year prior to *Hamed,* although not directly in relation to the s 30 balancing test, the Supreme Court confirmed in *R v Gwaze* that admissibility rules in the EA are rules of law and not the product of judicial discretion.[138] Nevertheless, *Hamed* repudiates this concession; most directly, *Hamed* favours "value judgments" based on a judge's predilections.[139] The words "value

129 *R v Shaheed*, above n 11, at [16]; see also *Police v Gray* [1991] 3 NZLR 697 (CA).

130 See paper discussion, at [II.A].

131 Scott Optican and Peter Sankoff, above n 22, at 2; *R v Butcher* [1992] 2 NZLR 257 (CA) at 266; *R v Kirifi* [1992] 2 NZLR 8 (CA).

132 See paper discussion, at [II.B].

133 Scott Optican and Peter Sankoff, above n 22, at 18.

134 *R v Shaheed*, above n 11, at 377 (Elias CJ dissenting).

135 *R v Williams*, above n 56, at [147].

136 *Hamed v R*, above n 87, at [282].

137 See paper discussion, above at [III.B].

138 *R v Gwaze* [2010] NZSC 52, [2010] 3 NZLR 734 at [49] and [50].

139 *Hamed v R*, above n 87, at [282].

judgments" in *Hamed* are synonymous with the jurisprudential definition of "discretion", insofar as they both inherently relate to the disposition of broad-based, subjective decision making.[140] Hence, value judgments based on the inclinations of particular judges, or what that judge believes to be relevant in the circumstances,[141] is not an apt approach for the admissibility of improperly obtained evidence determinations in New Zealand.

Importantly, this paper has only considered appellate court decisions that involve more than one judge. However, of additional concern are the s 30 balancing test determinations that are being made in the lower courts. In this context, the decision to admit improperly obtained evidence typically falls to the predilections of a singular judge. Hence, Bernard Robertson has succinctly termed the balancing test a "lottery";[142] implying that, oftentimes, the decision to exclude improperly obtained evidence will come down to the unpredictable whim of a singular judge (an outcome of luck, not law). This lottery deserves no place in New Zealand criminal procedure, for it derogates from the rule of law without restraint.

B. Section 30 is Operating Beyond its Intended Scope in the EA

Not only should the current operation of the s 30 balancing test be considered a "lottery",[143] but there is room to extend this analogy in that it now operates as a rigged one. This is because, most often, improperly obtained evidence is being admitted in criminal trials. In its May 2023 issues paper (NZLC-IP50), the Law Commission conducted a snapshot study, reviewing appellate court decisions between January 2019 to December 2022 on how the s 30 balancing test is being applied.[144] Of the 70 cases identified in that study, 38 admitted the improperly obtained evidence in whole, two in part, and 30 favoured exclusion.[145] This equates to a 57 per cent ruling of admission in whole or part, notwithstanding a finding that the evidence in question had been improperly obtained.

Although *Shaheed* was codified with the intention of weighting breaches of rights among other factors,[146] it was supposed that the public interest in convicting those guilty of crimes would not normally outweigh a finding of exclusion in response to any such breach.[147] Nevertheless, when considering the NZLC-IP50 case study,[148] this supposition has been undermined, and rather, the courts are favouring the admission of improperly obtained evidence more often than not, notwithstanding its acquisition through illegal means such as NZBORA breaches.

Furthermore, of the 40 cases that admitted the evidence in full or in part, the most frequent factor favouring admission was reported to be that "the evidence was important to the prosecution's

140 James Vorenberg, above n 15, at 652.

141 See *Hamed v R*, above n 87, at [64].

142 *R(SC23/2019) v R* [2020] NZLJ 99; see also Tom Bingham *The Rule of Law* (Penguin Global, London, 2011) at 48.

143 *R(SC23/2019) v R* [2020] NZLJ 99.

144 Law Commission *The Third Review of the Evidence Act 2006* (NZPLC 50, May 2023) at [7.26].

145 At [7.27].

146 Andru Isac, above n 112, at [EVA30.1].

147 *R v Shaheed*, above n 11, at [143].

148 Law Commission, above n 144, at [7.27].

case" ("the centrality factor").[149] The centrality factor is of considerable concern. Reverting to Blanchard J's remarks in *Shaheed,* "the centrality of the evidence to the prosecution's case" was listed as one of the factors to be included in the weighing exercise.[150] Although this factor was included in the Evidence Bill, it was removed on the recommendation of the Select Committee.[151] Moreover, although the s 30(3) EA factors are non-exhaustive, and although *Williams* appreciated that the centrality of the evidence to the prosecution may retain "some" relevance when assessing the nature of the evidence,[152] it was certainly not intended to be the primary factor supporting the admission of improperly obtained evidence in most determinations thereof.

C. Section 30 is Derogating from the Golden Thread of Criminal Law

The absence of any onus held by the prosecution to disprove a presumption of exclusion for evidence obtained in violation of the NZBORA amounts to a derogation from the golden thread principle of criminal law. After all, criminal evidence law forms part of the greater web of criminal law as a whole.[153] In *Woolmington v Director of Public Prosecutions,* it was famously observed that "throughout the web of [criminal law] one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt".[154] Although that case related to the onus of proof for substantive proceedings (aka, a finding of "guilty" or "not guilty"), the words "web of criminal law" included within,[155] suggest that the prosecution should also bear the onus of proof to depose a prima facie finding of inadmissibility when evidence has been obtained in violation of the NZBORA.

Another takeaway from *Woolmington* is that its principles benignantly poise in favour of the accused. For example, *Woolmington* introduced a very high threshold for proving guilt (beyond a reasonable doubt) and presumes innocence until proven guilty (now codified under s 25(c) of the NZBORA).[156] These principles act as protective safeguards against egregious potential breaches of rights,[157] whereby, an accused may be deprived of their liberties if convicted of an offence.[158] It would appear benign and parallel with the principles enshrined in *Woolmington* to, at the least, uphold a prima facie finding for exclusion for evidence obtained in violation of the NZBORA.

D. Rationales for the Exclusion of Improperly Obtained Evidence

As has been observed, most often, improperly obtained evidence is being admitted in criminal trials.[159] However, this finding is jurisprudentially troublesome. To admit improperly obtained

149 At [7.29].

150 *R v Shaheed*, above n 11, at [26].

151 Justice and Electoral Select Committee *Evidence Bill* (24 October 2006) at 4.

152 *R v Williams*, above n 56, at [141].

153 *Woolmington v Director of Public Prosecutions* [1935] AC 462 (HL) at 481.

154 At 481.

155 At 481.

156 At 481.

157 *R v Shaheed*, above n 11, at [143].

158 See New Zealand Bill of Rights Act 1990, ss 18 and 22.

159 Law Commission, above n 144, at [7.27].

evidence, especially when its contents are highly probative, is to pick the fruit of a poisoned tree;[160] although tempting at first, its implications may cascade into an egregious breach of quasi-constitutional rights,[161] ratify future police misconduct, and illegitimise our justice system. To substantiate this claim, three rationales discerned from Paul Robert's literature will be outlined: (1) rights-based, (2) deterrence-based, and (3) legitimacy-based considerations.[162]

1. Rights-based rationale

The rights-based rationale favours the exclusion of improperly obtained evidence as a means of "vindicating" the value of liberty enshrined under the rule of law.[163] To "vindicate" a right is to uphold its value and defend it against interference.[164] When evidence is obtained in violation of NZBORA provisions, this would be best achieved by excluding the evidence. Moreover, in the criminal law context, the exclusion of evidence will usually be the only appropriate remedy where one's liberty is at stake.

Beyond redress, the rights-based rationale confers wider benefits to all citizens. This is because, at the occasional expense of material evidence being excluded in trials, the exclusion of evidence obtained in violation of NZBORA rights would affirm the legitimacy of personal autonomy and freedom from state interference stipulated within that Act.[165] These protections are important to all citizens, culpable or not, who may seek to rely on its provisions in the future.

2. Deterrence-based rationale

With symmetry to the preceding paragraph, the deterrence-based rationale supports the exclusion of improperly obtained evidence not so much as a means of vindicating the rights of an accused, but more so to deter future police misconduct and thus protect citizens from future state interference.[166] In essence, if the police are deprived of their "fruits" of illegally obtained evidence by way of its exclusion in court, they may conduct their investigations with greater vigilance in the future.[167] Although this rationale accepts that, from time to time, a criminal may run free "because a constable has blundered,"[168] this would be a reasonable price to pay as police officers would become less incentivised to conduct their duties in an ultra vires manner.[169]

However, strictly speaking, the deterrence-based rationale is the subject of considerable critique. For example, Paul Roberts has stated that exclusion appears to be an "astonishingly inept tool" for deterring police misconduct where a breach may be appropriate in investigatory situations that give rise to urgency.[170] Nevertheless, this paper does not seek to use the deterrence-rationale to favour

160 Geoffrey Robertson "Entrapment evidence: Manna from Heaven, or Fruit of the Poisoned Tree?" [1994] Crim L Rev 805.

161 *R v Shaheed*, above n 11, at [143].

162 Paul Roberts *Roberts & Zuckerman's Criminal Evidence* (3rd ed, Oxford University Press, Oxford, 2022) at [5.3(B)–(D)].

163 At 198.

164 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [253].

165 Paul Roberts, above n 162, at 198.

166 At 201.

167 At 202.

168 *People v Defore* (1926) 242 NY 13 at 21.

169 Paul Roberts, above n 162, at 202.

170 At 202.

an absolute exclusion for all evidence obtained in violation of the NZBORA. Rather, although the deterrence rationale may be inept for supporting the exclusion of *all* improperly obtained evidence (such as situations that give rise to investigative urgency)[171] it certainly deserves *some* degree of relevance in the majority of improperly obtained evidence scenarios. Therefore, perhaps the deterrence-based rationale lacks persuasive authority for the imposition of absolute exclusion. However, when considered among other rationales, it cumulatively forms part of a persuasive argument for the reinstatement of a prima facie rule of exclusion (that is capable of being deposed with good reason),[172] at the very least.

Prior to the EA, judges acknowledged the need for deterrence-rationale. For example, in *Shaheed,* Elias CJ alluded that deterrence-based considerations ran hand in hand with rights-based considerations to support the retention of a prima facie rule of exclusion for evidence obtained in violation of the NZBORA.[173] These considerations remain material when considering the reinstatement of the prima facie rule.

3. Legitimacy-based rationale

The legitimacy rationale supports the exclusion of improperly obtained evidence as a means of preserving the integrity and moral legitimacy of the justice system.[174] The rationale is the product of rights-based, deterrence-based, and other constitutional considerations such as the rule of law and balance of powers. This paper submits that the legitimacy-based rationale is the most persuasive of the three considerations because it cumulatively facilitates the latter two rationales (rights and deterrence-based) alongside further material lines of reasoning.

New Zealand, whose harbours were once coined the "Hellhole of the Pacific" some 200 years ago,[175] is now the product of a robust democratic legal system that seeks to uphold the rule of law. Within this system lies the balance of powers between the judiciary and the executive. The judiciary's function is to act as a separate government body by upholding the rule of law.[176] To uphold the rule of law is to vindicate constitutional rights and maintain the integrity of our criminal procedure framework.

Where evidence has been obtained in violation of the NZBORA, it is the judiciary's role to safeguard the legitimacy of those rights; this would usually be achieved by excluding the evidence (especially where that evidence is highly likely to lead to conviction). However, the current finding that courts are most often admitting improperly obtained evidence appears rather ironic;[177] by doing so, the justice system is readily circumventing government illegality while simultaneously depriving citizens of their rights pursuant to their own illegality under the same system of recognised law. This sets double standards.

Double standards between the state and its citizens repudiates the rule of law. After all, the rule of law does not pick and choose its constituents; rather, "government officials shall be subjected to

171 Paul Roberts, above n 162, at 199: note the hypothetical terrorist example.

172 See for example, *R v H* [1994] 2 NZLR 143 (CA) at 150.

173 *R v Shaheed*, above n 11, at [24].

174 Law Commission, above n 144, at [7.12].

175 Richard Wolfe *Hellhole of the Pacific* (Penguin Books, 2018).

176 See De Smith and Rodney Brazier *Constitutional and Administrative Law* (6th ed, Penguin, Harmondsworth, 1989).

177 Law Commission, above n 144, at [7.27].

the same rules of conduct that are commands to the citizen".[178] However, as evidence obtained in violation of the NZBORA is most often admitted in courts,[179] an arbitrary line of expectation has been drawn between the government and its citizens.[180]

4. Closing remarks on the three rationales

Albeit briefly, the three rationales have been discussed in separate subparts. However, in substance, they should be considered cumulatively to bolster the crux of this paper's argument: the prima facie rule of exclusion for evidence obtained in violation of the NZBORA should be reinstated. Although these rationales are subject to criticism, most often, that criticism responds to arguments in favour of absolute exclusion.[181] However, this paper does not seek to propose an absolute rule of exclusion, but rather, a strong prima facie presumption, which is capable of being deposed by good reason (or "exceptions"). This would render *most* evidence obtained in violation of the NZBORA inadmissible.

E. The Merits of Temptation (Public Interest Factors that may Favour Exclusion)

The three abovementioned rationales have been outlined to support the reinstatement of the prima facie rule for evidence obtained in violation of the NZBORA. Nevertheless, these rationales only answer to one side of a competing policy argument. Lord Cooper for the Scottish High Court of Justiciary in *Lawrie v Muir* illustrated that the law must seek to reconcile two material interests, which are:[182]

(d) the interests of the citizen to be protected from illegal or irregular invasions of his liberties by authorities; and

(e) the interest of the State to secure that evidence bearing upon the commission of a crime and necessary to enable justice to be done shall not be withheld from Courts of law on any mere formal or technical ground.

The first of these interests has been addressed in considerable detail; however, it is important to consider the merits of the latter interest – interest (b).[183] Interestingly, New Zealand's prior prima facie rule appeared to facilitate both (a) and (b).[184] This is because the prima facie rule not only protected citizens from illegal interferences with their rights but also ensured that exclusion would not prevail on "any mere formal or technical ground".[185] As previously noted, the prima facie rule was not absolute, and it facilitated admission under common-sense situations where the breach was trivial, committed in circumstances that gave rise to urgency, or where there was reasonably apprehended danger to police officers.[186] Therefore, although the prima facie rule

178 *Olmstead v US* 277 US 438 (1928) at 485.

179 Law Commission, above n 144, at [7.27].

180 Paul Roberts, above n 162, at 205.

181 See for example Paul Roberts, above n 162, at 202.

182 *Lawrie v Muir* 1950 SC (J) 19 (Scot) at 26.

183 At 26.

184 At 26.

185 At 26.

186 *R v Goodwin*, above n 26, at 171.

provided considerable protection to rights enshrined by the NZBORA, it was not a catalyst for exculpating an accused on any mere formal or technical grounds.[187]

This paper appreciates that, when considered in isolation, there is considerable public interest in admitting highly probative evidence pertaining to serious crimes, notwithstanding its realisation in violation of the NZBORA. As Blanchard J reflected in *Shaheed,* "[p]ublic confidence in the justice system would obviously be severely shaken were probative evidence to be excluded" in situations such as the serial murderer example discussed therein.[188] Nevertheless, the previous prima facie rule could respond to this hypothetical scenario through the urgency and necessity qualifications affirmed in *R v Goodwin.*[189] Hence, although there is considerable public interest in convicting those of serious crimes, it lacks persuasive authority to support the absence of the prima facie rule of exclusion for evidence obtained in violation of the NZBORA.

F. The Operation of the Section 30 Balancing Test is Currently Repudiating All Six Purposes of the Evidence Act

Although this paper has previously stated that s 30 is operating beyond its intended purpose, this consideration is deserving of further dissent when considered in conjunction with the Interpretation Act 1999. Section 5(1) of the Interpretation Act requires that the meanings of enactments be ascertained in light of their purpose.[190] However, the current interpretation and operation of the s 30 balancing test appears to undermine all six purposes expressed in the EA (both interpretatively and substantively). Section 6 of the EA stipulates that the purpose of the Act is to "secure the just determination of proceedings by":[191]

1. providing for facts to be established by the application of logical rules; and
2. providing rules of evidence that recognise the importance of rights affirmed by the New Zealand Bill of Rights Act 1990; and
3. promoting fairness to parties [last part omitted due to relevance]; and
4. protecting rights of […] important public interests;
5. avoiding unjustifiable expense and delay; and
6. enhancing access to the law of evidence.

This paper will now illustrate how the s 30 balancing test is repudiating *all six* of the abovementioned purposes. In doing so, reference will be made to already established issues alongside some additional considerations (however, due to paper size restrictions, they will remain somewhat brief).

1. Providing for facts to be established by the application of logical rules

Considering purpose (1),[192] the operation of the s 30 balancing test lacks logic. The Supreme Court in *R v Gwaze* affirmed that admissibility rules in the EA are rules of law and not the product of judicial discretion.[193] Nevertheless, it appears that *Hamed* has invited a broad-based judicial

187 *Lawrie v Muir*, above n 182, at 26.

188 *R v Shaheed*, above n 11, at [152].

189 *R v Goodwin*, above n 26, at 171.

190 Interpretation Act 1999, s 5(1).

191 Evidence Act 2006, s 6.

192 Evidence Act 2006, s 6(a).

193 *R v Gwaze* [2010] NZSC 52, [2010] 3 NZLR 734 at [49] and [50].

discretionary relapse under the cloak of "value judgments" that are "based on the inclinations of particular judges".[194] The current operation of the s 30 balancing test is less of a predictable rule than it is a lottery.[195] The only true sense of consistency realised under the current balancing test is an emerging pattern of determinations that are skewed too much in favour of admitting improperly obtained evidence.[196] Therefore, this "lottery" now appears rigged in favour of the prosecution.

Conversely, the reinstatement of the prima facie rule of exclusion for evidence obtained in violation of NZBORA rights would run parallel to the disposition of purpose (1) by providing an unambiguous rule of law that is not subject to the whim of any particular judge.

2. Providing rules of evidence that recognise the importance of rights affirmed by the New Zealand Bill of Rights Act 1990

Considering purpose (2),[197] *Shaheed* and *Williams* affirmed that as a starting point in the balancing test, significant weight was to be afforded to any NZBORA breach.[198] This was also the original intention of the balancing test when it was codified in 2007.[199] However, this position was fettered by the Supreme Court in *Hamed,* which preferred judicial flexibility in determining whether any factor should be considered in the circumstances.[200]

Unlike any other balancing test factor listed in s 30(3) of the EA, s 30(3)(a) has a direct nexus with one of the purposes set out in s 6.[201] Section 30(3)(a) states that the court may have regard to the "importance of any right breached";[202] likewise, s 6(b) of the EA stipulates the importance of "providing rules of evidence that recognise the importance of the rights affirmed by the [NZBORA]."[203] Therefore, when reading the non-exhaustive factors in light of the purpose of the EA, this supports the notion that the breach of rights consideration should be afforded starting point primacy at the very least.

Moreover, s 6 of the NZBORA stipulates that the meaning of enactments is to be interpreted with NZBORA preference unless expressly authorised otherwise in statute.[204] This suggests that *Hamed* had no right in deviating from the NZBORA starting point consideration in the s 30 balancing test in the first place.[205]

3. Promoting fairness to parties

In light of purpose (3),[206] the current operation of the s 30 balancing test is failing to adequately realise a system of procedural fairness in the improperly obtained evidence framework. This

194 *Hamed v R*, above n 87, at [282].

195 *R(SC23/2019) v R* [2020] NZLJ 99.

196 Law Commission *The Third Review of the Evidence Act 2006* (NZLC R148, 2024) at 32.

197 Evidence Act 2006, s 6(b).

198 *R v Shaheed*, above n 11; *R v Williams*, above n 56.

199 Law Commission, above n 196, at 34.

200 *Hamed v R*, above n 87, (McGrath J dissenting).

201 Evidence Act 2006, ss 30(3) and 6(b).

202 Evidence Act 2006, s 30(3)(a).

203 Evidence Act 2006, s 6(b).

204 New Zealand Bill of Rights Act 1990, s 6.

205 *Hamed v R*, above n 87.

206 Evidence Act 2006, s 6(c).

finding stems from previous observations where, within New Zealand's democratic system, the government is bound to uphold the rule of law.[207] Nevertheless, considering the NZLC-IP50 case study on s 30 balancing test determinations, the judiciary is most often willing to circumvent government acts of illegality and arrive at conclusions, which allow for the admission of evidence in consequence thereof. Most frequently, admission is allowed on the basis that the evidence is central to the prosecution's case.[208] This sets double standards between the state and its citizens and is inherently unfair.

4. Protecting important public interests

Unequivocally, there is significant public interest in convicting those of serious crimes; however, this is only one of many public interest considerations. Other public interests, beyond convicting individuals of serious crimes, include the maintenance of police compliance,[209] and "taking into account the long-term interest there is in the maintenance of an effective and credible system of justice".[210] This has been discussed in detail above. Materially, the prima facie rule appears capable of protecting these broader range of public interest factors while astutely responding to reasonable instances, such as urgency or necessity, that may justify admission of improperly obtained evidence, notwithstanding a breach of rights.[211]

5. Avoiding unjustifiable expense and delay

The operation of the s 30 balancing test is producing unjustified expense and delay not just for defendants seeking to exclude improperly obtained evidence from trial,[212] but also the justice system (funded by the taxpayer dollar), at large. This is because the only true certainty of s 30 determinations is the notion of uncertainty itself, which skews too heavily in favour of the prosecution's case.[213] As a result, s 30 determinations are the subject of frequent appeals.[214]

The Law Commission has noted that, perhaps as a result of the uncertainty created by the balancing test, there are a large number of appeals relating to the matter.[215] As of 31 October 2023, a Lexis Advance search for appellate cases citing s 30 returned 515 High Court results, 499 NZCA results, and 59 Supreme Court results.[216] Although further research is required, if the significant volume of these reported appellate determinations are the product of uncertainty caused by the s 30 balancing test, a worthwhile fix to the issue would be the reinstatement of the prima facie rule. This would generate greater consistency among like cases, and thus, fewer appeals.

To reinforce that the s 30 balancing test is leading to an unjustifiable increase in public expenditure due to increased appeals within the courts (which is caused by uncertainty within

207 De Smith, above n 176.

208 Law Commission, above n 144, at [7.26]–[7.27].

209 *R v Hennessey*, above n 71, at [30].

210 *R v Reti*, above n 124, at [94].

211 See for example, *R v Goodwin*, above n 26; *R v H*, above n 25.

212 Law Commission, above n 196, at [7.18].

213 Law Commission, above n 144, at [7.7].

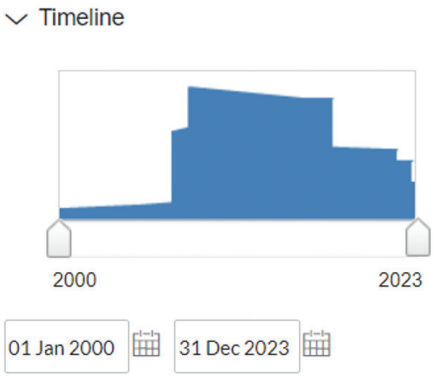
214 At [7.7].

215 Law Commission, above n 196, at [7.7].

216 At 117.

such determinations)[217] this paper has attached a visual timeline (Appendix 1) provided by Lexis Advance to illustrate the frequency of cases that have arisen between 2000−2023 that include the terms "improperly obtained evidence":

Appendix 1



Reflecting on Appendix 1, since the enactment of the s 30 balancing test in 2007,[218] the appellate courts have experienced a surge in cases relating to determinations on the matter of improperly obtained evidence. With the high likelihood that this surge is the product of uncertainty created by the balancing test,[219] the balancing test's derogation from consistency has caused unjustified expense and delay in the criminal justice system. This unjustified expense and delay could be decreased by re-adopting the more stringent prima facie rule of exclusion, whereby, less ambiguity and inconsistency flowing throughout judgments would be realised within the courts.

6. Enhancing access to the law of evidence

In further reference to Appendix 1, the reader may observe a decline in cases that include the terms "improperly obtained evidence" in the appellate courts since 2018. Subject to further research, this finding may be explained due to a decreased incentive to challenge improperly obtained evidence in the first place. After all, s 30 is now operating as a "rigged lottery".[220] Consequently, in the NZLC's third review of the EA, it was noted that defence lawyers are becoming "less likely to advise clients to challenge improperly obtained evidence because of their perception that challenges are unlikely to succeed".[221] This amounts to a decrease in access to the law of evidence and subsequently repudiates the purpose promulgated in s 6(f) of the EA. Clearly, however, a prima facie rule of exclusion that would most often favour the accused, would assuage and compel procedural illegality to be challenged more often, and more succinctly.

217 Law Commission, above n 144, at [7.7].

218 Evidence Act 2006, ss 2(1), 30(2)(b) and 30(3).

219 Law Commission, above n 196, at [7.7].

220 See paper discussion above, at [IV.B].

221 Law Commission, above n 196, at [7.27]; Criminal Bar Association, Ethan Huda, Public Defence Service; see also Tania Singh "Criminal Practice Section: The exclusion of improperly obtained evidence" [2021] NZLJ 59 at 59.

7. Conclusion on the Issues

The balancing test for determining the admissibility of improperly obtained evidence is fundamentally flawed.[222] By way of general reflection, the balancing test is derogating from the rule of law, its initial codified purpose, and the golden thread of criminal law. Too much weight is being afforded in favour of admitting evidence notwithstanding its discovery in violation of the NZBORA. Moreover, s 30 can be observed as repudiating all six purposes enshrined in s 6 of the EA. For these reasons, although not limited to such, statutory reform is required.

V. Proposed Reform

Throughout this paper, the reinstatement of the prima facie rule of exclusion for evidence obtained in violation of the NZBORA has been suggested as a desirable reform to alleviate the concerns realised within the currently flawed operation of the s 30 balancing test.[223] Considering that the balancing test has been codified in New Zealand law,[224] statutory amendment is required to reinstate the prima facie rule. However, unlike its common law predecessor, the prima facie rule should be expressed in simple English terms to make the law more accessible and understandable for all people, learned and lay.[225] It may read that:[226]

Improperly Obtained Evidence in Violation of the New Zealand Bill of Rights Act 1990

(1) If the Judge finds that the evidence has been improperly obtained in violation of the rights affirmed in the New Zealand Bill of Rights Act 1990, that evidence must be excluded unless one or more of the exceptions set out in subsection (3) apply.

(2) The prosecution bears the onus of satisfying the Judge that one or more of the exceptions set out in subsection (3) apply.

(3) For the purpose of subsection (1), an exception will only apply where the Judge is satisfied that:

  (a) The breach was trivial; or

  (b) There was a reasonably appreciable and immediate danger to police officers or other members of the public that gave rise to urgency or necessity; or

  (c) The nexus between the breach and discovery of evidence is too remote; or

  (d) *[subject to further development]*

Subsection (1) would create a prima facie presumption in favour of excluding evidence obtained in violation of the NZBORA subject to one or more exceptions set out in subs (3). This would afford primacy to the NZBORA violation and better realise the benign construction of an accused's rights in criminal law (for example, the golden thread principle).[227] Moreover, with symmetry to

222 Evidence Act 2006, ss 30(2)(b) and 30(3).

223 Evidence Act 2006, s 30.

224 *R v Shaheed*, above n 11; see also Evidence Act, s 30.

225 Alice Coppard and others *New Zealand Law Style Guide* (3rd ed, Thomson Reuters, 2018) at [1.1.1(d)].

226 Please note that the this is a general suggestion in light of the author's research to date, which is subject to further development (he is not a policy maker).

227 *Woolmington v Director of Public Prosecutions*, above n 153.

the golden thread principle that ought to string through criminal evidence law,[228] subs (2) would promulgate that the prosecution bears the onus of satisfying the Judge that good reasoning to the contrary (an exception) exists to favour admission.

The words "will only apply" have been used in the listed exceptions for the proposed reform (subs (3)) to ensure that the exceptions remain exhaustive. However, further research is required before developing a conclusive set of exceptions. Nevertheless, the reasoning for implementing an exhaustive list of exceptions is to bring a sense of precision and rigour[229] to determinations on the admissibility of evidence obtained in violation of the NZBORA. The rigour sought by this new rule will embrace the sentiments of *R v Gwaze,* that EA provisions should operate as rules of law and not loose exercises of discretion based on value judgments.[230]

VI. Conclusion

For reasons addressed, the current s 30 balancing test deserves no place in New Zealand's criminal procedure framework. Nevertheless, this paper has proposed statutory reform that will somewhat resemble the old prima facie rule realised in common law from 1991−2002 for evidence obtained in violation of rights affirmed in the NZBORA. At the very least, this paper hopes to add energy to a pre-existing and ongoing policy argument relating to the s 30 balancing test and its abolition.

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228 At 481: "web of criminal law".

229 Scott Optican, above n 67, at 179.

230 See *R v Gwaze*, above n 193.

The Ethics of Inequitable Public Healthcare Delivery to Māori: A Breach And Failure of Indigenous Human Rights in Aotearoa New Zealand

Ngā Matatika Tuku Atawhai Hauora Tūmatanui Kāore i Ōrite ki te Iwi Māori: He Takahi Tikanga me te Rahunga o ngā Matatika Iwi Taketake

Nicole Cutler*

I. Introduction

Aotearoa New Zealand's (ANZ) colonial history has aided in creating the existence of a unique sociodemographic ecosystem where historic social constructs have curated an environment of institutional racism that reinforces itself and is especially visible in healthcare access for ethnic minorities. This research critically evaluates the ethics of inequitable public healthcare delivery to Māori in the public health system, and demonstrates a breach and failure of Indigenous human rights in ANZ: in conjunction, through the supposition that healthcare is a right, the systemic failures observed are felt most strongly and disproportionately by Māori. The ethics of healthcare shows significant structural racism that directly benefits the majority ethnicity, while harming the minority. It is asserted that the Indigenous experience of colonisation has continued to be felt cumulatively through food ecosystems that are currently unaffordable, which would otherwise be a nurturing and stimulating force for thriving, healthy Indigenous populations.[1] The deficit of ecosystem access and distribution, and rights to healthcare, are directly impacted by those who make up lower socio-economic groups and who have poorer housing and health, othered by the majority ethnicity in ANZ of non-Māori.[2]

Equity can be framed as a public health issue from international covenants and applied domestically through the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) which was ratified in ANZ in 1978; in addition, the International Covenant on Civil and Political Rights, the Ottawa Charter for Health Promotion, the Treaty of Waitangi/Te Tiriti o Waitangi (TToW), and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),[3] all contribute to supporting access to healthcare rights for all people. It is abundantly

* Thanks to Kevin Hague, Chair of the Public Health Advisory Committee, for his expertise.

1 Public Health Advisory Committee (PHAC) *Rebalancing our food system* (Ministry of Health, Wellington, 2024) at iv.

2 David Pearson, "Ethnic inequalities" Te Ara – the Encyclopedia of New Zealand <www.TeAra.govt.nz>./mi/ethnic-inequalities/print>.

3 International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified in 1978; International Covenant on Civil and Political Rights; Ottawa Charter for Health and Promotion; Treaty of Waitangi; United Nations Declaration on the Rights of Indigenous Peoples.

clear that Māori have historically been, and continue to be denied access and subsequent delivery of healthcare. It is through these social constructs that Māori are suppressed further from accessing the same rights as non-Māori freely access, without barriers: the inequities of access to healthcare experienced by Māori simultaneously provide more of the resource to more dominant ethnicities.[4] Even though significant tracts of legislation in ANZ supports minimisation of inequities for minority groups,[5] it appears to be hampered largely by social, political and procedural constructs that expressly or impliedly support continued disadvantage within ANZ's healthcare system, extending further to include the socio-economic environment of Māori, which marginalises access; however, additionally increases Māori's need to access the fundamental right of health and healthcare.[6]

This critical review is separated into four sections; firstly, addressing the history of the problem of inequitable access to healthcare, which is reviewed in relation to the social constructs of legislation in conjunction with the effect of colonisation that has resulted in westernisation of a communalist society with a strong value system of tikanga, and connection to the land. The linking of the cumulative ongoing effect of colonisation and Māori having, "on average the poorest health status of any ethnic group in New Zealand" is highlighted.[7] Acknowledgement is given to colonialism as the inception of structured racism against Indigenous people, specifically, Māori of ANZ which continues in full operation today.

The second section considers whether access to healthcare is a right in ANZ and evaluates s 3 of Pae Ora (Healthy Futures) Act 2022 (POHFA), which states the purpose of the Act is to provide for public funding and the provision of services for the outcome to:[8]

> (a) protect, promote, and improve the health of all New Zealanders; and (b) achieve equity in health outcomes among New Zealand's population groups, including striving to eliminate health disparities, in particular for Māori; and (c) build towards pae ora (healthy futures) for all New Zealanders.

The Act references Te Tiriti o Waitangi (the Treaty of Waitangi),[9] which discusses the Crown's "intention" to give effect to the principles of the Treaty which specifically, states the Act:[10]

> Requires the Minister, the Ministry, and all healthy entities to be guided by the health sector principles, which, among other things, are aimed at improving the health sector for Māori and improving Hauora Māori outcomes.

Interpreting the intent and context of ss 3 and 6 of the Act demonstrates the aim to achieve equity; however, it has not done so. The Act's redeeming features is that the Public Health Advisory

4 Tracy Haitana and others "It absolutely needs to move out of that structure: Māori with bipolar disorder identify structural barriers and propose solutions to reform the New Zealand mental health system" (2023) 28(2) Ethnicity & Health 234 <www.doi.org/U10.1080/13557858.2022.2027884>.

5 New Zealand Bill of Rights 1990, ss 3, 10, 11, 19, and 20; Human Rights Act 1993, pts 1A and 2; Pae Ora (Healthy Futures) Act 2022, s 3.

6 PHAC, above n 1, at 3.

7 Hauora: report on stage one of the health services and outcomes Kaupapa inquiry (Wai 2575 – Waitangi Tribunal Report 2023 at [2.3].

8 Pae Ora (Healthy Futures) Act, s 3.

9 Pae Ora (Healthy Futures) Act, s 6.

10 Pae Ora (Healthy Futures) Act, s 6(a).

Committee is an Act-born, independent expert advisory committee which supports the New Zealand healthcare reforms of 2022.[11]

Furthermore, since inception, colonisation has resulted in cumulative adverse effects on generations of Māori through the social, political and structural inequities on the repressed Indigenous people.[12] Additionally, with TToW as a founding document, Māori were guaranteed "all the rights and privileges of British subjects".[13] The inequities of healthcare that Māori have experienced and currently experience represent a breach of ANZ's founding constitutional document and highlight the tokenism of the PAHFA.

Thirdly, the socio-economic conditions of inequity supporting poor health and deprivation are reflected in research outcomes, observing the poorer health outcomes of Māori when compared with Non-Māori,[14] with Māori experiencing greater food insecurity: this issue continues to drift upwards to the national median wage.[15] Food, when considered as a right for wellbeing is required to be supplied in sufficient quantity at a sufficient level of nutrition, connecting communities, in contrast to the current commodification of a resource needed as a human right.[16] Settler social constructs act as a barrier to Māori's access to health through western society structuring food with an economic tilt, which emphasises financial gain rather than being need-based.[17] A further issue that disadvantages Māori is the over-abundance of unhealthy food, which results in obesity related illnesses (second only to tobacco):[18] Māori are harmed persistently and at higher rates than other majority or minority groups in ANZ.

Fourthly, the disestablishment of Te Aka Whai Ora reflects the continued failures around breaches of the New Zealand Bill of Rights Act 1990 (NZBORA) and whether a declaration of inconsistency against TToW would be enough to seek judicial review resolution.[19] The legislature caused an urgent Bill to be passed on 28 February 2024. Further, it is argued that through disestablishing Te Aka Whai Ora, the Crown has demonstrated very low compliance with all five elements of TToW, being the preamble, the three written articles, and the oral article, which is therefore a breach of Māori's right to the healthcare that they already experience deeply ingrained inequities in accessing.

11 Pae Ora (Healthy Futures) Act, s 93.

12 P Reid P and B Robson B "Understanding Health Inequities"in B Robson and R Harris (eds) *Hauora: Māori standards of health IV: A study of the years 2000−2005* (Te Rōpū Rangahau Hauora a Eru Pōmare, University of Otago, Dunedin, 2007).

13 Te Tiriti o Waitangi 1840, art 3, <ww.archives.govt.nz/discover-our-stories/the-treaty-of-waitangi/what-te-tiriti-o-waitangi-says-in-english-and-te-reo-maori>.

14 Hauora, above n 7, at [2.3]; Ministry of Health (MoH) *Longer, Healthier Lives: New Zealand's Health 1990–2017* (Wellington, 2020).

15 PHAC, above n 1, at 14.

16 PHAC, above n 1, at vi.

17 PHAC, above n 1, at v.

18 MoH *Longer, Healthier Lives*, above n 14.

19 Stuff "Māori health providers seek High Court action against Crown over Te Aka Whai Ora, Te Aorewa Rolleston" (15 May 2024) <www.stuff.co.nz/nz-news/350278628/maori-health-providers-seek-high-court-action-against-crown-over-te-aka-whai-ora>.

II. Ethical History of the Problem in Different Social Constructs

A period of greater recognition of Māori health rights under TToW dawned with the emergence of the Treaty of Waitangi Act 1975,[20] and later the New Zealand Public Health and Disability Act 2000;[21] furthermore, the new neo-liberal government of the 1980s overturned the universal health system of ANZ's first Labour Government,[22] which had been focused on interventionism and protectionism. Māori continued to experience poor health outcomes and shorter life expectancy in in contrast to Non-Māori, with inequities in health between the groups worsening for the first time in recorded history in the 1990s.[23] Arguably, this was the result of "Rogernomics'"[24] focus on free markets and balanced budgets, which brought the social challenges of poverty and unemployment. Historians have largely focused on earlier tracts of time from mid-1800 through to mid-1900,[25] although post-1980, the social and macro-economic factors of education, employment, income and housing quality began to be considered as determinants of health, with recognition that Māori were affected more severely than non-Māori.[26] A Public Health Commission report in 1994 recognised and argued for improvements in Māori health through granting self-determination, with the report citing Mason Durie[27] extensively.[28]

The experiences of Māori are not unique: other Anglo-settler societies have seen inequitable health outcomes for Indigenous peoples resulting from settler colonialism (Australia, United States and Canada). While time and place varies for Indigenous experiences, the same pattern of magnitude of inequitable health outcomes remains as the consistent variable.[29] The Canadian healthcare system continued the colonial legacy of structural racism, where Indigenous people experienced insensitive, discriminatory and poor-quality care at higher rates than non-Indigenous Canadians: colonialism correlates strongly with health.[30] The Lancet's 2018 Canada Series "argued

20 Treaty of Waitangi Act 1975.

21 New Zealand Public Health and Disability Act 2000.

22 Hayley Brown and Linda Bryder "Universal healthcare for all? Māori health inequities in Aotearoa New Zealand, 1975−2000" (2023) Social Science and Medicine, 319.

23 Hayley Brown and Linda Bryder, above n 22.

24 Rogernomics is a portmanteau of Roger Douglas and economics. Mr Douglas was the Minister of Finance under the fourth Labour Government between 1984 and 1988. Rogernomics describes the neoliberal economic reforms undertaken by the government which featured market-led restructures and deregulation.

25 D A Dow and B Brookes "Māori health and government policy 1840−1940 [Review of *Maori health and government policy 1840-1940*]" (2001) 53(1) Political Science 78; W Anderson "May the People Live: A History of Maori Health Development 1900−1920 [Review of *May the People Live: A History of Maori Health Development 1900−1920*]" Health and History (2001) 3(1) 127. Australian Society for the History of Medicine <www.doi.org/10.2307/40111397>; M Durie *Whaiora: Māori health development* (2nd ed, Oxford University Press, Oxford, 1998).

26 Alastair Woodward and Tony Blakely *The Healthy Country? A History of Life and Death in New Zealand* (Auckland University Press, Auckland, 2014).

27 Sir Mason Durie, a psychiatrist, is also a New Zealand professor of Māori Studies and a research academic at Massey University, Palmerston North who is well-known for his contributions to Māori health in ANZ.

28 Public Health Commission *Our Health, Our Future; Hauora Pakari, Koiora Roa: the State of Public Health in New Zealand* (Public Health Commission, Wellington, 1994)

29 P Axelsson, T Kukutai and R Kippen "The field of Indigenous health and the role of colonisation and history" (2016) 33(1) Journal of Population Research (Canberra, ACT) 1 <www. doi.org/10.1007/s12546-016-9163-2>.

30 The Lancet "The past is not the past for Canada's Indigenous peoples" (2021) The Lancet (British ed) 397(10293) at 2439–2439 <www. doi.org/10.1016/S0140-6736(21)01432-X>.

that historically embedded and institutionalised forms of racism remain the root causes of large, multi-generational inequities in Indigenous health status".[31] The Canadian Indigenous peoples lived experience is highly comparable with New Zealand's Māori history in ANZ. Further comparing settler colonialism experiences, it is argued that:[32]

> Colonial medicine and political liberalism co-produced a social ontology and epistemology that centres whiteness as the norm to the exclusion of racialised others. It contends that it is necessary to understand this history to adequately address its continuing effects in the Australian healthcare system today. [It is argued] … that bioethics, a field that ordinarily functions as a source of regulation and critique of medicine, has been unable to respond to institutional racism because it too is shaped by this history of whiteness.

Racism is a health determinant, directly through psychological harm and indirectly through institutional racism,[33] and is defined as being, "encoded in the policies and funding regimes, healthcare practices and prejudices that affect Aboriginal and Torres Strait Islander peoples access to good care differentially".[34] The field of bioethics is interdisciplinary, comprising of philosophers, healthcare professionals, theologians and social scientists[35] and focused on "the ethical issues arising from health care and the biomedical sciences".[36] Bioethics origin stories are centred around opposing racist medical practices or research, for example, the Tuskegee, Alabama syphilis experiments.[37] It has been argued that through the ignoring of the method, dominant social and ethical theories normalise whiteness, with white privilege perpetually reinforced into the core of theoretical structures used to identify ethical issues,[38] creating colour blindness in ethics and research.

The ethics of care, as a lens for viewing the world, can be related to when Māori and non-Māori researchers work in collaboration: it is acknowledged that political, processual and ethical considerations will arise, with minimal guidance for non-Māori researchers on management of the experience.[39] This may be described as a worldview that frames the examination of politics, privilege and power required to guide research that responds ethically in complex or non-standard settings.[40] In this setting, researchers have a critical framework for assessing questions of researcher privilege and power to promote unity with the decolonising objectives of Indigenous

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31 The Lancet, above n 30.

32 C Mayes "White Medicine, White Ethics: On the Historical Formation of Racism in Australian Healthcare" (2020) 44(3) Journal of Australian Studies 287 <www.doi.org/10.1080/14443058.2020.1796754>.

33 Christopher Mayes, above n 32, at 287.

34 J Dwyer and others "Equitable care for indigenous people: Every health service can do it" (2016) 11(3) Asia Pacific Journal of Health Management 11 at 13 <www.//doi.org/10.24083/apjhm.v11i3.143>.

35 Christopher Mayes, above n 32, at 288.

36 H Kuhse, and P Singer "What Is Bioethics? A Historical Introduction" in *A Companion to Bioethics* (2009, Wiley-Blackwell) 1 <www.doi.org/10.1002/9781444307818.ch1>.

37 S Ferber and ÁR Rodriguez "Bioethics in Historical Perspective [Review of *Bioethics in Historical Perspective*]" (2015) 48(3) British Journal for the History of Science 537. Cambridge University Press <www.doi.org/10.1017/S0007087415000539>.

38 C Myser "A Response to Commentators on 'Differences from Somewhere: The Normativity of Whiteness in Bioethics in the United States'" (2003) 3(3) American Journal of Bioethics 56 <www.doi.org/10.1162/152651603322874825>.

39 T Brannelly and A Boulton "The ethics of care and transformational research practices in Aotearoa New Zealand" (2017) 17(3) Qualitative Research: QR 340 <www. doi.org/10.1177/1468794117698916> at 2.

40 T Brannelly and A Boulton, above n 39, at 2.

communities.[41] It is argued that these concepts are transferrable to the Indigenous context, where power and privilege are featured strongly.[42] Colonisation and political context are omnipresent and extend deeply within the Indigenous populations lived experience, subsequently manifested through lower life expectancy, poorer housing standards and educational access and outcomes, poverty at greater rates than non-Māori and long-term illnesses, in conjunction with removal of land and subsequently loss of culture.[43] The extent that these indicators have been felt to varying extents differ across sites of colonisation (New Zealand, Australia, America and Canada).[44] The key subjects of health, poverty and social care are regular research topics for social scientists, however, it is imperative that research frameworks do not repeat colonial attitudes and methods, or worse yet, recolonise Indigenous peoples. Linda Tuhiwai Smith asserted:[45]

> the term research is inextricably linked to European imperialism and colonialism and is one of the dirtiest words in the Indigenous dictionary … as knowledge is collected, classified and then represented back to the West. The word research stirs up anger, silence and distrust.

Colonisation has spawned both the social issues that must be investigated and simultaneously tainted the relationship of Indigenous and settler communities, minimising or even averting access to the people that hold the best solutions to the problem. Self-determination is imperative for Māori to exercise knowledge and culture safety, uninterrupted by settler politics; however, Māori have struggled to assert control over myriad aspects of life, including research due to the impact of colonisation.[46] Cultural safety requires doctors to meet cultural safety standards while reflecting on the effect their own views and biases bring to the clinical interaction, and is defined as:[47]

> The need for doctors to examine themselves and the potential impact of their own culture on clinical interactions and healthcare service delivery. The commitment by individual doctors to acknowledge and address any of their own biases, attitudes, assumptions, stereotypes, prejudices, structures and characteristics that may affect the quality of care provided. The awareness that cultural safety encompasses a critical consciousness where healthcare professionals and healthcare organisations engage in ongoing self-reflection and self-awareness and hold themselves accountable for providing culturally safe care, as defined by the patient and their communities.[48]

The ethics of care is a "political theory and feminist philosophy that draws out the connection between morality and politics, and calls for political recognition of care".[49] Ethics of care can be used to raise concerns about privilege, marginalisation and oppression, utilising Indigenous

41 T Brannelly and A Boulton, above n 39, at 2.

42 T Brannelly and A Boulton, above n 39, at 2.

43 T Brannelly and A Boulton, above n 39, at 2.

44 T Brannelly and A Boulton, above n 39, at 2.

45 LT Smith "On Tricky Ground, Researching the Native in the Age of Uncertainty" in NK Denzin and YS Lincoln (eds) *The SAGE handbook of qualitative research* (2005, Thousand Oaks, Sage Publications).

46 T Brannelly and A Boulton, above n 39, at 2.

47 Te Kaunihera Rata o Aotearoa Medical Council of New Zealand Statement on cultural safety (October 2019) <www.mcnz.org.nz/assets/standards/b71d139dca/Statement-on-cultural-safety.pdf>.

48 E Curtis and others "Why cultural safety rather than cultural competency is required to achieve health equity: a literature review and recommended definition" (2019) 18(1) International Journal for Equity in Health 174 <www.doi.org/10.1186/s12939-019-1082-3>.

49 T Brannelly and A Boulton, above n 39, at 5.

academics to guide and support the moral elements of integrity of care.[50] Bozalek defines privilege as "unearned social and structural advantages which benefit dominant groups or those who occupy positions of power in society at the expense of marginalised groups".[51] It is noted that Indigenous people exist in a hostile environment where the norm of vulnerability persists and is perpetuated by politics: additionally, existence in this state requires perpetual vigilance to cohabitate in an environment with structural advantages that lean to the dominant group.[52] Privilege is a comfortable cloak that makes people feel secure, while being simultaneously invisible and normalised.[53] Tronto states:[54]

> The problem also is that those who have benefitted from past injustice have a great incentive to forget that fact, whether they perpetrated injustice or were simply bystanders who benefitted from the unjust acts of others, and those who have been so harmed cannot grasp how the world can go forward simply by ignoring or burying the past.

Domination politically and socially is inherent to Indigenous lives; however, specific recognition is imperative to ensure they do not become a society within a society and are acknowledge as a unique identity: Young suggests that "blindness to difference perpetuates cultural imperialism by allowing norms expressing the point of view and experience of privileged groups to appear neutral and universal."[55] Through ethics of care, privileged irresponsibility can be addressed, achieving justice and improving research relationships.

Colonisation saw the end of life as tangata whenua (Indigenous People) had known for over six hundred years. The United Nations has identified that no universal definition of Indigenous people exists; nonetheless, the UNDRIP manual stated the Martínez Cobo Study had the most widely cited working definition of Indigenous Peoples:[56]

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

The UNDRIP does not provide a definition of Indigenous peoples; despite this, the Declaration does consider self-identification as a fundamental criterion, with the right to self-determine identity or membership aligned with their customs and traditions.[57] ANZ's Indigenous people have been excluded from self-governing from the signing of the TToW and transitioning as a self-governing

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50 T Brannelly and A Boulton, above n 39, at 2.

51 V Bozalek "Privilege and responsibility in the South African context" in *Ethics of Care* (2015) Policy Press 83 at 83 <www.doi.org/10.51952/9781447316527.ch007>.

52 T Brannelly and A Boulton, above n 39, at 2.

53 T Brannelly and A Boulton, above n 39, at 2.

54 JC Tronto *Caring Democracy: Markets, Equality, and Justice* (1st ed, 2013, NYU Press) xix at 127 <www.doi.org/10.18574/9780814770450>.

55 IM Young *Justice and the politics of difference* (2011, Princeton University Press, Princeton) at 165.

56 The United Nations Declaration on the Rights of Indigenous Peoples, A Manual for National Human Rights Institutions <www.ohchr.org/sites/default/files/Documents/Issues/IPeoples/UNDRIPManualForNHRIs.pdf> at 5.

57 United Nations Declaration on the Rights of Indigenous Peoples, art 33.

colony where settlers soon began rapid and unscrupulous acquisition of Māori land, followed by the New Zealand Wars, which was attributed to "settler hunger for land and the government's desire to impose real sovereignty over Māori".[58] The New Zealand Settlements Act 1963[59] was the legislative tool for gaining Māori land, in conjunction with being a mechanism for punishing Māori through confiscation (raupatu) of almost 4 million acres of tribal lands, of which some was returned to Māori in individual titles.[60] Previously *R v Symonds*[61] reinforced Crown pre-emptive rights to purchase Māori land which was recognised through the doctrine of Aboriginal title (a common law doctrine that Indigenous people's land rights persist after sovereignty) by the Supreme Court. Further, the Native Court was established through the Native Lands Act 1865,[62] which was a settler-controlled court with the primary purpose of translating customary title into individual titles to land (no more than 10 owners): making the process of selling Māori land to settlers significantly easier for settlers.[63] The systematic eradication of communalism eroded tribal power when the Crown emphasised individual title and ownership, transferring power from Māori to the Crown. *Wi Parata v The Bishop of Wellington* provided that the Treaty was "worthless" and a "simple nullity" further displacing Māori and cooling ahi kaa (fires of occupation),[64] derogating customary law. Furthermore, *Wi Parata* eroded the Kauwaeranga Judgment,[65] which had held the Treaty to be effective and Māori to have exclusive possession of fishing. These decisions reflected the social perspectives of the time and further cemented the Crown's ability to marginalise Māori through weaponising legislation for colonial benefit.

"Land is taonga tuku iho of special significance to Māori people."[66] As a communal society, land tenure is through communal title that passes down from tipuna (ancestors) to whanaunga (blood descendants):[67] alienation from the land and this mode of succession is unimaginable for Māori.[68] Identity comes from connection to the land as tangata whenua, and belonging to the land, which gives a special significance to Māori.[69] This deep connection to the land goes back generations in a role of preservers of the land for their uri (descendants), as their tipuna did before them,[70] entrenching Māori's role as kaitiakitanga (guardians of the land, stewardship of land and resources).[71] Land was of great importance to Māori wellbeing, culturally and spiritually: the more Māori were alienated from their land, the greater harm that was inflicted on their communities.[72]

58 "The Treaty in Practice – slide to war" <www.nzhistory.govt.nz/politics/treaty/the-treaty-in-practice/slide-to-war>.

59 New Zealand Settlements Act 1963.

60 The Treaty in Practice, above n 58.

61 *R v Symonds* (1847) NZPCC (1840−1939) 387 at [55].

62 Native Lands Act 1865.

63 The Treaty in Practice, above n 58.

64 Te Ture Whenua Maori Act 1993, s 4.

65 *Kauwaeranga Judgment* (1870); reprinted in (1984) 14 VUWLR 227.

66 Te Ture Whenua Maori Act 1993, Preamble.

67 Alice Eager "Enough is Enough!" Achieving the Protection of Maori Freehold Land from Public Works Acquisition" (A dissertation in partial fulfilment of a Bachelor of Laws (Honours) at the University of Otago, 2002) at 2.

68 ETJ Durie "Will the settlers settle? Cultural concilisation and law" (1996) 8(4) Otago Law Review 449 at 452.

69 HM Mead *Tikanga Māori: Living by Māori Values* (Huia Publishers, Wellington, 2003) at 273.

70 HM Mead, above n 69, at 283.

71 Te Ture Whenua Maori Act 1993, s 4.

72 Alice Eager, above n 67, at 3.

Tikanga Māori are the customary Māori values and practices.[73] Tikanga, as a worldview, is a derived from "tika" meaning "right" or "correct" and informs that actions are to be aligned with what is culturally and socially appropriate: it is considered to be a body of rules used for self-governance through customary laws.[74] Elements of Māori practice and values are whanaungatanga (kinship, inclusiveness, relationships), and manaakitanga (care) are relational and collective values and practices connected to Indigenous cultures.[75] Additional foundational values are whakapapa (genealogy), wairuatanga (spirituality), mana (honour, prestige, influence), tapu (sacred, holy), utu (reciprocity, balance), mauri (life principle in all things), rangatiratanga (effective leadership), kohitanga (unity), all providing a strong base for a cohesive, moral, self-governing culture. As a society, Māori did not place emphasis on possession and ownership, taking only what was needed rather than commodification for the sake of commodification.

The Public Works Acts,[76] in all iterations, methodically and systematically broke Māori's ahi kaa with their land through the continual and targeted acquisition of land. As a result of Crown acquisition of Māori land, Māori urbanisation eroded identity, with many no longer knowing Tikanga Māori. Further, the dissolution of ahi kaa disconnected Māori from their land, whakapapa and whanaungatanga. It is argued that the assimilative pressures from government agencies with emphasis on individualism and a nuclear family further disconnects Māori from whanau, land, identity and greater dissolution of tikanga adherence mutes Rangatira values that had previously been considered as foundational and unquestionable.[77]

TToW is ANZ's founding document,[78] written in English and Māori, taking the form of a preamble, the three written articles, and the oral article. TToW is a contributing document of ANZ's constitution, which defines the power of the state and regulates the exercise of this power.[79] TToW provided Māori with "nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani" (all the rights and privileges of British subjects)[80] and by the Articles existence, requires corrective action to occur when inequities of rights and privileges occur.[81] It stands that the inequities in health outcomes that Māori continue to experience since the inception of universal healthcare, represent a significant breach of a primary document.[82] Through the five guiding principles of the TToW a structured solution to the inequity of health outcomes that Māori subsist is provided, both broadly

73 Te Ture Whenua Maori Act 1993, s 4.

74 R Joseph "Whanau Mentoring, Maori Youth and Crime: Possible Ways Forward" (2007) 11(1) Childrenz Issues.

75 A Boulton and T Brannelly "Care ethics and Indigenous values: political, tribal and personal" in M Barnes and others *Ethics of Care, Critical Advances in International Perspective* (2015, Policy Press, Bristol).

76 Public Works Act 1864; Public Works Act 1876; Public Works Act 1928; Public Works Act 1953 and Public Works Act 1981 relating to the disposal of land and subsequently the return of land not required for public works to Māori given the barriers of the previous Acts.

77 R Joseph, above n 74.

78 Te Tiriti o Waitangi: The Treaty of Waitangi <www.gg.govt.nz/office-governor-general/roles-and-functions-governor-general/constitutional-role/constitution>.

79 K Keith "On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government." <www.gg.govt.nz/office-governor-general/roles-and-functions-governorgeneral/constitutional-role/constitution>.

80 Te Tiriti o Waitangi: The Treaty of Waitangi. <ww.archives.govt.nz/discover-ourstories/the-treaty-of-waitangi>.

81 P Reid "Achieving health equity in Aotearoa : strengthening responsiveness to Māori in health research" (2017) 130(1465) New Zealand Medical Journal 96.

82 Hauora, above n 7.

and at the macro level of structure and organisation.[83] The Public Health Advisory Committee's September 2023 release on a position statement on "Equity, Te Tiriti o Waitangi, and Māori Health" suggests the Treaty provides clear solutions through the guiding principles tino rangatiratanga, equity, active protection, options, and partnership.[84] The fact that Māori are entitled to the same rights and privileges as settlers, and that access to the determinants of health are discussed in Part 3.

III. Is Access to Healthcare a Right in ANZ and are Equitable Health Outcomes Being Achieved?

The previous primary health system was established under the New Zealand Public Health and Disability Act 2000[85] and funded through the Ministry of Health, and overseen through district health boards to facilitate systems and performance: the Crown's role in primary health care in ANZ is fundamentally supreme.[86] Restructuring occurred during the pandemic, with reforms following an extended period of structural stability since 2001, after the instability of rapid, radical restructuring in the 1990's.[87] The drive for change was twofold, arising to centralise and streamline the fragmented system of 20 individual, semi-autonomous district health boards (DHBs) that had sparked the phrase, "post-code lottery" where access and service levels were inconsistent; and the second purpose had a strong orientation towards tackling the persistent and unequivocal health inequities within ANZ's population groups, specifically of Indigenous people, but also including Pasifika peoples in conjunction with rural populations, and lower socio-economic people:[88] arguably, these are one and the same as it is Māori who hold a foothold on lower socio-economic status. Along with other colonised peoples globally, Māori experience lower life expectancy and have greater rates of disease than non-Māori.[89] Key governance changes were that elected DHBs ceased and Health New Zealand (HNZ) or Te Whatu Ora, and the Māori Health Authority (MHA) or Te Aka Whai Ora were established.[90] The reforms were based on a blueprint from two highly influential law reform reports, the Health and Disability System Review (the Review), reported to the incumbent government in 2020, and the Waitangi Tribunal Report, Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry (WAI 2575). The Review was an acknowledgement of the incoming Labour Government recognising the urgency of confronting the inequities of the health system.[91] While the Review was progressing, the Waitangi Tribunal released WAI 2575, stage one of the report, which was timed to allow interim recommendations to

83 Public Health Advisory Committee *Position statement on Equity, Te Tiriti o Waitangi, and Maori Health* (2023, Ministry of Health, Welliington) at [13] <www.health.govt.nz/system/files/2024-05/phac-te-tiriti-equity-statement>.

84 Position statement, above n 83, at [13].

85 New Zealand Public Health and Disability Act 2000.

86 Hauora, above n 7, at 17.

87 J Manning, J "New Zealand's bold new structural health reforms: The 'Pae Ora (Healthy Futures) Act 2022'" (2022) 29(4) Journal of Law and Medicine 987 at 987.

88 J Manning, above n 87.

89 J Manning, above n 87.

90 J Manning, above n 87.

91 Hon D Clark *Major Review of Health System Launched* (29 May 2018).

be considered by the Review. WAI 2575 delivered an "uncompromising critique of the failure of the system to deliver equitable health outcomes for Māori".[92]

The reforms ushered in by the 2000 Act have continued to fail in delivering equitable outcomes for Māori health, with the Director-General of Health (at the time of the Wai 2575 report), Dr Ashley Bloomfield, stating:[93]

> [the] state of health for Māori is unacceptable and it is the core business of the New Zealand health and disability system to respond effectively – as required by the New Zealand Public Health and Disability Act 2000

And:[94]

> There is still considerable work needed to achieve equitable health outcomes between Māori and non-Māori . This has been an ongoing issue for the primary health care system and one that is not acceptable or tolerable.

Crown counsel in the inquiry acknowledged that proof of inequity is not required on a national level as this is an established and undisputed fact.

The Treaty of Waitangi Act[95] makes available a procedure by which Māori can claim they have been "prejudicially affected" by any legislation, policy or practice by the Crown that is "inconsistent with the principles of the Treaty of Waitangi".[96] After assessment, the Waitangi Tribunal can make non-binding recommendations to the compensate or remove the prejudice: the non-binding nature allows the Tribunal to fulfil a "quasi-legal/political role" and disregard strict neutrality in favour of significant moral authority.[97] Prior to WAI 2575, claimants held grievances relating to health services and the inequitable outcomes, focusing on Treaty compliance components of the healthcare system relating to Māori's role in the system and resourcing: this was broadly argued as Māori's lack of ability to exercise tino rangatiratanga in design and delivery of health care services for Māori. Three interim recommendations were proffered, with the overarching recommendation being that the Crown make a strong commitment within the health sector aimed at reconciling equitable health outcomes for Māori: the interim time-bound recommendations are:

92 J Manning, above n 87, at 993.

93 A59 Dr Ashley Bloomfield *Brief of Evidence* (7 September 2018); (a) Dr Ashley Bloomfield 'Current State of Māori Health in New Zealand', word processor document (no date); (b) Dr Ashley Bloomfield, 'Summary of Evidence', PDF of Powerpoint presentation summarising evidence (25 October 2018) cited in Hauora, above n 7, at 17.

94 A65 Ashley Bloomfield, second brief of evidence (12 September 2018) cited in Hauora, above n 7, at 17.

95 Treaty of Waitangi Act 1975.

96 Treaty of Waitangi Act 1975, s 6(1). The Treaty of Waitangi was based on the fundamental exchange of kāwanatanga, the right of the Crown to govern and make laws for the country (ceded by Māori to the Crown in art 1), in exchange for the right of Māori to exercise tino rangatiratanga over their land, resources, and people (guaranteed to Māori in art 2). Tino rangatiratanga means Māori self-determination, autonomy, control, independence and decision-making power over their affairs and destiny, including over hauora Māori. Hauora means holistic health and wellbeing, cited in J Manning, above n 87, at 993.

97 J Manning, above n 87, at 993.

1. To explore the possibility of a stand-alone Māori health authority …

2. [To] agree upon a methodology for the assessment of the extent of underfunding of Māori primary health organisations and providers … [and] should include a means of assessing initial establishment and ongoing resource underfunding since the commencement of the New Zealand Public Health and Disability Act 2000.

   … the following interim recommendation that was not time-bound:

3. A view to redesigning, its current partnership arrangements across all levels of the primary health sector. This process should be co-designed with Māori health experts, including representatives from the Wai 1315 and Wai 2687 claimants.

The New Zealand Public Health and Disability Act 2000 contained Treaty compliant elements, although it was confined to Māori mechanisms orientated solely towards Māori contributions in decision-making and participation in the delivery at a DHB level of health and disability services, being very careful to provide any commitments relating to access to services or outcomes.[98] The Review later observed that the clause did not go far enough to ensure TToW compliance from top (Minister of Health) to bottom (DHB) and was considered "a narrow, reductionist version of the Treaty principles … downgrad[ing] the principle of partnership to mere 'participation' and 'contribution'"[99] and failing to involve Māori as legitimate Treaty partners in development or delivery of primary healthcare for Māori.

After releasing WAI 2575, the Crown committed to establishing an MHA, working in conjunction with the Ministry of Health with two main responsibilities:[100]

> It will support the Ministry in shaping system policy and strategy to ensure performance for Māori, and will work in partnership with Health NZ to commission care across New Zealand, ensuring that the needs and expectations of Māori communities are also centred in design and delivery.

The core goals and objectives for the MHA embodied "hav[ing] joint decision-making rights to agree to national strategies, policies and plans that affect Māori, at all levels of the system".[101] Since commencement on 1 July 2022, the Act has created a new set of principles for TToW arguing for their place in the health system, including the proposal of an MHA.[102]

Key policy elements of the Act were identified by the Review, primarily addressing persistent inequities in health outcomes along with access to services provided between Māori and non-Māori; work towards pae ora (healthy futures) for all; simplification of the health system into a national health service through centralised power and streamlining; promoting sustainability of demand

98 New Zealand Public Health and Disability Services Act 2000, s 4 states: "In order to recognise and respect the principles of the Treaty of Waitangi, and with a view to improving health outcomes for Māori, Part 3 provides for mechanisms to enable Māori to contribute to decision-making on, and to participate in the delivery of, health and disability services." Section 3(3)(a) stated that "To avoid any doubt, nothing in this Act entitles a person to preferential access to services on the basis of race".

99 Waitangi Tribunal, Hauora, above n 7, at 78.

100 Health and Disability Review Transition Unit *Our Health and Disability System : Building a Stronger Health and Disability System that delivers for all New Zealanders* (April 2021, White Paper) at 6. <www.dpmc.govt.nz/sites/default/files/2021-04/heallth-reform-white-paper-summary-apr21.pdf>.

101 Health and Disability Review, above n 100, at 6.

102 Hauora, above n 7, at 17; A65 Ashley Bloomfield, second brief of evidence (12 September 2018) cited in Hauora, above n 7, at 17.

and resource availability.[103] Conflicting objectives of universality and equity are observed in the s 3 purpose.[104] Section 3(b) of POHFA states as an objective, that Health New Zealand is to, "achieve equity in health outcomes among New Zealand's population groups, including striving to eliminate health disparities, in particular for Māori." "Strive" may be considered to mean, "to make a great and tenacious effort,"[105] or "to try very hard to do something or to make something happen, especially for a long time or against difficulties."[106] This definition may be problematic for demonstration of intent, with the Crown being able to argue it tried very hard, but ultimately failed.

Signs of tailored universalism may be seen in the provision of a universal service which is tailored to different population's needs and premised on the acknowledgement that strict universalism has underserved minority populations: acceptance of culturally adapted services being required to address and balance the issues of inequity of the previous Act.[107] The Act's inclusion of the TToW difficult in that the well-established fact that two versions of TToW are in existence that differ fundamentally with the English version diluting and fundamentally altering key obligations and guarantees which are clearer in the Māori version. The Act refers to "te Tiriti o Waitangi" and "The Treaty of Waitangi" sits alongside in brackets, signifying the two documents are the same, which is a well-established point of difference. Māori scholars consider that the Māori people are more interested in the contents of the Māori version,[108] being a controversial point for Māori. The Act uses a "defined" te Tiriti clause, itemising the specific manner in which the Crown's intentions and obligations are given effect narrowly, rather than the previous format of free-standing clauses incorporating TToW in a broader and vaguer manner.[109] The section 6 itemised list "provides for the Crown's intention to give effect to the principles of te Tiriti":[110] this includes, inter alia, the requirement that "the Minister, the Ministry and all health entities to be guided by five health system principles, which, among other things, are aimed at improving the health sector for Māori and improving Hauora Māori outcomes".[111] Regardless of the intent behind the use of a defined clause, judicial dicta indicates this may be ineffective in the exclusion of broader obligations to give effect to TToW which leaves open the opportunity to argue the inclusion of further, as of yet, unlisted initiatives.[112]

The five health principles stated in s 7(1) are of a guiding purpose to the Minister, the Ministry, and each specific health entity[113] in reference to the performance of statutory functions.[114] Each of the five health principles is based on, and corresponds directly with the five TToW principles

103 Health and Disability Review, above n 100, at 3–4.

104 J Manning, above n 87, at 997.

105 Collins Dictionary <www.collinsdictionary.com/dictionary/english/striving>.

106 Collins Dictionary, above n 105.

107 J Manning, above n 87, at 997.

108 For example, M Mutu "Constitutional Intentions: The Treaty Texts" in M Mulholland and V Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (1st ed, Huia Publishers, 2011) at 13.

109 For example, clauses that provide that decision-makers are "to take appropriate account of" or "to give effect to" the Treaty principles.

110 Pae Ora (Healthy Futures) Act 2022, s 6.

111 Pae Ora (Healthy Futures) Act 2022, s 6(1)(a).

112 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [151] and [296].

113 Pae Ora (Healthy Futures) Act 2022, s 4 meaning defined as: means Health New Zealand, HQSC, Pharmac, or NZBOS.

114 Pae Ora (Healthy Futures) Act 2022, s 7(2).

recommended by the WAI 2575 Tribunal to act as foundational guiding footstones of the primary health care system. The Bill's Explanatory Note stated that:[115]

> This places Tiriti/Treaty-informed decision-making at the heart of the system by ensuring that decision made by health entities will be genuinely informed by the health principles identified by the Tribunal, and that the legislation will support system-wide accountability for Māori health outcomes.

The combination of the purpose section, the TToW clause, and through the articulation of principles embodying the Crown's obligations under TToW through legislative channels reflects a significant directional change in high-level policy with respect to the health system. Joanna Manning observes that:[116]

> Principles-based legislation is where a list of high-level principles is explicitly articulated in the statute, which state the policy aims of the legislation and are intended to guide the outcomes to be achieved by the regulated entities.

The Tiriti principles and their corresponding health principle are below:[117]

(1) **Tino rangatiratanga**: Health sector principle (c) is that "the health sector should provide opportunities for Māori to exercise decision-making authority on matters of importance to Māori," through the redesign, delivery, and reorientation of health services for Māori (*s 7(1)(c*)). The enabling mechanisms for tino rangatiratanga in the health system are through the MHA and the iwi-Māori Partnership Boards;

(2) **Equity**: The principle in s *7(1)(a)* is that "the health sector should be equitable, which includes ensuring Māori and other population groups have access to services in proportion to their needs, receive equitable levels of service and achieve equitable health outcomes."

(3) **Active protection**: that "the health sector should protect and promote people's health and wellbeing, including by the adoption of population health approaches that prevent, reduce or delay the onset of health needs, … and preventative measures to protect and improve Māori health and wellbeing, … and collaborating with agencies and organisations to address the wider determinants of health" (*s 7(1)(e)*);

(4) **Options**: "the health sector should provide choice of quality services to Māori and other population groups," by: resourcing kaupapa Māori and whānau-centred services; providing services that are culturally safe[118] and culturally responsive; developing and maintaining a workforce representative of communities it serves; providing services tailored to a person's mental and physical circumstances and preferences; and "providing services that reflect mātauranga Māori" (*s 7(1)(d)*);

(5) **Partnership**: "that the health sector should engage with Māori, other population groups, and other people to develop and deliver" services and programmes that reflect their needs and aspirations. To achieve this, Māori are required to be co-designers of the system alongside the Crown (*s 7(1)(b)*).

Of note is that principle (c) is not restricted or limited to solely contributing to decision-making, but has the requirement of provision for exercising decision-making authority therefore

115 Explanatory Note, Pae Ora (Healthy Futures) Bill 2021 (NZ) at 2.

116 J Manning, above n 87, at 999.

117 Pae Ora (Healthy Futures) Act 2022, s 7(1).

118 Pae Ora (Healthy Futures) Act 2022, s 7(1)(d)(ii).

incorporating tino rangatiratanga over Hauora Māori outcomes, per the vision of the Waitangi Tribunal. Additionally, compliance with the health sector principles is only required "as far as reasonably practicable, having regard to all the circumstances, including any resource constraints; and to the extent applicable to them."[119] The use of legal qualifiers is usually used to negate legal claims in the acquisition of entitlements and facilitating rationing of a limited system resource.[120]

Manning (2022) argues that structural changes to the health system, with respect to the institutions and services commissioned, will only have a modest impact as the real causes of health inequity lie beyond the health sector and are rooted in increasing "income and wealth inequity, climate change, unemployment, access to safe and affordable housing, healthy environments, nutrition, education under-achievement, through cost-effective public health interventions."[121] During submissions for the Pae Ora (Healthy Futures) Bill 2021, the above indicators were highlighted, with advocacy for addressing the overwhelmingly strong role of the social determinants.[122] The World Health Organisation (WHO) recommended a Health in All policy aimed at achieving good health as an outcome of all policy formation,[123] which would require multisectoral engagement focusing on health equity and the impacts of policy beyond the health sector.[124] It is acknowledged that the Act required strengthening; additionally, the need for the health sector to collaborate with other agencies through promotional and preventative measures is seen through the higher-level principles of s 7.[125] Given the modest band of power to actually reduce inequity, the reforms could be considered to have set the MHA up to fail to achieve closure of inequities, while continuing to risk majority groups to retain longstanding preferential access to health care outcomes.[126]

A. International Covenants, Conventions, Treaties and Laws

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by the General Assembly on 13 September 2007 with a majority of 143 states in favour, and four votes against, which included Australia, Canada, New Zealand, and the United States: the four countries with significant Indigenous populations. While the document is the "most comprehensive international instrument[s] on the rights of Indigenous people … and provides a framework of minimum standards for Indigenous people worldwide,"[127] it is merely a declaration and is not binding, in main aspirational. The four countries that voted against the UNDRIP are now supporting the Declaration, New Zealand declaring support in April 2010. The now National-led government

119 Pae Ora (Healthy Futures) Act 2022, s 7(2).

120 *Attorney-General v Idea Services Ltd (in Stat Man)* [2012] NZHC 3229; [2013] 2 NZLR 512 at [216].

121 J Manning, above n 87, at 999.

122 Auckland Women's Health Council, Submission to Pae Ora Legislation Select Committee (undated) <www.womenshealthcouncil.org.nz/wp-content/uploads/2022/01/Auckland-Womens-Health-Council-submission-on-the-Pae-Ora-Healthy-Futures-Bill-December-2021.pdf>.

123 TR Ingham and others "The Multidimensional Impacts of Inequities for Tāngata Whaikaha Māori (Indigenous Māori with Lived Experience of Disability) in Aotearoa, New Zealand" (2022) 19(20) *International Journal of Environmental Research and Public Health* 13558 <www.doi.org/10.3390/ijerph192013558>.

124 J Manning, above n 87, at 1000.

125 Pae Ora (Healthy Futures) Act 2022, s 7(1)(e)(iv).

126 J Manning, above n 87, at 1000.

127 The Sponoff "What would pulling out of the UNDRIP mean for New Zealand? Mira Karunanidhi" (14 December 2023) <www.thespinoff.co.nz/politics/14-12-2023/what-would-pulling-out-of-the-undrip-mean-for-new-zealand>.

has confirmed non-recognition of the declaration having any effect on New Zealand: the articles of concern for New Zealand's 2007 Labour government were Articles 26, 28 and 19 and 32, with the opposition being based on the articles being fundamentally diametric to New Zealand's constitution and legislative structure, in conjunction with Treaty settlement policy of the time.[128] The current National government has stipulated all work to cease on He Puapua, a 2019 Labour-NZ First government-commissioned report investigating implementation of the UNDRIP commitments.[129] The Articles that New Zealand does not appear to have rejected which have applicability to Indigenous equitable health outcomes are:

> Article 21: Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.
>
> Article 23: Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. Indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.
>
> Article 24: Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.
>
> Article 29: Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for Indigenous peoples for such conservation and protection, without discrimination.

However, given the principally symbolic nature of supporting UNDRIP, there is no ability to attain rights to health from this declaration. The ICESCR was ratified by New Zealand on 28 December 1978 and is administered by the Ministry of Justice. Conventions are legally binding agreements under international law and domestic law once signed and ratified. Under Part III of ICESCR, Article 12 states:

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
    (a) The provision for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child;
    (b) The improvement of all aspects of environmental and industrial hygiene;
    (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
    (d) The creation of conditions which would assure to all medical service[s] and medical attention in the event of sickness.

128 Spinoff, above n 127.

129 Spinoff, above n 127.

Despite the right to healthcare being protected by the Covenant, ANZ still has preventable diseases such as rheumatic fever, a disease more likely in "developing" countries rather than "developed" countries.[130] Highly concerning is that as one of the most developed countries in the OECD, rheumatic fever is still found here[131] given the especially harmful effect on Māori and Pacific Islanders who are 22 and 75 times more likely to contract the disease, respectively, than non-Māori.[132] The interrelated nature of the Articles is observed through the respective rights of housing (Article 11) and healthcare as "severe housing deprivation is very likely to have negative health … consequences".[133] Individuals may complain to the ICESCR committee about breaches of rights provided through ratification of this covenant by a state so long as the state is a party to the ICESCR and the state recognises the competence of the monitoring committee to receive and consider the complaint.[134] The Human Rights Commission observes that courts have an increasing role in relation to the delivery of the social and economic rights and that these rights are justiciable.[135]

The Ottawa Charter is a WHO-initiated development aimed at improving the health of individuals and populations and is used in ANZ as a public health planning framework: the Charter's underlying mandate is to improve public health; states must look beyond basic public health services to facilitating people's ability to take responsibility for their health through having control of the social determinants of health:[136]

1. protection from environmental factors leading to health issues and risks;
2. adequate housing;
3. a liveable income;
4. employment;
5. educational opportunities;
6. a sense of belonging and being valued; and
7. a sense of control over life circumstances.

Further to the Ottawa Charter, the Bangkok Charter for Health Promotion in a Globalised World was developed on 11 August 2005. To further advance health strategies, all sectors must act to:[137]

130 JR Oliverand others "Acute rheumatic fever and exposure to poor housing conditions in New Zealand: A descriptive study." (2017) 53(4) Journal of Paediatrics and Child Health 358 <www.doi.org/10.1111/jpc.13421>; A Anderson, C Mills and K Eggleton"Whānau perceptions and experiences of acute rheumatic fever diagnosis for Māori in Northland, New Zealand" (2017) 130 (1465) New Zealand Medical Journal 80.

131 *Rheumatic Fever* (New Zealand College of Public Health Medicine Policy Statement, adopted by NZCPHM Council 23 August 2023) <https://nzcphm.org.nz/filescust/CMS/Policy/2023%20NZCPHM%20%20Rheumatic%20Fever%20Policy%20Statement.pdf>.

132 JR Oliver and others, above n 130, at 2.

133 Kate Amore "New Zealand's severe housing deprivation statistics and comparisons with Australia." (2013) 26(10) Parity 29.

134 United Nations, Individual Communications <www.ohchr.org/en/treaty-bodies/individual-communications>.

135 Human Rights Commission Te Kahui Tika Tangata, Human Rights in Aotearoa <www.tikatangata.org.nz/human-rights-in-aotearoa/right-to-health>.

136 Models of health, Health New Zealand Te Whatu Ora <www.tewhatuora.govt.nz/health-services-and-programmes/public-health/models-of-health>.

137 Models of health, above n 136.

1. advocate for health based on human rights and solidarity;
2. invest in sustainable health policies, actions, and infrastructure to address the determinants of health;
3. build capacity for policy development, leadership, health promotion practice, knowledge transfer, health research, and health literacy;
4. regulate and legislate to ensure a high level of protection from harm and enable equal opportunity for health and well-being for all people; and
5. partner and build alliances with public, private, non-governmental and international organisations and civil society to create sustainable actions.

Māori models of health are based on holistic health and wellness models, which include Te Whare Tapa Wha, Te Wheke, and Te Pae Mahutonga. Mason Durie developed Te Whare Tapa Wha, which uses the wharenui symbolically illustrating the 4 dimensions of Māori wellness (taha wairua = spiritual health, taha tinana – physical health, taha whanau = family health, and taha hinegnaro = mental health) and recognises that if one of the 4 dimensions is damaged or not present, there will be an unbalanced state and unwellness.[138] Health services often do not recognise the taha wairua, leaving an unbalanced experience.

Figure 1. Te Whare Tapa Wha, Māori Health Model[139]

138 Te Whare Tapa Wha model of Māori health, Ministry of Health Manatu Hauora <www.health.govt.nz/maori-health/maori-health-models/te-whare-tapa-wha>.

139 Te Whare Tapa Wha model of Māori health, above n 138.

Te Wheke as a health model concept was developed by Dr Rose Pere to outline family health and uses the head of the octopus to represent whanau, the eyes represent waiora (total wellbeing) for the whole family unit.[140] A dimension of health is represented by one of 8 tentacles, which are interwoven, representing relations between each tentacle:[141]

1. wairuatanga – spirtuality
2. hinengaro – the mind
3. taha tinana – physical wellbeing
4. whanaungatanga – extended family
5. mauri – life force in people and objects
6. mana ake – unique identity of individuals and family
7. ha a koro ma, a kui ma – breath of life from forbears
8. whaumanawa – the open and healthy expression of emotion

Te Pae Mahutonga is a Māori name for the Southern Cross constellation and each of the 4 central stars representing a key task of health promotion: mauriora (cultural identity), waiora (physical environment), toiora (healthy lifestyles), and te orange (participation in society).[142]

The NZBORA protects the right to health through the right to be free from discrimination, the right not to be subjected to medical or scientific experimentation and the right to refuse medical treatment, and to be able to enjoy the rights of minorities to their language and culture in healthcare.[143] The Human Rights Act 1993 links to the NZBORA through s 19 (freedom from discrimination) and deals with discrimination by government, related persons and bodies, or persons or bodies acting with legal authority and unlawful discrimination.[144] Together, the two Acts protect the right to health. Furthermore, the Health and Disability Services Act 1994 (in partnership with the associated Code of Consumer Rights) and the Privacy Act 2020 (with the accompanying Health Information Privacy Code 1994) protects the privacy of individuals.

The Human Rights Commission observes that there is no express right to health in ANZ legislation; however, through ratification of the ICESCR, the state agrees to protect the health of citizens through the provision of services, policies and through budgetary means while promulgating the elimination of health-based discrimination.[145] Qualification is through the recognition of finite resources and progressive realisation,[146] although, the use of resource constraints as a barrier to compliance is restricted through the provision of demonstrating satisfaction of the minimum

140 Te Whare Tapa Wha model of Māori health, above n 138.

141 Te Whare Tapa Wha model of Māori health, above n 138.

142 Te Whare Tapa Wha model of Māori health, above n 138.

143 New Zealand Bill of Rights Act 1990, ss 19, 10,11 and 20.

144 Human Rights Act 1993, pts 1A and 2.

145 Human Rights Commission Te Kahui Tika Tangata, Right to Health <www.tikatangata.org.nz/human-rights-in-aotearoa/right-to-health>.

146 Progressive realisation is "given the cost of health services, compliance is contemplated as happening incrementally, or progressively, depending on available resources and the competing claims and priorities on those resources", Human Rights Commission Te Kahui Tika Tangata, above n 145.

obligations of the covenant through establishing monitoring mechanisms, collection of data, and progressive realisation.[147]

While the right to health is not expressly stated, there are multiple protectors of this right; firstly, as stated by the Human Rights Commission, ICESCR has specific references to health and although not compulsory UNDRIP is a guiding document for Indigenous Peoples: NZBORA is broadly written to include any elements of discrimination but can be mechanised out of.

IV. Socio-economic Conditions of Inequity Supporting Poor Health and Deprivation

The alternatively lensed report from PHAC established a fresh perspective for viewing the food system within ANZ, with recommendations around unification of food systems, stimulating local communities to meet local food system requirements, healthy food environments fostered through local and central government policy, secure access to good food throughout ANZ, and data management for future policy around food systems.[148] To ensure equitable outcomes for Māori, the evidence has been indicative of the strong relationship between social and economic determinants of health that dictate the disparities in health outcomes between Māori and non-Māori, rather than inequitable access to the actual healthcare services themselves.[149] It is estimated that a person's health and wellbeing status through clinical and medical care is attributed to approximately 20 per cent, whereas the remaining 80 per cent is determined by the broader determinants of health of social and economic contributions.[150] Four core values underpinned the PHAC report that determined "equal access to the determinants of good health – like healthy food – is a fundamental human right, supported by UNDRIP"[151] and enforceable through international covenants.[152] The food system is reviewed relating to the values of the report and the current food system in ANZ.

147 Human Rights Commission Te Kahui Tika Tangata, above n 145.

148 PHAC, above n 1, at 29.

149 J Manning, above n 87, at 1000.

150 The description of and data relating to the New Zealand health system in the text is drawn from F Goodyear-Smith, and T Ashton "New Zealand health system: universalism struggles with persisting inequities." (2019) 394(10196) The Lancet (British Edition) 432 <www.doi.org/10.1016/S0140-6736(19)31238-3>; R Gauld *International Health Care Profiles: New Zealand (Commonwealth Fund, 2020)* <www.commonwealthfund.org/international-health-policy-center/countries/new-zealand>; Health and Disability System Review *Interim Report; Hauora Manaaki ki Aotearoa Whānui – Pūrongo mō Tēnei Wā* (August 2019, Interim Report) 25 <www.health.govt.nz/system/files/2022-09/h-and-d-full-interim-report-august-2019.pdf>.

151 PHAC, above n 1, at 2.

152 United Nations. International Covenant on Economic Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR). Geneva, Switzerland: United Nations, 1966. The principal of equality and freedom from discrimination is referred to in the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); and the treaties on racial discrimination, discrimination against women and the rights of refugees, stateless persons, children, migrant workers and members of their families, and persons with disabilities. Other treaties require the elimination of discrimination in specific areas, such as employment and education. Article 26 of the ICCPR also guarantees equal and effective protection before, and of, the law, cited in Human Rights Commissioner. Towards implementation of human and indigenous rights: Healthy food for positive health outcomes. Wellington, New Zealand: Human Rights Commission, 2023.

The first core value in considering that all citizens have a right to food for wellbeing, therefore indicating that individuals and collectives or groups may be protected through the rights of: self-determination, development, to enjoy clean, healthy, and sustainable environment, and includes Indigenous rights and children's rights.[153] Māori's need to retain food-based knowledge paired with tikanga combined with the special connection to whenua and moana where Māori grow and gather food for wellbeing.[154] The achievement of a healthy food system supports the functionality of individual and collective wellbeing which can be achieved through positive obligations of government and business through policy and that business supports, reducing the interference in human rights,[155] in part achieved through the Ruggie Principles.[156] The second value ascribes that food systems should create future health and wellbeing and plainly focuses on future-focused and resilient food systems[157] supporting food security.[158] The third value asserts that people and the environment should be protected and cared for by the food system through how we connect with one another and the ecosystem, for example, many Māori consider "growing, gathering, preparing, eating, and sharing encompasses fundamental relationships with te Taiao, tino rangatiratanga, concepts of sovereignty, handing down of matauranga, and strengthening whakapapa connections".[159] PHAC argues that the commodification of food is not beneficial when the environment funds the wealth of a few at the expense of many through environmental harm, social harm or physical harm that is ethically and environmentally unsustainable: although economic wealth supports ANZ, the system must be rebalanced to protect ANZ.[160] All citizens should have the same access to healthy food for wellness and are entitled to the same opportunity to experience a healthy life of similar expectancy.[161] For example, non- Māori will live approximately eight years longer than Māori who are significantly more likely to experience cardiovascular

153 Human Rights Commission *Te Mana I Waitangi: Human Rights and Te Tiriti o Waitangi* <www.tikatangata.org.nz/human-rights-in-aotearoa/human-rights-and-te-tiriti-owaitangi>.

154 Human Rights Commission, above n 153.

155 PHAC, above n 1, at 3.

156 United Nations *Guiding principles on business and human rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (New York and Geneva, United Nations, 2011) which requires that business "enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved" <www.ohchr.org/en/publications/reference-publications/guiding-principles-business-and-human-rights>.

157 PHAC, above n 1, at 3.

158 South Africa − The State of Food Security and Nutrition in the World Report 2023: Urbanization, agrifood systems transformation and healthy diets across the ruralurban continuum. (2023). In *MENA Report* (Disco Digital Media, Inc): Food security is defined as "when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life".

159 PHAC, above n 1, at 4.

160 PHAC, above n 1, at 4−5.

161 Position statement, above n 83.

disease,[162] have a stroke,[163] become diabetic[164] and sustain renal disease or renal failure;[165] these are all conditions influenced by the food system on available diet. PHAC states "the strongest pattern of disadvantage occurs by ethnicity. These are the cumulative result[s] of generations of social, political, and structural inequity".[166]

The current food system in ANZ comprises of multilayered contributors ranging from growers and producers to processors, retailers, and consumers, that collectively impact (positively or negatively) on the physical environment, society and the health of society.[167] ANZ's food system is multi-elemental, both providing for the community and contributing to the nation's economic prosperity, utilising te taiao (land, soil, water, oceans, air and biodiversity) to enhance the economy.[168] Food is spiritually important to Māori, and:[169]

> In Te ao Māori (a Māori worldview), food has a strong spiritual connection. Kai (food) is a gift from the atua (gods) of the natural environment and is considered to share the mauri (the spiritual power) and life essence of the atua, which enriches the tinana (body), hinengaro (mind), wairua (spirit), and whānau (family).

Kai is both a connector of people and their environment, related to whakapapa and kaitiakitanga which involves a sense of connection to place and requires that people consider the consequences of their practices within the environment.[170] Food has evolved from introduced foods that arrived with colonisation to food being an economic commodity that is produced for exportation, in conjunction with the urbanisation of Māori, deforestation, and wetlands being drained has resulted in many traditional practices being lost and Māori's spiritual connection decaying. Through increased globalisation, food availability has orientated towards convenience and the "proliferation of energy-dense, low-nutrient highly processed foods"[171] that are low-cost have

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162 J Gurney, J Stanley and D Sarfati "The inequity of morbidity: Disparities in the prevalence of morbidity between ethnic groups in New Zealand" (2020) Journal of Comorbidity 10 <www.doi.org/10.1177/2235042X20971168>; Ministry of Health *Wai 2575 Māori Health Trends Report* (Ministry of Health, Wellington, New Zealand, 2019), <www.health.govt.nz/publications/wai-2575-maori-health-trends-report>; Y Gu and others "Burden of atrial fibrillation in Māori and Pacific people in New Zealand: a cohort study." 2018 48(3) Internal Medicine Journal 301 <www.doi.org/10.1111/imj.13648>.

163 VL Feigin and others "30-Year Trends in Stroke Rates and Outcome in Auckland, New Zealand (1981−2012): A Multi-Ethnic Population-Based Series of Studies." (2015) 10(8) PloS One <www.doi.org/10.1371/journal.pone.0134609>.

164 Te Whatu Ora | Health NZ. Virtual Diabetes Register (VDR) web tool (2023) <www.tewhatuora.govt.nz/for-health-professionals/data-and-statistics/diabetes/virtual-diabetes-register-web-tool#link-to-the-virtual-diabetes-register-web-tool>; JK Gurney and others "Risk of lower limb amputation in a national prevalent cohort of patients with diabetes" (2018) 61(3) Diabetologia 626 <www.doi.org/10.1007/s00125-017-4488-8>.

165 Joachim von Braun and others *Scientific Group for the UN Food Systems Summit. Food Systems – Definition, Concept and Application for the UN Food Systems Summit* (A paper from the Scientific Group of the UN Food Systems Summit: United Nations, 2021).

166 PHAC, above n 1, at 5.

167 PHAC, above n 1, at 7.

168 PHAC, above n 1, at 5.

169 PHAC, above n 1, at 8.

170 PHAC, above n 1, at 8.

171 PHAC, above n 1, at 9.

displaced nutritious wholefoods based on affordability, accessibility, and their promotion:[172] simultaneously: ANZ has experienced an explosion of obesity and diet-related illnesses, described as the "nutrition transition".[173] Food-related legislation focuses on safety and the improvement of health for ANZ.[174] PHAC observes a weakness of the Food Act 2014,[175] where the Act protects public food safety but has no measures for promoting long-term food health, nevertheless, one stated purpose is to "provide for risk-based measures that minimise and manage risks to public health; and protect and promote public health" which affects intersecting legislation as the Food Act can be restrictive to other Acts relating to unhealthy food.[176] The focus on change has been driven by a flood of unhealthy foods driving poor health outcomes, such as long-term conditions (LTCs), for example, cardiovascular and respiratory diseases, along with cancer and diabetes which are significant causes of death in ANZ and are connected to inequities in health outcomes between non-Māori and Māori people.[177] It has been identified that the abundance of unhealthy food is a leading modifiable cause of health harm in ANZ[178] acting as an agent of further health inequities for Māori given their statistically astronomic likelihood of experiencing obesity-related health issues such as "cardiovascular disease and/or type-2 diabetes, suffer a stroke, and have kidney disease or failure compared to non- Māori".[179] Obesity-related LTCs are highly burdensome to the public health system, with 59 per cent of ANZ's health expenditure connected to LTCs (anticipated to balloon in years to come),[180] with estimates of obesity causing $2 billion in direct health costs per annum, leading to estimated societal costs of $4−9 billion.[181] Furthermore, health-constraining outlets plague the most deprived areas with fast-food and takeaway outlets predating on those most vulnerable,[182] indicating the lack of randomness in exposure and when considered against statistics relating to Māori whanau predominantly domiciled in deprived locales, Māori children's subsequent exposure is twice that of non-Māori children.[183] The strong effect of food insecurity on

172 J Wiki, S Kingham and M Campbell "Accessibility to food retailers and socio-economic deprivation in urban New Zealand" (2019) 75(1) New Zealand Geographer 3 <www.doi.org/10.1111/nzg.12201>.

173 J Wiki, S Kingham and M Campbell, above n 172.

174 Food Act 2014; Pae Ora (Healthy Futures) Act 2022.

175 Food Act 2014.

176 Local Government Act 2002; Pae Ora (Healthy Futures) Act 2022.

177 MoH *Longer, Healthier Lives*, above n 14.

178 MoH *Longer, Healthier Lives*, above n 14.

179 PHAC, above n 1, at 12.

180 T Blakely and others "Health system costs for individual and comorbid noncommunicable diseases: An analysis of publicly funded health events from New Zealand" (2019) 16(1) PLoS Medicine <www.doi.org/10.1371/journal.pmed.1002716.>

181 B Barton and T Love *Economic impact of excess weight in Aotearoa: Collating, evaluating, and updating the evidence* (Hāpai te Hauora and Sapere, Māori Public Health, Auckland, September 2021).

182 Healthy Location Index in Aotearoa New Zealand – ArcGIS dashboard. <www.arcgis.com/apps/dashboards/04c40689c2f2456da5249fa25da57f82> cited in PHAC, above n 1, at 13.

183 J Pearce J and others "Neighborhood deprivation and access to fast-food retailing: a national study." (2007) 32(5) Am J Prev Med 375 <www.hapai.co.nz/sites/default/files/Economic-Impact-of-Excess-Weight-in-NZ-15-Nov-2021.pdf>.

child health relates to tooth decay being heightened for Māori children[184] along with mental health harm associated with distress and a plethora of mental health outcomes.[185]

Moving away from the commodification of food towards ensuring that the right to healthy food for all ethnicities in ANZ is protected is essential to halt the continuation of LTCs and the obesity epidemic that disproportionately harms Māori. To achieve this goal, it is imperative that policy solutions that have an "evidence informed equity lens"[186] are implemented by population-level programmes that focus on the structures and systems utilised to access food.[187] PHAC suggests that the "most effective solutions are likely to be community directed, participatory, multifaceted, and culturally relevant".[188] Ultimately, the cost of reevaluating the food cycle will reduce expenditure related to poor diet illnesses that Māori are highly susceptible to; and save lives.

V. Disestablishment of Te Aka Whai Ora

The establishment of Te Aka Whai Ora (the Māori Health Authority) was considered the achievement after many decades of advocacy by Māori, beginning with a strong vision and embedded principles of the TToW, as recommended through the Waitangi Tribunal's Wai 2575 Report and the Review. The underscore of establishment was to remedy breaches of TToW and attend to the longstanding health inequities[189] which were born from ANZ's colonial past[190] and furthered through unbalanced access to determinants of health, intergenerational legacies of colonial trauma, institutional racism[191] and the collective memory thereof, subsequently according part reason for the inequities experienced by Māori in health outcomes. Many sources indicate that culture and racism a strongly determinant of health outcomes of Indigenous Peoples who continue to be disproportionately afflicted by poverty[192] and structurally prevented from accessing fundamental rights and freedoms of the prerequisites of health.[193]

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184 PHAC, above n 1, at 15.

185 CA Myers "Food Insecurity and Psychological Distress: a Review of the Recent Literature." (2020) 9(2) Current Nutrition Reports107 <www.doi.org/10.1007/s13668-020-00309-1>; D Fang, MR Thomsen and J Nayga "The association between food insecurity and mental health during the COVID-19 pandemic." (2021) 21(2) BMC Public Health 607 <www.doi.org/10.1186/s12889-021-10631-0>; KS Cain and others "Association of Food Insecurity with Mental Health Outcomes in Parents and Children." (2022) 22(7) Academic Paediatrics 1105 <www.doi.org/10.1016/j.acap.2022.04.010>.

186 PHAC, above n 1, at 27.

187 J Browne and others "Effects of food policy actions on Indigenous Peoples' nutrition-related outcomes: a systematic review." (2020) 5(8) BMJ Global Health e002442- <www.doi.org/10.1136/bmjgh-2020-002442>.

188 PHAC, above n 1, at 12.

189 F Cram and others *Oranga and Māori Health Inequities, 1769–1992* (Manatū Hauora−Ministry of Health, Wellington, 2019) <www. forms.justice.govt.nz/search/Documents>.

190 P Reid and B Robson, above n 7, at 4.

191 Heather Came and others "(Disestablishment of Maori Health Authority) AmendmentAct 2024: further Crown breaches of Te Tiriti o Waitangi" (2024) 137(1595) New Zealand Medical Journal 94.

192 UN News "Spectre of poverty" hangs over tribes and Indigenous groups: UN labour agency. United Nations. (3 February 3, 2020) <www.news.un.org/en/story/2020/02/1056612>.

193 M Gracey and M King "Indigenous health part 1: determinants and disease patterns." (2009) 374(9683) The Lancet (British Edition) 65 <www.doi.org/10.1016/S0140-6736(09)60914-4> cited in N Redvers and others "Indigenous determinants of health: a unified call for progress." (2023) 402(10395) The Lancet (British Edition) 7 www.doi.org/10.1016/S0140-6736(23)01183-2>.

With a political change came concerns of a race-based, separatist health system, which prioritised health needs based on ethnicity resulting in preferential access to health services was the basis for the National and ACT NZ parties' opposition to the suggested health reforms leading up to 2020.[194] National argued the POHFA weighed too heavily towards a Treaty response rather than focusing on health needs whereby that distribution is based on a scarce public resource to be shared equally. National declared that should it become government, the MHA would be abolished and downgraded to a directorate, within the Ministry of Health.[195] The National-led government came into power after winning the 14 October 2023 election and forming a majority with the ACT party and New Zealand First. The disestablishment of the MHA arose through the Disestablishment Act introduced to Parliament under urgency on 27 February 2024 and receiving Royal Assent 5 March 2024 and coming into force 30 June 2024 thereby the MHA ceased to exist. Legal advice provided to the government regarding consistency with the NZBORA concludes the Bill to be "consistent with the rights and freedoms affirmed in the Bill of Rights Act".[196] The advice states consistency and freedom from discrimination, which requires two factors to be met to identify discrimination:[197]

1. there is a differential treatment or effect as between persons or groups in analogous or comparable situations on the basis of a prohibited ground of discrimination; and

2. that treatment has a discriminatory impact (i.e., it imposes a material disadvantage on the person or group differentiated against).

The advice defines differential treatment as occurring when comparable groups are treated legislatively differently on a singular or multi-factorial ground of prohibited discrimination, regardless of disadvantage arising.[198] Alternatively, discrimination may occur where two different groups, by reason of a prohibited ground of discrimination, differently.[199] Therefore, through the removal of the MHA, the Bill is seen to "remove a distinction on the basis of race and ethnicity … [and] does not propose to change the purpose of the principal Act."[200] Ultimately, counsel sees no engagement of s 19 right to freedom from discrimination to Māori.[201]

194 J Manning, above n 87, at 999.

195 RNZ Radio, "National Party against Stand-alone Māori Health Authority" (Morning Report, 8 April 2022).

196 Advice to Hon Judith Collins *Consistency with the New Zealand Bill of Rights Act 1990: Pae Ora (Disestablishment of Maori Health Authority) Amendment Bill* (15 February 2024) <www.justice.govt.nz/assets/Documents/Publications/NZBORA-advice-Pae-Ora-Disestablishment-of-Maori-Health-Authority-Amendment-Bill-FINAL-for-publication_.pdf>.

197 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [55]; *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729, cited in Advice to Hon Judith Collins, above n 196.

198 *McAlister v Air New Zealand* [2009] NZSC 78, [2010] 1 NZLR 153 at [40] per Elias CJ, Blanchard and Wilson JJ.

199 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 17.10.42.

200 Advice to Hon Judith Collins, above n 196, at [14] and [18] specifically observing the provision of services achieved through Pae Ora (Health Futures) Act 2022, s 3(b).

201 Advice to Hon Judith Collins, above n 196, at [17]−[21].

The MHA was borne from objectives achieved through form and function, with an intended role as an "agent of tino rangatiratanga," which initially reflected the aspirations of WAI 2575 claimants, where the previous health system did not reflect TToW partnership obligations, the MHA has been legally disestablished.[202] The core theme of WAI 2575 was stated as:[203]

> To reiterate one of the core themes of our report, tino rangatiratanga means nothing less than Māori having decision-making power over their affairs, including hauora Māori. [Tino rangatiratanga is autonomy when given the broadest possible meaning].[204] When the Crown says it is partnering with Māori and giving effect to tino rangatiratanga, the Crown is required to protect actively Māori authority in respect of their own affairs.

It is likely that the short-lived Authority and its demise will result in contributing to further disenfranchisement within Māori communities in conjunction with the entrenchment and continuation of poor health outcomes for Māori. Health Minister Shane Reti acknowledges improving health for all is a government priority and that through merging staff from the MHA to the public health system, the expertise required to improve health outcomes would be retained.[205] Māori health providers have sought relief through the High Court against the Crown relating to the manner in which the MHA was disestablished and seek judicial review for alleged breaches against NZBORA in conjunction with a declaration of inconsistency against TToW.[206] All that remains is to wait on the outcome.

VI. Conclusion

In conclusion, ethics of inequitable healthcare has been contributed to by a vast array of factors relating to the social constructionism of majority ethnicities that are manifested specifically in colonial settlement states. From colonisation, Indigenous peoples have been disproportionately represented by many, if not all, of the determinants of inequity within the healthcare system within ANZ: simultaneously, Māori's inability to have the same access as non-Māori increases the availability of the resource for the majority. The TToW has placed an increased responsibility on the Crown to provide the same rights and privileges as settlers. Māori are the only Indigenous

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202 Hauora, above n 7, at 178.

203 Waitangi Tribunal, The Ngātiwai Mandate Inquiry Report (Legislation Direct, Wellington, 2017) <www.forms.justice.govt.nz/search/Documents> at 27; Waitangi Tribunal *The Ngāpuhi Mandate Inquiry Report* (Legislation Direct, Wellington, 2015) at 24; Waitangi Tribunal *Turanga Tangata Turanga Whenua : The Report on the Turanganui a Kiwa Claims* (Vol 2, Legislation Direct, Wellington, 2004), vol 2 <www.forms.justice.govt.nz/search/Documents>, at 739; Waitangi Tribunal *Te Whanau o Waipareira Report* (Legislation Direct, Wellington, 1998) at 215, cited in Hauora, above n 7, at 178.

204 Waitangi Tribunal *Tauranga Moana, 1886–2006 : Report on the Post-Raupatu Claims* (Vol 1, Legislation Direct, Wellington, 2010) <www.forms.justice.govt.nz/search/Documents > at 20; Waitangi Tribunal *He Maunga Rongo: Report on the Central North Island Claims* (Vol 1, Legislation Direct, Wellington, 2008) <www.forms.justice.govt.nz/search/Documents> at 172; Waitangi Tribunal *The Taranaki Report : Kaupapa Tuatahi* (Legislation Direct, Wellington, 1996) <www.forms.justice.govt.nz/search/Documents> at 6.

205 Moana Ellis "How Maori health providers are getting on after the end of Te Aka Whai Ora Maori Health Authority" Whanganui Chronicle (7 July 2024) <www.nzherald.co.nz/whanganui-chronicle/news/how-maori-health-providers-are-getting-on-after-the-end-of-te-aka-whai-ora-maori-health-authority>.

206 Te Aorewa Rolleston "Maori health providers seek High Court action against Crown over Te Aka Whai Ora" (Stuff, 15 May 2024) <www.stuff.co.nz/nz-news/350278628/maori-health-providers-seek-high-court-action-against-crown-over-te-aka-whai-ora>.

group to have a Treaty with the Crown; however, the "historically embedded and institutionalised forms of racism remain the root causes of large, multi-generational inequities in Indigenous health status",[207] which cannot be ignored or minimised. Further, the fact that access to healthcare is an implied right through many international and domestic covenants and legislations that are endorsed by many Crown departments garners support for the human right of access to healthcare and potentially the determinants of inequity. Additionally, the food system within ANZ is harmfully titled towards economic and environmentally unsustainable orientation. Finally, the disestablishment of the MHA taken the progress of the previous years rearward and raises the possibility for a ground-breaking judicial review, if successful in the High Court of ANZ. There are myriad factors that have contributed to the inequitable healthcare Māori experience and the point of inception has strong, clear roots in colonisation.

The effects of colonisation were the beginning point of the formulation of social constructs of power and politics that still continue to other Māori. The ethics within healthcare has become inhibited by the institutional and structural racism that define funding, policy and practices to protect citizens; however, when the method is ignored or not forefronted, the structural failures continue to harm ethnic minorities. The conjunction of colonisation and politics are omnipresent throughout Indigenous populations as their lived experience culminates in poor housing standards, poverty at disproportionate rates and lower life expectancy on contrast to non-Māori. In part, this reduced life expectancy and higher rates of LTC's that orientate towards Māori have been attributed to food becoming and economic commodity for exportation and through globalisation the gross "proliferation of energy-dense, low-nutrient highly processed foods"[208] that are economically more available for lower socio-economic groups and nutrient-poor continue to perpetuate obesity-related health issues. Health reforms litter healthcare's regulatory history: the problem continues to worsen with no lasting changing having been achieved for Māori.

Health reforms in the early 2000s clearly acknowledged the inequity, on a national level, of the state of Māori health: the next health reform of a reimagined Act (Pae Ora (healthy futures)) evolved from the Review and Wai 2575, further supported by new principles that were reflected legislatively providing Māori with the ability to self-govern and to protect the health of Māori by Māori; however, the disestablishment of the MHA has clouded efforts to finally accede rangatiratanga to Māori in the area of healthcare and speak to the Crown with respect to the well-researched area of determinants of health. PHAC acknowledges that the equal access to social and economic determinants of good health is a *fundamental human right*, with this right supported by UNDRIP and enforceable through international covenants ratified by the Crown. Since the TToW was signed in 1840, there have been many waypoints for the Crown provide Māori with the same rights as settlers. As time as progressed with the world unifying and global organisations forging equality-based covenants, declarations and protocols, the Crown has not been able to achieve the equity that is required to provide Māori with the same rights to life (underpinned by rights to healthcare and nutritious food) as non-Māori. Disestablishment of the MHA arguably breaches the principles of the TToW and eschews responsibility for Māori health inequities.

After the brief success for Māori of a MHA followed by the disestablishment, hope for closing the inequities lies with legislation through judicial review or a change of government. The evidence is beyond clear and the results of this evidence are compelling in its clarity with respect to determinants of health and the heavy effect on Māori. UNDRIP and ICESCR and many other legal

207 The Lancet, above n 30.

tools are iterating the same information: Indigenous peoples are experiencing inequitable health outcomes in conjunction with inequities in all surrounding elements of determinants of health and racism plays an ongoing and burdensome role.

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208 PHAC, above n 1, at 9.

Changing Conceptions: A Critical Review of the Regulation of Posthumous Reproduction in New Zealand

Ngā Ariā Hurihuri: He Arotake Kaikini o te Whakaturetanga o te Whakaputa Uri Murimate i Aotearoa

Cullen White

I. Introduction

Death has always been deceptively uncertain. When Hamlet pondered "for in that sleep of death what dreams may come" he was concerned about being pursued by his earthly problems.[1] Today, however, death's uncertainty is compounded by assisted reproductive technologies that have, remarkably, made posthumous reproduction possible. This paper critically reviews the regulation of posthumous reproduction in New Zealand. Posthumous reproduction raises a range of legal and ethical issues including the extraction and storage of gametes, the importation and exportation of gametes, the status of posthumously conceived children and their potential inheritance rights. The most consequential issue, however, is whether posthumous reproduction is allowed to occur. Therefore, this paper reviews the posthumous *use* of gametes, despite acknowledging the importance, complexity, and relevance of related issues.

This paper contains three parts. First, it provides a brief overview of New Zealand's approach to the regulation of assisted reproductive technologies. This involves a discussion of the period before any centralised policy was developed, the era of early policy development, and the modern legislative approach under the Human Assisted Reproductive Technology Act 2004 (HART Act). In particular, this paper outlines the dual committee structure established by the HART Act.

The second part of this paper reviews the regulation of posthumous reproduction specifically. This includes an explanation of the factual circumstances within which posthumous reproduction arises as an issue and the fundamental ethical arguments that have shaped New Zealand's policy. This paper then reviews the 2000 Guidelines for the Storage, Use, and Disposal of Sperm from a Deceased Man,[2] and demonstrates the key shortcomings of these guidelines. This paper then discusses the updated guidelines published in 2024.[3] It is submitted that the new guidelines

1 William Shakespeare *Hamlet* (The Floating Press, Auckland, 2008) at 117 (Act III, Scene 1).

2 National Ethics Committee on Assisted Human Reproduction *Guidelines for the Storage, Use and Disposal of Sperm from a Deceased Man* (February 2000) [2000 Guidelines].

3 Advisory Committee on Assisted Reproductive Technology *Guidelines for the Posthumous Use of Gametes, Reproductive Tissue and Embryos* (June 2024) [2024 Guidelines].

substantially remedy the shortcomings of the 2000 Guidelines and improve the regulation of posthumous reproduction.[4]

The third part of this paper considers the practical application of the 2024 Guidelines by the Ethics Committee on Assisted Reproductive Technology (ECART). This paper submits that whilst the ECART is generally appropriate to determine most applications for assisted reproductive procedures, difficulties arise with applications raising disputed issues of fact. In those cases, there is a conspicuous lack of mechanisms to promote transparency and ensure the observance of natural justice. Therefore, this paper suggests two procedural reforms to ensure ECART is able to apply the guidelines in a manner consistent with the intended purposes of the HART Act.

This paper now briefly introduces key terminology. Gametes are the reproductive cells (sperm or egg) that can combine with the complementary gamete from the opposite sex (fertilisation) to give rise to an embryo.[5] Due to limited clinical capabilities in relation to eggs, early policy only catered to the posthumous use of sperm. The different legal position of sperm compared to eggs will be critiqued in relation to the 2000 Guidelines. In general, however, the concepts discussed now apply equally to sperm, eggs or even embryos. For clarity and simplicity, the term gamete will be used throughout this paper.

II. Regulation of Assisted Human Reproduction in New Zealand

Assisted reproductive technologies have proliferated in variety and prevalence over recent decades. Within the context of the ever-developing technology, three broad periods can be observed in New Zealand's policy development. First, is the period before any centralised policy was developed. Second, is the period of early policy development. Third, is the current period following the enactment of the HART Act which is the first specific legislative control of assisted reproduction in New Zealand. Whilst these periods are not entirely distinct from each other they help to identify key trends in policy direction and to understand what mischief Parliament intended the HART Act to address.

A. Prior to Policy Development

Modern biotechniques paved the way for assisted human reproduction. While we refer to these techniques as modern they have in fact existed for several decades. Faced with emerging techniques, New Zealand was initially slow to regulate their use. It was not until 1985 that the Ministry of Justice first published an issues paper to stimulate public discussion surrounding assisted reproduction.[6] In response to this issues paper, a joint proposal was published in the New Zealand Medical Journal on behalf of the New Zealand Law Society, the Royal Society of New Zealand, the Medical Council of New Zealand, the Medical Research Council of New Zealand and the New Zealand

4 It is understood that there have been no academic articles published reviewing the 2024 Guidelines at the time of writing.

5 Human Assisted Reproductive Technology Act 2004, s 5.

6 Department of Justice *New Birth Technologies: An Issues Paper on AID, IVF and Surrogate Motherhood* (March 1985); see also Department of Justice *New Birth Technologies: A Summary of Submissions Received on the Issues Paper* (December 1986).

Medical Association.[7] These organisations argued that a specialist committee urgently needed to be established. They suggested that such a committee should be tasked with focusing the public debate and education, providing the Government with expert advice, formulating policy, and providing ongoing scrutiny of assisted reproductive procedures.[8] The paper recommended that the committee contain a broad spectrum of interdisciplinary expertise given that it would be required to consider "questions both of fact and also of value and principle".[9] Such a committee was not immediately established.

Ken Daniels, suggests that the lack of central oversight during this early period contributed to an aura of secrecy surrounding assisted human reproduction.[10] For example, it is not known when the first child was conceived by clinically assisted donor insemination in New Zealand.[11] Overall, there was a lack of transparency about what was happening in laboratories and fertility clinics, or at the very least, a perceived lack of transparency.

The consequence of not immediately regulating this area was that fertility clinics were tasked with self-regulating. The prevailing view is that this self-regulation was effective. For instance, it was noted in debates during the passage of the HART Bill in 2004 by Pita Paraone MP that "it is thanks to the responsible attitudes of fertility clinics and fertility service providers to date that nothing untoward has happened in this area".[12] Fertility clinics in New Zealand voluntarily joined the Reproductive Technology Accreditation Committee, an Australian organisation.[13] In the third reading of the HART Bill, Paul Hutchinson MP described this as a decade of voluntary self-regulation.[14] One of the arguments in favour of maintaining an unregulated approach is that self-regulation of the medical profession was and is sufficient. Whilst that may be true, the significant power of assisted reproductive technology means that the state has an interest in preventing unacceptable practices.[15]

B. Early Policy Development

Eventually, in 1993, a central oversight body similar to what had been called for in the 1985 joint proposal was established. The body was called the Interim National Ethics Committee on Assisted Reproductive Technology (INECART). INECART had the dual role of policy generation and ethical approval of procedures. There was no specific provision requiring clinics to submit for approval

7 Geoffrey Brinkman and others "Position Paper: Issues arising from in vitro fertilisation, artificial insemination by donor and related problems in biotechnology" (1985) 98 New Zealand Medical Journal 396.

8 At 397.

9 At 397.

10 Ken Daniels, "Assisted Human Reproduction in New Zealand: The Contribution of Ethics" (1998) 8 Ebios Journal of Asian and International Bioethics 79.

11 At 80.

12 (6 October 2004) 620 NZPD 15899.

13 Fertility Society of Australia and New Zealand *Guidelines for Centres Using Assisted Reproductive Technology (ART) in Australia and New Zealand* (1986).

14 (10 November 2004) 621 NZPD 16834.

15 For an example of powerful and unacceptable experiments see He Jiankui genetically editing live human embryos against HIV infection and continuing the experiments through to live births; Vera Lucia Raposo "The First Chinese Edited Babies: A Leap of Faith in Science" (2019) 23(3) JBRA Assisted Reproduction 197.

from INECART. However, it has been suggested by Nicola Peart that, at least from 1 July 1996,[16] such a requirement may have arisen under the Code of Health and Disability Services Consumers' Rights.[17] Specifically, r 4(2) provides that consumers have the right to have services provided that comply with professional and ethical standards.[18] In 1995, INECART became a permanent ministerial committee.[19] The new committee, the National Ethics Committee on Assisted Human Reproduction (NECAHR), remained the policy and approval body until the HART Act came into force.

Simultaneously, more research on potential regulatory approaches was undertaken. Bill Atkin and Paparangi Reid were tasked by the Ministry of Justice with providing an overview of assisted reproduction in New Zealand and canvassing some options for how the Government could regulate the area.[20] Published in 1994, their report recommended eight principles which should guide policy direction.[21] This paper argues that two broad themes can be distilled from the Atkin and Reid report.

First, Atkin and Reid favoured a consent-based approach to assisted reproduction. The writers considered whether a property-based approach could apply to gametes.[22] For instance, just one year previously in *Hecht v Superior Court of Los Angeles* a will purporting to dispose of sperm as if it were personal property was held to be effective in the United States of America.[23] The writers considered the consequences of a property-based approach to be troubling. For example, gametes could then be sold or mortgaged and be the subject of matrimonial property division.[24] Furthermore, in the New Zealand context gametes are considered tapu,[25] and a property-based approach would fail to give regard to the mana of human tissues.[26] Therefore, the writers suggested a consent-based approach where the gamete provider has dispositional authority, but not a full set of property rights.[27]

The second key theme from Atkin and Reid's report was that whichever regulatory approach the Government eventually adopted, it should promote openness, transparency, and scrutiny. The report noted that "openness rather than secrecy should be encouraged".[28] This theme was most explicit in the context of the right of children to know their genetic origins and whakapapa, and to hold

16 Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996, reg 1(2).

17 Nicola Peart "Alternate Means of Reproduction" in P Skegg and R Patterson (eds) *Health Law in New Zealand* (Thomson Reuters, New Zealand, 2015) 515 at 518.

18 Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996, sch 1.

19 Health and Disability Services Act 1993, s 46; and Peart "Alternate Means of Reproduction", above n 17, at 518.

20 Bill Atkin and Paparangi Reid *Assisted Human Reproduction: Navigating Our Future* (Ministerial Committee on Assisted Reproductive Technologies, July 1994).

21 At 27−35.

22 At 95.

23 *Hecht v Superior Court of the County of Los Angeles ex parte Kane* 20 Cal Rptr 2d 275 (Cal Ct App 1993).

24 Bill Atkin and Paparangi Reid, above n 20, at 95−96.

25 At 94−95; see also Marewa Glover, A McCree and LCT Dyall *Māori Attitudes to Assisted Human Reproduction: An Exploratory Study* (University of Auckland Press, Auckland, 2008).

26 Bill Atkin and Paparangi Reid, above n 20, at 96.

27 Atkin and Reid, above n 20, at 97.

28 At 118.

clinicians accountable for their mistakes. It was, however, expressed in general terms throughout the report. For instance, the writers referred to developing policies in which "the country can have confidence"[29] and that decision making should be "clear and consistent".[30] Overall, the report clearly recommended a step away from the prior era of secrecy and opaque self-regulation towards openness and transparency.

C. Human Assisted Reproductive Technology Act 2024

It is from this context that the HART Act arose. The Act had what numerous commentators fittingly describe as a long gestation.[31] The Human Assisted Reproductive Technology Bill was introduced as a members' bill in 1996 but did not become law.[32] However, the Bill prompted the Government to introduce the Assisted Human Reproduction Bill in 1998.[33] The 1998 Bill also did not become law. Six years later, a new bill also titled the Human Assisted Reproductive Technology Bill was introduced.[34] The Bill passed by way of conscience vote on 10 November 2004 and Royal assent was received on 21 November 2004. Parliament intended the Act:[35]

(a) to secure the benefits of assisted reproductive procedures, established procedures, and human reproductive research for individuals and for society in general by taking appropriate measures for the protection and promotion of the health, safety, dignity, and rights of all individuals, but particularly those of women and children, in the use of these procedures and research:
(b) to prohibit unacceptable assisted reproductive procedures and unacceptable human reproductive research:
(c) to prohibit certain commercial transactions relating to human reproduction:
(d) to provide a robust and flexible framework for regulating and guiding the performance of assisted reproductive procedures and the conduct of human reproductive research:
(e) to prohibit the performance of assisted reproductive procedures (other than established procedures) or the conduct of human reproductive research without the continuing approval of the ethics committee:
(f) to establish a comprehensive information-keeping regime to ensure that people born from donated embryos or donated cells can find out about their genetic origins.

It is suggested that s 3 illustrates a move towards acceptance of assisted reproductive technology. This can be seen from s 3(a) which recognises the benefits assisted reproductive procedures can provide. Of course, some procedures were, and are, regarded as unacceptable and therefore the Act intends to prevent such procedures.[36] Importantly, the Act recognised that assisted human reproduction was an area of medicine that was rapidly changing. This is illustrated by s 3(d) which provides that the Act seeks to establish a *flexible* framework for regulating assisted reproductive

29 At 34.

30 At 33.

31 Bill Atkin "Regulation of Assisted Human Reproduction: The Recent New Zealand Model in Comparison with Other Systems" (2004) 11 NZACL Yearbook 81 at 82; see also Peart "Alternate Means of Reproduction", above n 17, at 518.

32 Human Assisted Reproductive Technology Bill 1996 (195-1).

33 Assisted Human Reproduction Bill 1998 (227-1).

34 Human Assisted Reproductive Technology Bill 2004 (195-3).

35 Human Assisted Reproductive Technology Act 2004, s 3.

36 Human Assisted Reproductive Technology Act 2004, s 3(b).

procedures. Heather Roy MP stressed the importance of flexibility when suggesting that it was "important to have a good deal of flexibility in a field that is seeing progress running at a huge pace".[37] However, it is submitted that the word flexibility is not limited merely to adapting to developing technology over time. The regulatory framework also needs to be flexible to changing societal attitudes over time, and also to apply to the wide variety of situations which arise in a modern and multicultural New Zealand. Overall, flexibility is one of the justifications for the dual committee structure established by the Act.

The other justification for the dual committee structure is also alluded to by s 3(d) and that is to establish a *robust* framework.[38] The two committees established by the HART Act have membership requirements designed to ensure that decisions are made by those with relevant expertise. Although not explicitly mentioned in s 3, it is submitted that the word robust imports the theme of accountability and transparency advocated for by Atkin and Reid. Certainly, for a framework to be described as robust it must be able to withstand public scrutiny. This important principle of accountability and transparency will be returned to later in this paper.

Turning to the substantive effects of the HART Act, the Act categorises reproductive procedures into three categories. First, the HART Act prohibits certain procedures.[39] It is an offence to carry out a procedure prohibited by sch 1 of the Act.[40] Any person who does so is liable on conviction to a maximum of five years imprisonment or a $200,000 fine or both.[41] As prohibited procedures are outlined by the Act, any change to prohibited procedures requires Parliament to amend the Act.

On the other hand, the HART Act categorises some procedures as established procedures. The Governor-General, acting on the advice of the Minister for Health (after the Minister has received advice from the Advisory Committee on Assisted Reproductive Technology), may declare a procedure to be established.[42] Established procedures are recorded in the Human Assisted Reproductive Technology Order 2005 (HART Order). The definition of assisted reproductive procedure expressly excludes established procedures.[43] Therefore, once a procedure has been declared an established procedure, it is no longer governed by the other provisions of the HART Act and can be carried out without ethical approval.

The third category under the HART Act is any procedure that is not prohibited by the Act or is not established an established procedure. This third category is referred to as regulated procedures. All regulated procedures must receive case by case ethical approval under the HART Act before they can be undertaken.[44]

37 (20 November 2004) 621 NZPD 16361.

38 Human Assisted Reproductive Technology Act 2004, s 3(d).

39 Human Assisted Reproductive Technology Act 2004, sch 1 and ss 9−16, and 26.

40 Human Assisted Reproductive Technology Act 2004, s 8(1).

41 Human Assisted Reproductive Technology Act 2004, s 8(4).

42 Human Assisted Reproductive Technology Act 2004, s 6.

43 Human Assisted Reproductive Technology Act 2004, s 5.

44 Human Assisted Reproductive Technology Act 2004, s 16.

1. Advisory Committee on Assisted Reproductive Technology

As alluded to above, the HART Act establishes a dual committee structure. The first of these committees is the Advisory Committee on Assisted Reproductive Technology (ACART). ACART is established under s 32 of the Act. Its functions are set out in s 35 and include issuing ethical guidelines on assisted reproductive procedures (and reviewing these guidelines),[45] and providing advice to the Minister.[46] The advice to the Minister includes whether the HART Act should be amended to prohibit or provide for any procedures,[47] whether any procedures should become an established procedure,[48] and whether a moratorium should be imposed on any procedure.[49] In general terms, ACART fulfils a policy role under the HART Act, particularly when issuing guidelines. In keeping with the theme of openness, transparency and scrutiny, ACART may only issue guidelines if it has publicly circulated a discussion paper and given the public an opportunity to make submissions.[50] Furthermore, ACART must take those submissions into account before issuing guidelines.[51]

2. Ethics Committee on Assisted Reproductive Technology

The second committee established by the HART Act is ECART. ECART is responsible for considering applications to carry out assisted reproductive procedures and research. ECART was established by the Minister of Health in 2005 under s 27 of the HART Act.[52] The Act requires ECART to include one or more members with experience in assisted reproductive procedures, and one or more members with experience in assisted reproductive research.[53] ECART's terms of reference also require for at least half the committee to comprise lay members including:[54]

(a) one or more members with the ability to articulate issues from a consumer perspective;
(b) one or more members with the ability to articulate issues from a disability perspective;
(c) one or more members with expertise in ethics; and
(d) one or more members with expertise in law.

ECART's main function is to consider applications to carry out regulated procedures. The Act imposes three duties on ECART upon receiving an application. First, ECART must operate in accordance with any guidelines issued by ACART.[55] Second, ECART must operate expeditiously given the impact that delay can have on the reproductive capacity of individuals.[56] Third, ECART

45 Human Assisted Reproductive Technology Act 2004, s 35(1)(a).

46 Human Assisted Reproductive Technology Act 2004, s 35(1)(b).

47 Human Assisted Reproductive Technology Act 2004, s 35(1)(b)(i).

48 Human Assisted Reproductive Technology Act 2004, s 35(1)(b)(iii).

49 Human Assisted Reproductive Technology Act 2004, s 35(1)(b)(iv).

50 Human Assisted Reproductive Technology Act 2004, s 36(1)(a).

51 Human Assisted Reproductive Technology Act 2004, s 36(1)(b).

52 "Appointments to the Ethics Committee on Assisted Reproductive Technology" (7 July 2005) 105 *New Zealand Gazette* 2484.

53 Human Assisted Reproductive Technology Act 2004, s 27(3)(b).

54 Ethics Committee on Assisted Reproductive Technology *Terms of Reference* (2005).

55 Human Assisted Reproductive Technology Act 2004, s 29(a).

56 Human Assisted Reproductive Technology Act 2004, s 29(b).

must provide ACART with a copy of all approvals.[57] These statutory duties demonstrate that ECART is bound to apply the guidelines as published by ACART. This is reinforced elsewhere in the Act. For example, s 18 provides that ECART can only consider applications for procedures that are covered in guidelines issued by ACART. This means, that if relevant guidelines have not been published, ECART *must* decline the application and refer it to ACART.[58] Furthermore, s 19 clarifies that approval can only be granted if the application is consistent with the guidelines issued by ACART.[59] However, s 19 is merely permissive. If the proposed activity is consistent with those guidelines, ECART *may* approve it but is not required to do so.

The HART Act provides little procedural guidance on how ECART is to fulfil its functions. The Act provides that ECART must be subject to applicable standards for ethics committees.[60] ECART's terms of reference refer to Chapters 1−4 of the Operational Standard for Health and Disability Ethics Committees.[61] However, these standards are no longer in effect having been replaced in 2012 with new standards, which in turn were updated in 2019.[62] The 2019 standards provide significant procedural guidance for the four regional Health and Disability Ethics Committees (HDECs) including a right of appeal to the Health Research Council Ethics Committee.[63] However, the 2019 standards only apply to HDECs and expressly exclude ECART from their scope.[64] The National Ethics Advisory Committee provides standards for ethics committees, but these standards only apply when ECART is assessing applications for research approval, not applications to carry out procedures.[65] Therefore, there is an inconsistency between ECART's terms of reference and current standards which should be clarified by publishing updated terms of reference.

Despite this lack of clarity in exactly what standards ECART is subject to it is widely accepted that there is no right of appeal from ECART decisions.[66] Whilst Parliament has never expressly explained why there was no statutory right of appeal, it appears that Parliament intended to appoint a committee with broad expertise to evaluate moral and ethical questions. The lack of a right of appeal will be returned to in the third substantive part of this paper. At this point, however, this paper turns to critically review the regulation of posthumous reproduction specifically.

57 Human Assisted Reproductive Technology Act 2004, s 30.

58 Human Assisted Reproductive Technology Act 2004, s 18(2).

59 Human Assisted Reproductive Technology Act 2004, s 19(2).

60 Human Assisted Reproductive Technology Act 2004, s 27(4).

61 Ministry of Health *Ministry of Health Operational Standard for Health and Disability Ethics Committee* (2002).

62 Ministry of Health: Health and Disability Ethics Committees *Standard Operating Procedures for Health and Disability Ethics Committees* (Version 3, December 2019).

63 At 33.

64 At 10.

65 National Ethics Advisory Committee *National Ethical Standards* (February 2022); see also Peart "Alternate Means of Reproduction", above n 17, at 528.

66 *Re Lee* [2017] NZHC 3263, [2018] 2 NZLR 731 at [93]; see also Peart "Alternative Means of Reproduction", above n 17, at 530; and Jeanne Snelling and others "Law and Regulation" in Mark Henaghan *Choosing Genes for Future Children: Regulating Preimplantation Genetic Diagnosis* (Human Genome Research Project, Dunedin, 2006) 229 at 252.

III. Regulation of Posthumous Reproduction in New Zealand

Posthumous reproduction refers to any situation where reproduction occurs after the death of one of the gamete providers. The possibility of posthumous reproduction is not new. It has always been possible for a father to die after conception but prior to the birth of their child.[67] Similarly, the dangers of child-birth mean children can be born without a living mother. Cryopreservation of gametes, artificial insemination, and in vitro fertilisation have pushed posthumous reproduction beyond its natural constraints. A child can now be *conceived* after the death of their genetic father. When these modern technologies are combined with the surrogacy it is also possible for a child to be conceived after the death of their genetic mother, or indeed after the death of both parents. Incredibly, posthumous reproduction is not only limited to stored gametes or embryos. Sperm, for example, can remain motile and viable for at least 72 hours after the point where most people are certified dead.[68] This allows children to be conceived not only from stored sperm but also sperm that is *retrieved* posthumously. Overall, whilst the label posthumous reproduction is attached to all these circumstances they raise different ethical issues.

As can be seen from the preceding paragraph, posthumous reproduction can be categorised depending on when the gametes were retrieved. First, is where the gametes are retrieved whilst the provider is conscious. Second, is where the gametes are retrieved whilst the provider is alive but unable to give consent to the retrieval or use, for example in a coma. Third, is where the gametes are retrieved posthumously. Posthumous reproduction can also be categorised depending on what consent (if any) the gamete provider has given for the use of their gametes. For example, the gamete provider may have:

1. Consented to a specific person using their gametes to have a child after their death and that person wants to use the gametes;
2. Consented to a specific person using their gametes, subsequently formed a new relationship with another person who now wants to use the gametes but the consent was not updated;
3. Specifically objected to posthumous use or requested gametes be destroyed on their death; or
4. Not turned their mind to the issue.

Already, the label of posthumous reproduction has been split into twelve potential factual permutations. This can be further complicated by factors such as whether the deceased's remaining family support or oppose the use of the gametes. Clearly, any regulation of posthumous reproduction must be sufficiently flexible to adapt to the various situations that may arise.

67 Famous examples include Sir Isaac Newton, Bill Clinton, and Governor George Grey.

68 Stav Ovics and others "Perimortem and postmortem sperm acquisition: review of clinical data" (2022) 39(4) Journal of Assisted Reproduction and Genetics 977 at 985.

A. Ethical Considerations in Posthumous Reproduction

This paper does not seek to answer whether posthumous reproduction should occur. Many excellent works on the topic already exist.[69] Instead, this paper reviews the regulation of posthumous reproduction in New Zealand and intends to answer whether the regulatory approach is effective. However, in order to engage in such a critique, it is necessary to establish a basic understanding of the fundamental ethical arguments. The first key concept is the application of the principle of autonomy. Another concept is the application of consequentialist moral theory. These concepts will be discussed before turning to whether an analogy can be drawn with ethical considerations in other areas.

1. The principle of autonomy

Beginning with the principle of autonomy. Deontological moral theory argues that whether an action is morally or ethically right is not solely determined by whether it produces good outcomes.[70] Instead, certain values or rights should be protected regardless of the outcomes. One value that our democratic society protects is the principle of autonomy. The plain and ordinary meaning of autonomy is the ability and freedom to self-determine. In the context of human reproduction, people have the right to reproductive freedom. However, this is a negative right in that a person cannot be prevented from exercising their right, but a person cannot require others (such as the state) to assist them in fulfilling their reproductive desires. Obviously, an unborn child cannot exercise autonomy in deciding whether or not to be conceived. Therefore, autonomy in posthumous reproduction is only relevant to the deceased gamete provider and the surviving parent.

Applying the principle of autonomy to a deceased gamete provider is difficult as death stops autonomous decision-making. Therefore, respecting the wishes of a gamete provider who either consented or objected to posthumous reproduction upholds the autonomous decision that person made during their life. However, if that person has not expressed any wishes as to posthumous reproduction then any posthumous use of those gametes cannot be defended by the principle of autonomy.[71]

Turning to the surviving parent, permitting posthumous reproduction on face value upholds their autonomy. This is because the surviving parent has the option to conceive a child if they wish to. That is, they have reproductive freedom which a deontological moral theory would argue is worthy of significant weight in any ethical analysis. The case of *R v Human Fertilisation and Embryology Authority, ex parte Blood* concerned whether Mrs Blood could use sperm from her deceased husband extracted whilst he was in a coma before succumbing to meningitis.[72] Speaking about her situation to the public, Mrs Blood appealed to the principle of her reproductive autonomy when she suggested that we should "ask not what you would want to do if you were in that situation,

69 Kelsey Baird "Dead Body, Surviving Interests: The Role of Consent in the Posthumous Use of Sperm" (LLB(Hons) Dissertation, University of Otago, October, 2018); Martha Ceballos "From the Grave to the Cradle: Looking for Answers to the Question of Consent to Reproduce Posthumously in New Zealand" (2019) 50 VUWLR 433; Andrew Moore "Posthumous Reproduction" (2000) Otago Bioethics Report 11; and Nicola Peart "Life Beyond Death: Regulating Posthumous Reproduction in New Zealand" (2015) 46 VUWLR 725.

70 Alison Douglass "Assisted Human Reproduction: Posthumous Use of Gametes" (Master of Bioethics and Health Law Thesis, University of Otago, 1998) at 37.

71 Douglass, above n 70, at 43.

72 *R v Human Fertilisation and Embryology Authority, ex parte Blood* [1999] Fam 151 (CA).

but whether or not you think we have the right to decide for ourselves".[73] Whilst reproductive autonomy is a strong argument in favour of posthumous reproduction, Alison Douglass, who would later be appointed to chair ACART, noted that the surviving parent may be coerced into using the gamete to conceive.[74] This coercion could arise internally from the grieving process or be exerted from external sources such as family. In such a case Douglass describes the perceived autonomy of the surviving parent as an "illusory choice".[75]

2. Consequentialist moral theory

The second key concept that can be applied to posthumous reproduction is consequentialist moral theory.[76] Consequentialist moral theory provides that the results or consequences of a decision are what determines whether a decision is ethically and morally correct.[77] This theory can be applied to the three main parties to posthumous reproduction.

First, the consequentialist theory can be applied to the deceased gamete provider. If they consented during their lifetime to posthumous reproduction there is a benefit to them in knowing that they may conceive posthumously. For example, a person undergoing chemotherapy prior to death may take significant solace, peace, and strength in the knowledge that by consenting to posthumous use of their gametes they will not be 'letting down' their partner. However, in the absence of such consent, there is an absence of this knowledge and therefore no clear benefit. The analysis then turns to benefit after death. Aristotle suggested that the fortune of descendants, family, and friends may influence the dead.[78] Such a view also accords with a tikanga understanding of a person's mana persisting after their death.[79] It could therefore be argued that a deceased gamete provider could benefit, for example by continuing their bloodline or enhancing their mana, without knowing that posthumous reproduction would occur. However, it is also possible for the indignity or unnaturalness of posthumous conception to be offensive to the reputation or mana of the deceased. Therefore, in the absence of consent during the lifetime of the deceased, consequentialist analysis is neutral in regards to the deceased gamete provider.

Turning to the surviving parties. There is potential benefit to the surviving parties. For example, in *Re Lee* (discussed in more detail later) the main argument in favour of posthumous reproduction was so that Mr Lee's[80] child that had been conceived during his lifetime might have a full genetic sibling.[81] The surviving parent (particularly in the case of a spouse or long-term partner) will have the benefit of conceiving the child with the person they loved – as in the case of Mrs Blood or Ms Long. The benefit can extend to parents of the deceased who will be able to raise a genetic grandchild as in the internationally publicised Indian case of Harbir Kaur and Gurvinder Singh.[82] The clear benefits to surviving family members have led some commentators to argue that consent

73 Diane Blood "Speech to Westminster School 6th Form Pupils" (Westminster School, London, 26 February 1997).

74 Douglass, above n 70, at 48 and 60.

75 At 52 and 71.

76 Tom Beauchamp and James Childress *Biomedical Ethics* (3rd ed, Oxford University Press, New York, 1989).

77 Douglass, above n 70, at 37.

78 Kurt Pritzl "Aristotle and Happiness after Death: Nicomachean Ethics 1. 10-11" (1983) 78 Classical Philology 101.

79 *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239 at [187].

80 Fictitious names of Mr Lee and Ms Long were used by the Court to protect the identity of the parties.

81 *Re Lee*, above n 66, at [5] and [8].

82 *Singh v Government of NCT of Delhi* [2024] WP(C) 15159/2021.

of the deceased should be presumed so that posthumous reproduction can occur.[83] Such arguments place greater weight on the benefit to surviving family members than on the autonomy of the deceased.[84] Furthermore, since young and healthy individuals rarely consider death, there is the practical consideration that most people will never provide explicit consent in the event of their sudden death.[85]

The potential benefit or harm to a child conceived posthumously is very difficult to quantify. It could be argued that there is a benefit to the child who would not otherwise be conceived. On the other hand it could also be argued that there is harm in creating a child that is parentless by design. This demonstrates the problems with a strict consequentialist approach. Consequentialist analysis presupposes that there is a universally agreed hierarchy of outcomes. This is clearly not the case in a modern pluralistic society. Furthermore, even if it could be agreed whether a certain outcome is good or bad, the existence of different parties in posthumous reproduction complicates the equation. Douglass refers to the complex tripartite relationship (between child, gamete provider, and surviving parent) in posthumous reproduction and concludes that it is difficult to weigh up competing benefits or harms.[86]

Overall, New Zealand has prioritised the deceased's autonomy, and the benefit in their knowledge of posthumous reproduction by adopting a consent-based approach. This is discussed further in relation to the various applicable guidelines.

3. Analogous ethical considerations

Given the limitations of the application of the principle of autonomy and difficulties applying a consequentialist approach it is enticing to try and draw an analogy with ethical considerations in related areas. One such area is organ donation where the consequential benefit of life-prolonging organ transplants is balanced against the deceased's autonomy by giving next-of-kin a strong voice in whether organs may be harvested.[87] However, Douglass rightly identifies that such an analogy is tenuous as the life *preserving* benefit of organ donation is distinguishable from the life *creating* effect of posthumous reproduction.[88] Furthermore, there is no moral obligation on an organ donor to provide for the recipient.[89] In terms of other potential analogies, it has already been demonstrated that a property-based approach is problematic,[90] and gametes cannot be given legal personhood without radically undermining our abortion laws.[91] In an area as unique as posthumous reproduction, most analogies are of little assistance. Posthumous reproduction should therefore be approached from a first principles basis.

83 Kelton Tremellen and Julian Savulescu "A discussion supporting presumed consent for posthumous sperm procurement and conception" (2015) 30 Reproductive BioMedicine Online 6.

84 At 8.

85 At 7.

86 Douglass, above n 70, at 49.

87 Human Tissue Act 2008, s 31(2).

88 Douglass, above n 70, at 65-66.

89 At 65.

90 Discussed above in relation to the early policy development period.

91 Atkin and Reid, above n 20, at 96.

B. 2000 Guidelines on the Storage, Use, and Disposal of Sperm from a Deceased Man

Between 2000 and 2024 the posthumous use of gametes was regulated by guidelines published by NECAHR.[92] As discussed earlier, NECAHR has since been replaced by ACART and ECART. The thrust of the guidelines was to adopt an approach to posthumous reproduction that prioritised the consent of the gamete provider. The guidelines aimed to establish procedures to ensure that consent or objection to posthumous use was gathered from a gamete provider whilst they were still alive. To achieve this, fertility clinic forms were required to "include specifications as to what is to happen should the sperm donor die leaving sperm in storage".[93]

The guidelines then addressed three potential situations where the issue of posthumous reproduction may arise. First, was when sperm was provided by a later deceased person for use by a non-specified person, that is donated sperm.[94] The guidelines permitted such sperm to be used by a person or couple who already had produced a child with that sperm, if the donor consented to this use at the time of donation. In all other cases, the sperm was to be disposed of.

The second situation was when sperm had been stored prior to medical intervention.[95] This situation commonly arises when a person is undergoing surgery which may impact their reproductive capabilities such as chemotherapy. The guidelines provided that the sperm provider could consent to a specific person using the sperm in the event of their death and that use must occur within a specified time period. Compulsory counselling must be completed by the intending parent to discuss the advisability of a stand-down period to allow for grieving before using the sperm. Whilst the use of consent forms clearly aimed to ensure written consent was obtained, the guidelines did note that where consent was not or could not be obtained an application could be submitted to NECAHR. This implied that it was possible for posthumous use to be authorised without written consent. This paper submits that this provision was included due to the nature of NECAHR being both the policy and approval body. Therefore, NECAHR had the ability to alter the guidelines. This can be seen from the balance of the paragraph which provides that an application to NECAHR may be made "when there is a request for variation to these requirements".[96] Overall, in cases of donor sperm or sperm extracted prior to medical intervention, the 2000 Guidelines established a simple process to obtain consent from a person when providing sperm for storage.

The third situation mentioned within the guidelines was retrieval from a comatose or deceased man. The guidelines did not consider this situation in detail, but clearly intended not to take the position adopted in the United Kingdom following the *Blood* case.[97] Instead, consistent with the focus on written consent, NECAHR asserted that "collection of sperm from a comatose or recently deceased person without that person's prior written consent is ethically unacceptable".[98] This paper now turns to critically review the 2000 Guidelines by exploring their operation in various cases or applications.

92 2000 Guidelines, above n 2.

93 At 5.

94 At 5.

95 At 5−6.

96 At 6.

97 At 4; see also *Re Lee*, above n 66, at [58].

98 2000 Guidelines, above n 2, at 6.

1. Critique of 2000 Guidelines

The main criticism of the 2000 Guidelines was the insistence on written consent of the deceased in posthumous extraction cases. Two recent High Court cases illustrate the problem with requiring *written* consent. *Re M* concerned the extraction of sperm from a comatose man.[99] The male partner in *Re M* had suffered a cardiac arrest following a heart attack which in turn resulted in an irreversible brain injury. The surviving partner wanted to extract and use the sperm so that the couple's existing daughter might have a genetic full sibling. Woodhouse J authorised the extraction; however due to the urgency of the circumstances, the Court did not identify the jurisdictional basis of such an order. It has been noted by ACART that the precedent value of *Re M* is likely to be low given the urgent nature of the decision.[100]

The issue was dealt with in more detail in *Re Lee* in 2017.[101] The facts of the case were similar to *Re M* in that the couple concerned already conceived one child, but the female partner (Ms Long) wanted to extract sperm from Mr Lee for their child to have a genetic sibling in the future. However, unlike *Re M* the sperm had already been extracted under an interim order and therefore Heath J had the luxury of time to hear full submissions to determine whether the High Court could authorise extraction. Heath J embarked on what his Honour described as a "first principles" approach.[102] The Court considered that the Supreme Court's decision in *Takamore* was binding authority for the proposition that there can be no property in the dead body of a human being.[103] Instead of finding a property right in the sperm, the High Court relied on its inherent jurisdiction to authorising the removal of sperm so as to preserve the lawful right of Ms Long to make an application to ECART.[104] Given that the HART Act and HART Order did not directly address posthumous reproduction that there was a legislative gap which could be filled by the inherent jurisdiction. Of course, the 2000 Guidelines purport to prohibit posthumous extraction without consent.[105] The issue then is whether the guidelines prevented the High Court from exercising its inherent jurisdiction. In holding that they did not, Heath J was partially influenced by an affidavit provided by the then chair of ACART, Alison Douglass, describing the background to the guidelines. Douglass noted that the 2000 guidelines were tentative and did not truly address posthumous extraction.[106] Heath J therefore held that the interim order was authorised to enable Ms Long to make an application to ECART for the use of the sperm.

These applications illustrate the practical reality that unless gametes are stored at a fertility clinic, and consent forms completed, then it is unlikely that written consent to posthumous reproduction will have been recorded. As described earlier the HART Act intends to establish a "flexible" framework.[107] The inability of the 2000 Guidelines to cater for other evidence of consent

99 *Re M* [2014] NZHC 757.

100 Advisory Committee on Assisted Reproductive Technology *Consultation Document: A review of the current Guidelines for the Storage, Use, and Disposal of Sperm from a Deceased Man to take into account gametes and embryos* (July 2018) at 41.

101 *Re Lee*, above n 66.

102 At [24].

103 At [87]; citing *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [117].

104 At [100].

105 2024 Guidelines, above n 3, at 6.

106 *Re Lee*, above n 66, at [58].

107 Human Assisted Reproductive Technology Act 2004, s 3(d).

(such as verbal consent to family members or medical staff, or implied consent from conduct) demonstrates rigidity rather than flexibility. The problem of narrowly focusing on written consent was highlighted by Judy Turner MP who identified:[108]

> When we look at what ethics committees decide, we see that most of what the guidelines seem to be concerned about is *whether everybody has signed the right piece of paper* and whether everybody has consented … We need to look at the bigger picture, not just at whether everybody who is involved today has signed the appropriate consent form.

Rather than weighing competing moral considerations as to whether posthumous reproduction should occur in a given case, the guidelines relegated ECART to a box-checking authority (in both a literal and figurative sense). Furthermore, the insistence on written consent was out of step with other guidelines published subsequently.[109]

The second problem with the 2000 Guidelines was that they only concerned posthumous reproduction with sperm. The posthumous use of female gametes, or even embryos was not covered in the guidelines. It is clear that the guidelines were a reaction to address the clinical possibilities that existed at the time they were written. As Douglass noted in her evidence in *Re Lee* "[in 2000], it was not possible to allow the efficient freezing and thawing of ova".[110] The 2000 Guidelines themselves noted that future clinical advances may allow freezing and thawing of ova and therefore the Committee endeavoured to "regularly review" the guidelines.[111] Furthermore, the HART Act imposes a duty on ACART to issue guidelines and importantly to "keep such guidelines … under review".[112] As it became possible to freeze and thaw eggs, the guidelines were no longer wide enough in scope to cover all potential posthumous reproduction situations and needed to be reviewed.

The third problem with the 2000 Guidelines was the difficulty adapting to situations where written consent had been given but there had been a change in circumstance. An example of this difficulty arose in 2019 where ECART had to determine a posthumous use application.[113] Application E19/108 arose when a man had stored sperm prior to cancer treatment.[114] At the time the man signed a written consent form authorising his then partner to use the sperm in the event of his death. The man survived, and went on to marry a different woman. On his passing, his wife applied to use the stored sperm but the consent form had not been updated. ECART initially deferred the application in order to contact the ex-partner to hear her views.[115] Upon the

108 (6 October 2004) 47 NZPD 15899.

109 Advisory Committee on Assisted Reproductive Technology *Guidelines for family gamete donation, embryo donation, the use of donated eggs with donated sperm and clinic assisted surrogacy* (September 2020) at 4; Advisory Committee on Assisted Reproductive Technology *Guidelines for Extending the Storage of Gametes and Embryos* (June 2023) at 6.

110 *Re Lee*, above n 66, at [58].

111 2000 Guidelines, above n 2, at 1.

112 Human Assisted Reproductive Technology Act 2004, s 35(a).

113 Ethics Committee on Assisted Reproductive Technology *Minutes of the Seventy-ninth Meeting of the Ethics Committee on Assisted Reproductive Technology* (7 November 2019) [ECART Minutes 7 November 2019]; Ethics Committee on Assisted Reproductive Technology *Minutes of the Eightieth Meeting of the Ethics Committee on Assisted Reproductive Technology* (12 December 2019) [ECART Minutes 12 December 2019].

114 ECART Minutes 7 November 2019 at [3].

115 ECART Minutes 7 November 2019 at [3].

ex-partner supporting the application ECART was satisfied that consent to the wife's use could be inferred.[116] ECART's decision demonstrates significant flexibility. However, this application arose under the second situation considered by the 2000 guidelines namely sperm stored prior to medical intervention.[117] As discussed earlier, the 2000 Guidelines distinguished between sperm stored prior to medical intervention and sperm extracted posthumously. ECART was therefore able to consider an application for ethical review despite not having written consent.[118] If the same situation had arisen in a posthumous extraction case, for example if a will provided written consent to extraction and then use by the ex-partner, then such flexibility would not be allowed. Therefore, there was a need for clarity and consistency on when inferred consent will be sufficient.

The third problem with the 2000 guidelines was the interaction with the HART Order designating some techniques to be established procedures. The HART Order provides that where the deceased had given consent to a specific use of their *sperm* then that is an established procedure.[119] However, the HART Order expressly excludes posthumous use of eggs from the definition of an established procedure.[120] Therefore the above critique as to the different treatment of sperm and eggs is again relevant. Returning to application E19/108, the interaction with the HART Order raises an issue which the 2000 guidelines did not adequately cover. What if the ex-partner in E19/108 wanted to use the sperm? Such use would ostensibly be an established procedure and not require ECART approval.[121] There is no mechanism in the 2000 guidelines, or HART Order to require the ex-partner to submit an application to ECART. This could lead to posthumous reproduction without current consent of the deceased and therefore undermine the intention of the 2000 Guidelines.

The final critique of the regulation of posthumous reproduction under the 2000 guidelines is their interaction with the HART Act prohibiting the use of gametes obtained from a minor. The well-publicised Cameron Duncan situation illustrates this issue.[122] Mr Duncan was a promising filmmaker who died at 17 from cancer. Before undergoing treatment, Mr Duncan stored his sperm. He was 15 when the sperm was stored. After his death, his sister's female partner wanted to use the sperm so that the family might have Mr Duncan's child. However, posthumous reproduction in such circumstances was prohibited by the HART Act, which provides that it is an offence to use a gamete obtained from an individual who is under 16 years old.[123] Section 12 further provides that it is a defence to the charge if the use was to "bring about the birth of a child that was … likely to be brought up by [gamete provider]".[124] As Cameron had passed, the child would not be brought up by him and therefore the defence could not apply. As a result, despite Cameron providing consent

116 ECART Minutes 12 December 2019, at [11].

117 2000 Guidelines, above n 2, at 5−6.

118 It is arguable that E19/108 was truly an application to alter the guidelines and therefore Advisory Committee on Assisted Reproductive Technology [ACART] as the National Ethics Committee on Assisted Human Reproduction's successor should have dealt with the application.

119 Human Assisted Reproductive Technology Order 2005 , sch, pt 2, cl 5.

120 Human Assisted Reproductive Technology Order 2005, sch, pt 2, cl 7.

121 ECART Minutes 7 November 2019, above n 113, at [3].

122 Kirsty Wynn "Frozen Sperm Battle After Tragedy" The New Zealand Herald (online ed, Auckland, 4 January 2015); and Emily Ford and Jane Matthews "Cameron Duncan died of cancer at 17; 15 years later he could become a father" Stuff (online ed, Auckland, 8 July 2018).

123 Human Assisted Reproductive Technology Act 2004, s 12(1)(b).

124 Human Assisted Reproductive Technology Act 2004, s 12(3)(b).

(after his 16th birthday) his family was unable to use the sperm. The HART Act can be criticised for focusing on the wrong moment. Arguably, what should be important is when *consent* was given, not when the gametes were provided.

C. 2024 Guidelines on Posthumous Use of Gametes, Reproductive Tissue and Embryos

In June 2024, ACART published updated Guidelines for the Posthumous Use of Gametes, Reproductive Tissue and Embryos.[125] These guidelines contain four requirements which must always be met for posthumous reproduction to be approved. Namely, consent requirements, counselling requirements, legal advice requirements, and medical advice requirements. The most obvious change within the 2024 guidelines is that *written* consent is no longer required. Instead, ECART is afforded discretion to determine whether there has been "sufficient consent".[126] This paper submits that the new guidelines are a significant improvement on the 2000 Guidelines and brings the regulation of posthumous reproduction into line with the intended purposes of the HART Act and with what society now deems acceptable.

The first improvement in the 2024 Guidelines is the removal of the requirement for written consent for reproduction using posthumously extracted gametes. The fundamental ethical focus of the guidelines is the same in that consent is still required. There has not been a major policy change, but there is a change in what type of evidence is now required. While written consent is still preferred,[127] ACART has clarified that ECART may consider any form of consent in making its decisions.[128] The new guidelines therefore accord with Parliament's intention to establish a flexible framework.[129] Parliament has established ECART as a body with an amalgam of diverse expertise. It is appropriate that ECART is afforded more discretion rather than being relegated to a box-checking function. Furthermore, there is no risk of a proverbial slippery slope as a result of the 2024 Guidelines. This is because ACART has been very clear that there must still be clear evidence of consent.[130] Furthermore, attempting to have children whilst alive is distinguishable from consent to posthumous reproduction.[131] Therefore, there must still be evidence of consent to *posthumous* use of the gametes. Whilst some may argue that this does therefore not go far enough,[132] the end position is one that the public consultation carried out by ACART settled on as acceptable. In particular, 74 per cent of submitters recommended that the new guidelines still required consent by the deceased,[133] however 69 per cent of submitters agreed that oral consent should be acceptable.[134]

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125 2024 Guidelines, above n 3.

126 At 4.

127 Advisory Committee on Assisted Reproductive Technology *Supplementary Advice for the Guidelines for the Posthumous Use of Gametes, Reproductive Tissue and Embryos* (June 2024) [ACART Supplementary Advice] at [18]–[22].

128 At [22].

129 Human Assisted Reproductive Technology Act 2004, s 3(d).

130 ACART Supplementary Advice, above n 127, at [18]–[22].

131 At [16].

132 It is likely that *Re Lee* and *Re M* would not have sufficient consent under the new guidelines; see ACART Supplementary Advice, above n 127, at [18].

133 Advisory Committee on Assisted Reproductive Technology *Stage Two Consultation (Submissions Analysis): Proposed Guidelines for the Posthumous Use of Gametes, Reproductive Tissue and Stored Embryos* (March 2021) at 13.

134 At 14.

The second improvement is a strengthening of provisions designed to protect the intending parent. Whilst counselling requirements featured in the old guidelines, the new guidelines place a greater focus on the potential coercion of the intending parent. The 2024 Guidelines require the intending parent's consent to be free from "undue influence".[135] Furthermore, ECART may determine that an intending parent's request for use is "not valid".[136] Counselling allows ECART to identify if the request is improperly motivated by grief or if pressure is being applied by surviving family members. It could be argued that the guidelines could go further and impose a stand-down period before posthumous reproduction is permitted. However, this would reduce flexibility, particularly given that there are many good reasons why posthumous reproduction may need to occur expeditiously.[137]

Despite the positive changes in the 2024 Guidelines, the interaction with the HART Order remains problematic. As shown by application E19/108 there is a risk that written consent may no longer be valid if there has been a change in circumstances. However, if a procedure is an established procedure it will not be subject to ECART scrutiny. This is a problem because the responsibility is placed on fertility clinics to self-regulate and ensure that consent is still current. Notably, 62 per cent of submitters recommended the HART Order be amended to ensure that all posthumous reproduction cases come before ECART.[138] As of the time of writing, the HART Order has not been amended. This paper suggests that best practice would be to always require ECART scrutiny. This would ensure that consent of the gamete provider is still current. Furthermore, the potential coercion on the intending parent could exist in all posthumous reproduction. Therefore, ECART review would ensure the surviving parent's request is valid and not subject to undue influence. Whilst an amendment would be desirable, fertility clinics have reported that they are on-notice to these potential issues.[139]

One further shortcoming of the 2000 Guidelines that has not been remedied by the 2024 Guidelines is the posthumous use of gametes extracted from minors. Such gametes may still only be used by the gamete provider, and therefore cannot be used posthumously.[140] Of course this is not something that ACART can change on its own initiative. The prohibition is established by the HART Act, and therefore Parliament would need to amend the Act.[141] However, an amendment would be popular with the public as 86 per cent of submitters recommended that an amendment to s 12 in order to permit posthumous reproduction where there has been consent after the 16th birthday.[142]

135 2024 Guidelines, above n 3, at 4.

136 At 4.

137 For example, to minimise the age gap with siblings or to avoid the declining reproductive capacity of the surviving parent with age.

138 Advisory Committee on Assisted Reproductive Technology *Stage Two Consultation (Submissions Analysis): Proposed Guidelines for the Posthumous Use of Gametes, Reproductive Tissue and Stored Embryos*, above n 133, at 10.

139 ECART Minutes 7 November 2019, above n 113, at [3].

140 2024 Guidelines, above n 3, at 7.

141 Human Assisted Reproductive Technology Act 2004, s 12.

142 Advisory Committee on Assisted Reproductive Technology *Stage Two Consultation (Submissions Analysis): Proposed Guidelines for the Posthumous Use of Gametes, Reproductive Tissue and Stored Embryos*, above n 133, at 21.

Overall the 2024 Guidelines are a significant improvement on the 2000 Guidelines. The increased flexibility in evidencing consent and the protection of the autonomy of the intending parent is appropriate. It may be wise to amend the HART Order to ensure ECART can consider all applications for posthumous reproduction. Furthermore, the HART Act's prohibition on use of gametes extracted from minors remains an overreach.

IV. Review of ECART's Role

As described above, the 2024 Guidelines are generally adequate. However, they do highlight some potential problems with ECART's ability to apply the guidelines effectively. The guidelines may require ECART to determine disputed issues of fact. This paper submits that ECART is not equipped to deal with such applications. Furthermore, there are insufficient accountability mechanisms to scrutinise ECART decisions and promote openness and transparency.

A. Is ECART an Ethics Approval Body or is it a Fact-Finder?

The role of ECART is to consider applications to carry out assisted reproductive procedures. ECART is ordinarily tasked with determining medical, cultural, and ethical matters. As the 1985 joint proposal noted, an approval body (such as ECART) must ponder questions of "value and principle".[143] However, certain provisions in the 2024 Guidelines may raise disputed issues of fact. First, is regarding the consent by the gamete provider. The intending partner could assert that the deceased consented, for example in a conversation, but other evidence may not support such an assertion. This exact situation occurred in application E22/065 where the man requested stored sperm to be destroyed on his death.[144] He died ten years later. However, his partner asserted that, eighteen months prior to his death, he told her that he consented to posthumous use. The second provision is that the request to use the sperm be free from undue influence. The intending parent may provide evidence that they are free from influence, but this may be contradicted by counselling evidence. In both of these situations ECART is tasked with determining disputed issues of fact. Unlike a court there is no right for the applicant to appear in person before ECART. There is no right to cross examine contradictory evidence (such as counselling reports) and the rules of evidence do not apply. ECART normally convenes six times per year and has to dispose of many applications in each meeting. It is therefore not practical for ECART to hold full hearings on all applications. The dislocation between ECART's role as an ethics committee and the 2024 Guidelines requiring ECART to determine factual issues forms the basis of the recommendation of a transfer provision discussed later in this paper.

B. Accountability Mechanisms

Given that ECART is afforded significant power to determine applicants' reproductive interests, it is necessary to examine what accountability mechanisms exist.

143 Brinkman and others, above n 7, at 397.

144 Ethics Committee on Assisted Reproductive Technology *Minutes of the Ninety-fourth Meeting of the Ethics Committee on Assisted Reproductive Technology* (12 April 2022) at [14].

1. Right of appeal

The primary mechanism to challenge or scrutinise a decision of tribunal is normally by way of an appeal. The HART Act is conspicuously silent on appeal rights from a decision from ECART. The only statutory process for an ECART decision to be reconsidered is found in s 18, which provides that ECART *may* reconsider an application if "relevant new information becomes available".[145] Clearly this does not afford an unsuccessful applicant any entitlement to a rehearing. The statutory wording does not place any *obligation* on ECART to reconsider the application. The High Court has noted that Parliament's decision not to include an appeal right from ECART is likely due to the argument that the medical, moral, and ethical subject matter of ECART applications is not suited to judicial intervention.[146] Whilst that may have been true under the tentative 2000 Guidelines, which left ECART to weigh competing interests, the factual issues that can arise under the 2024 Guidelines are plainly subject matter that judges can determine. This paper suggests that a statutory right of appeal is desirable and provides reasons to support this argument in the following sections.

2. Judicial review

Another potential accountability pathway is judicial review which allows courts to review the decision making of any "tribunal or other public authority".[147] ECART is a public authority and makes decisions which affect applicants' rights and interests. Therefore, on face value, judicial review is available. Heath J in *Re Lee* considered in obiter that judicial review would likely be available from an ECART decision.[148] However, the Court noted that the subject matter may not be justiciable, and even if it were the grounds of review would likely be narrow.[149] In reaching that view, Heath J approved the comments of the Court of Appeal in *Lab Tests* noting that a court is not well placed in judicial review to interfere with "medical, economic and other complexities".[150] Overall, serious questions remain as to how effective judicial review would be at scrutinising ECART.

3. Ombudsman

It is possible that a complaint to the Ombudsman may be able to resolve unfairness arising from an ECART determination. The Ombudsmen Act provides the circumstances where an Ombudsman may intervene.[151] However, intervention is normally limited to a non-binding recommendation.[152] The Ombudsman could certainly alleviate concerns regarding any potential impropriety or unfair discrimination. However, an investigation by the Ombudsman is not a rehearing and is therefore not able to resolve disputed factual issues as an appeal could.

145 Human Assisted Reproductive Technology Act 2004, s 18(3).

146 *Re Lee*, above n 66, at [93].

147 New Zealand Bill of Rights Act 1990, s 27(2).

148 *Re Lee*, above n 66, at [93].

149 At [93].

150 *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [340].

151 Ombudsmen Act 1975, s 22.

C. Potential Reform

There are two potential options for reform. The first is to insert an appeal process from ECART within the HART Act. The second is to insert a provision that provides for certain ECART applications to be transferred to the High Court.

1. Inserting an appeal process

There are two fundamental reasons why a right of appeal is desirable. First, it would promote transparency. Second, it is necessary to uphold an applicant's right to natural justice. The fundamental counterargument, however, is that the courts are not well placed to determine moral and ethical matters. This paper submits that this counterargument having merit is not mutually exclusive with inserting an appeal process.

The first reason why an appeal right is desirable is to promote transparency and legitimacy regarding assisted reproductive technology. In the third reading of the HART Act, Sue Kedgley MP argued that the Act established an unaccountable framework:[153]

> Regrettably… this legislation sets up … a regime that relies on guidelines, rather than regulation, and a regime that bypasses Parliament completely and delegates policy-making in that highly contentious, ethical minefield area to a committee of *unelected and unaccountable experts meeting behind closed doors*.

Whilst the criticism was aimed at the delegation of policy to ACART, the description of unelected and unaccountable experts meeting behind closed doors could equally apply to ECART. In reality the criticism may go too far as ACART engages in much public consultation and education and ECART meeting minutes are publicly available. However, whether the criticism is correct or not is not the important point; it is trite law that "justice should not only be done, but should manifestly and undoubtedly be seen to be done".[154] If it can reasonably be perceived that ECART is making decisions behind closed doors and those decisions are immune from challenge, then the mere presence of such a perception is problematic. Such a perception has the potential to undermine confidence in regulation of new and emerging technologies.

Recalling the legislative background to the HART Act described earlier in this paper, one of the main changes the Act sought to implement was openness and transparency. As Bill Gudgeon MP noted, "because of the … sensitivity and importance of this legislation, the public … need to be advised of what is actually happening".[155] Similarly, Atkin and Reid highlighted the need for scrutiny to ensure the public could have confidence in the regulation of this new technology, and further, that decision making should be "clear and consistent".[156] Appellate oversight would ensure decision making is clear and consistent. This argument is not new. In 2006, Jeanne Snelling (now the current chair of ECART) argued that a right of appeal was necessary to promote transparency.[157] This paper submits that declining trust in public institutions makes the argument more pressing than ever. For instance, trust in the health system has reportedly declined 13 per cent over the past

152 Human Assisted Reproductive Technology Act 2004, s 22(3).

153 (10 November 2004) 621 NZPD 16839 (emphasis added).

154 *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256 at 259 per Lord Hewart CJ.

155 (6 October 2004) 620 NZPD 15899.

156 Atkin and Reid, above n 20, at 33.

157 Snelling "Law and Regulation", above n 66, at 252.

decade.[158] However, the courts remain the second most trusted institution behind only the police suggesting that judicial oversight can promote public confidence in this area.

The second reason why a right of appeal is desirable is based on an applicant's right to natural justice. The New Zealand Bill of Rights Act provides that:[159]

> Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

ECART is plainly a tribunal or other public authority. Furthermore, ECART determinations do concern the applicant's reproductive rights. Applicants are therefore entitled to the observance of the principles of natural justice. It has been said that a right to appeal an adverse decision is not an automatic requirement under the principles of natural justice; however, fairness may require a party have an appeal right.[160] Of course, rights may be limited if justified in a free and democratic society.[161] Appeal rights must be limited in some circumstances. Policy factors include the need for finality and the administrative burden of an appeal. Furthermore, the potential merits of an appeal and the appropriateness of appellate consideration are also relevant. However, it is submitted that an important factor in determining whether a right of appeal is needed to uphold natural justice is the consequence of the decision. Decisions of a purely administrative nature which do not engage fundamental rights can be distinguished from ECART decisions which dictate whether or not an intending parent can have a child in the manner they wish. Nicola Peart put it pithily when she stated that the absence of an appeal process was "troubling when individuals' reproductive rights are at stake".[162] The significant, life-altering implications of ECART declining an application necessitate a more robust adherence to the principle of natural justice.

The main argument against an appeal right from ECART is that the courts are not suited to determine decisions involving a mix of moral, ethical and scientific issues. Parliament has intentionally created ECART as an expert committee to determine such applications. The judiciary, on the other hand does not have the mix of expertise present on ECART. In *New Zealand Climate Science Education Trust*, Venning J expressed doubts about the High Court's ability to wade into technical scientific disputes.[163] Venning J noted that the High Court "should not seek to determine or resolve scientific questions demanding the evaluation of contentious expert opinion."[164] Heath J in *Re Lee* noted this obiter and suggested that this concern was exacerbated when the decision also includes moral, ethical, cultural and spiritual considerations as ECART applications do.[165] This

158 Statistics New Zealand "New Zealanders' trust in key institutions declines" (25 September 2024) <www.stats.govt.nz/news/new-zealanders-trust-in-key-institutions-declines>.

159 New Zealand Bill of Rights Act 1990, s 27(1).

160 Shi Sheng Cai and others (eds) *Human Rights Law* (online ed, Thomson Reuters, New Zealand) at [BOR27.01].

161 New Zealand Bill of Rights Act 1990, s 5.

162 Peart "Alternative Means of Reproduction", above n 17, at 530.

163 *New Zealand Climate Science Education Trust v National Institute of Water and Atmospheric Research Ltd* [2012] NZHC 2297, [2013] 1 NZLR 75.

164 At [48].

165 *Re Lee*, above n 66, at [93].

argument should be afforded significant weight. However, to say that these statements are authority for the proposition that the courts should never be able to consider moral or ethical issues would be to go too far. For example, ACART themselves have noted that the High Court is the appropriate forum to determine posthumous extraction cases.[166] Clearly competing moral and ethical interests are at play posthumous extraction cases. It is therefore artificial to suggest that a court is equipped to deal with posthumous extraction applications, but not posthumous use (or other) appeals.

Furthermore, this paper argues that the principles applied by the courts when determining the approach taken on appeal are sufficient to guard against inappropriate interference with ECART's discretion. This is because a distinction can be drawn between a general appeal and an appeal against an exercise of discretion. The Supreme Court in *Austin, Nichols & Co* stated that in a general appeal, the appellant is entitled to judgment in accordance with the opinion of the appellate court.[167] It is true that caution should be exercised when making credibility findings when only the trial court had the benefit of observing the witnesses.[168] However, in general the appellate court is entitled to make its own findings of fact or law.[169] The approach set out in *Austin, Nichols & Co* allows the court to robustly review ECART's factual findings, or interpretation of the HART Act or relevant guidelines.

A different approach is employed where the appeal is against an exercise of discretion. Substantially adopting the criteria enunciated by the House of Lords in *Hadmor Productions*,[170] in *Kacem v Bashir* the Supreme Court observed that in appeals against the exercise of discretion, the criteria for a successful appeal are:[171]

1. error of law or principle;
2. taking account of irrelevant considerations;
3. failing to take account of a relevant consideration;
4. the decision is plainly wrong.

Certainly, the court will not interfere merely on the basis of attaching different weight to relevant factors.[172]

Overall, an appeal process is desirable to promote transparency, facilitate scrutiny, and ensure the observance of natural justice. The lack of an appeal process is inconsistent with Parliament's intention to establish a robust framework.[173] The argument that the courts are not suited to intervene

166 2024 Guidelines, above n 3, at 2.

167 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [16].

168 At [13].

169 At [16]; for general appeals from specialist bodies see *Rabih v Professional Conduct Committee of the Dental Council* [2015] NZHC 1110, [2015] NZAR 1102.

170 *Hadmor Productions Ltd v Hamilton* [1983] 1 AC 191 (HL) at 220.

171 *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].

172 *Alex Harvey Industries Ltd v Commissioner of Inland Revenue* (2001) 15 PRNZ 361 (CA) at [13]–[15].

173 Human Assisted Reproductive Technology Act 2004, s 3(d).

is valid, but the distinction between a general appeal and an appeal against an exercise of discretion largely ameliorates this concern.

2. Inserting a 'transfer' provision

The second potential reform is to provide for certain ECART applications to be transferred to the High Court. Similar provisions exist in a range of other Acts.[174] This approach would recognise that ECART is the best forum to weigh competing moral and ethical considerations, but some applications are better suited to the High Court. If an application contained disputed facts or multiple interested parties then ECART may not be able to effectively and fairly assess such an application. In such a case the High Court could determine the application. In some cases, it may even be desirable for the High Court to judicially determine the facts and then remit the application back to ECART to weigh the facts once determined. Such a provision improves flexibility by adapting the forum as appropriate, and also makes the determination of difficult or contested applications more robust.

V. Conclusion

This paper has traced the background to the HART Act through the early era of secrecy and caution towards the current era openness and flexibility. This early policy development period culminated in the enactment of the HART Act which intended to create a flexible and robust framework. This paper then demonstrated the shortcoming of the previous regulation of posthumous reproduction and suggested that the new guidelines are an improvement on earlier regulation. The 2024 Guidelines are significantly more flexible and treat sperm and eggs equally. The regulation of posthumous reproduction could be supported by amending the HART Act to improve flexibility in relation to gametes extracted from minors and amending the HART Order to ensure consistent oversight from ECART. Finally, this paper suggested that inadequacies in ECART's application of the guidelines could be cured by inserting a statutory right of appeal, or a provision to transfer proceedings to the High Court. Such changes should be made, lest we allow assisted reproductive technology to be regulated by unelected and unaccountable experts meeting behind closed doors.

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174 Property (Relationships) Act 1976, s 38A; Criminal Procedure Act 2011, s 70; Weathertight Homes Resolution Services Act 2006, s 119; District Court Act 2016, pt 5; Family Court Act 1980, s 14.